

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No.13067/2009**

% **Date of Decision: 10.05.2010**

The Commissioner, Kendriya Vidyalaya Sangathan Petitioners
& Other

Through Ms.Yogmaya Agnihotri, Advocate

Versus

Shri A.K. Kaushal Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

The petitioners, Commissioner, Kendriya Vidyalaya Sangathan, and others, have challenged the order dated 7th August, 2007 passed in OA No.2683 of 2006 and order dated 21st July, 2009 passed in RA No.3 of 2009 by the Central Administrative Tribunal allowing the original application of the respondent and setting aside the memo dated 28th June, 2006 and memo dated 13th October, 2006 of the petitioners and quashing the adverse entries recorded in the ACR of the respondent for the year ending 31st March, 2006.

The respondent while posted as Principal, Kendriya Vidyalaya BSF, Jalalabad, Punjab, was served with a memo dated 28th June, 2006 whereby adverse entries in the ACR for year 2006 was communicated to him. The respondent challenged the adverse entries contending inter alia that Shri O D Sharma, petitioner No.4, had been biased against the respondent as he had not obeyed the orders of the petitioner No.4 which were not in the interest of Kendriya Vidyalaya Sangathan. The respondent also contended that procedure for recording adverse entries in the ACR had not been followed, as while communicating the adverse entries, the reviewing authority has not considered the facts in terms of the OM dated 30th January, 1978 by DoP&T contemplating that it is mandatory to communicate all the adverse entries in the ACR both on performance as well as on the basic qualities and potential with good points within one month of they being recorded. The respondent also contended that in accordance with the said OM, the countersigning authority should have given its remark on the report of the reporting officer regarding agreement or disagreement.

The respondent made a detailed representation dated 19th July, 2006 against the adverse remarks communicated to him and also highlighted that the reporting officer acted contrary to rules and in a malafide manner. It was also emphasized that the reporting officer has given remarks on his whims and fancies and without any substance.

The detailed representation dated 19th July, 2006 of the respondent was rejected by Deputy Commissioner, KVS HQ, by a non-speaking and cryptic order. The respondent challenged the same contending *inter alia* that his representation against the adverse remark has not been considered and the pleas raised by him have been ignored. The respondent relied on Article 86 of Education Code of Kendriya Vidyalaya. The respondent also highlighted the anomalies in as much as it was alleged that on account of the conduct of the respondent, the strength of the school had been reduced, while in fact there had not been any reduction in the school strength on account of any act on his part or imputable to him. The respondent had detailed that the strength had been reduced because of transfer of one battalion of BSF from Jalalabad with effect from October 2005 and consequently only one battalion was stationed at Jalalabad. The respondent also contended that the school was run in a temporary building as it was located 16 kilometers from the border and considering the overall fact it was asserted that his performance could not be as it had been alleged by the petitioners. The respondent also challenged the ACRs on the ground that no advisory memo regarding his work and conduct had been issued. The respondent also raised the plea that though the representation was made to the Joint Commissioner, KVS, but the same had been decided by a non-competent authority. The respondent also contended that in the long service of 30 years, he was never

communicated any adverse entries and the alleged adverse entries were on account of mala fides on part of the petitioner No.4.

The Tribunal after considering the pleas and contentions relied on the fact that no opportunity at all was afforded to the respondent and no corrective measures by the reporting officer by way of advisory memo, explanation, etc. to improve upon the actions of the respondent were taken. The Tribunal also noted that the petitioners admitted that no written communication had been issued to the respondent except the allegation of the petitioners that verbal counselling had been done. The Tribunal considered that giving a proof or detail of instances would substantiate the point of view of the reporting officer and in absence of any instances when no disciplinary proceedings are taken for the alleged lapses, one is prejudiced and is deprived of opportunities to effectively rebut the adverse entries made against an employee, if the instances on which the adverse entries are made are given. Relevant observations of the Tribunal in the order before us dated 7th August, 2007 are as under:-

“8. It is trite that ACR is to be written with objectivity and particular instances when the person has not performed upto the mark or there is any discrepancy in his performance should have been reported upon with instances. The need for giving a brief detail of the instances would substantiate the point of view of the reporting officer. For want of brief statement as to the performance and in the event of recording of an adverse remarks as to the performance when such a performance has not been the subject matter of the disciplinary proceedings, one is prejudiced

and deprived of an opportunity to effectively rebut the conclusions arrived at, which is founded on no material. The Apex Court in Sukhdeo's case (supra) ruled that controlling officer should show objectivity and a fair assessment has to be made.

9. Accordingly, in Swatantar Singh's case (supra) an object of communication of adverse remarks is to afford an opportunity to employee to improve upon and in such view of the matter, an opportunity to reform and to mend his conduct to do hard work, the condition precedent is shortcomings should be apprised to the concerned by way of corrective measures. The Apex Court in State of U.P. v. Yamuna Shanker Misra & another, (1997) 4 SCC 7, insofar as objectivity in writing ACR is concerned, ruled as follows:-

“7. It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon the facts or circumstances. Though sometimes, it may not be part of record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the reporting officers writing confidential should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record.”

In the circumstances, the Tribunal inferred that the adverse comments are without any justification and instances and since no corrective measures had been taken, the ACR lacks the objectivity and

fairness. The Tribunal also directed the petitioners to show consideration of the representation of the respondent which had been disposed of by a cryptic order that the representation had been considered and is rejected.

Despite the opportunities given to the counsel for the petitioners to show consideration of the representation, the counsel failed to show any record before the Tribunal which would have reflected the application of mind in deciding the representation of the respondent and consequently Tribunal had set aside the adverse entries made against the respondent and the orders passed in respect thereof.

Before this Court, the petitioners were again directed to produce the original record to show that the representation of the respondent dated 19th July, 2006 was disposed of by the application of mind and after considering the pleas and contentions raised by the respondent. The learned counsel for the petitioners sought time to produce the original record on various dates and thereafter produced the photocopies of alleged original record.

Learned counsel referred to the memorandum dated 28th June, 2006 contending that the memorandum would show the consideration of the representation of the respondent. The memorandum dated 28th June, 2006 does not show application of mind and consideration of the

pleas of the respondent because the memorandum dated 28th June, 2006 is the communication of the adverse remarks in the ACR of the respondent for the year ending 31st March, 2006, whereas the representation was made after the said memorandum on 19th July, 2006. The representation is quite detailed and raises various points of consideration which was raised by the respondent even before the Tribunal. The detailed representation of the respondent was rejected by memorandum dated 13th October, 2006 by Deputy Commissioner (Pers.) by only stipulating that he is the appellate authority and he does not find any merit in the pleas raised by the respondent and therefore request of the respondent to expunge the adverse entries from his ACR cannot be acceded to. The Tribunal have set aside the adverse entries in the ACR on the ground that the adverse comments are without any justification and instances and no corrective measures had been taken and the representation of the respondent dated 19th July, 2006 was not considered and the original record was not produced before the Tribunal.

The photocopy of the alleged original record produced before this Court also does not reflect any consideration on the representation dated 19th July, 2006 by the petitioners. The photocopies of the record produced before this Court shows a complaint regarding selection of Cricket U-16 Boys Regional Team and nothing adverse against the respondent. The learned counsel for the petitioner has failed to produce

and show a proper consideration with application of mind of the pleas and contentions raised by the respondent in his representation dated 19th July, 2006 against the adverse entries communicated to the respondent by memorandum dated 28th June, 2006 of the ACR for the year ending 31st March, 2006. The learned counsel has again not produced the original record nor has shown any documents or notings which would show the consideration of each and every plea raised by the respondent in his representation. Consequently the decision of the Tribunal also based on account of non production of original relevant record despite opportunities given to the petitioners cannot be faulted. Even before this Court the petitioners have failed to produce the relevant original record despite opportunities granted to them.

In the circumstances, the petitioners have failed to establish and show any illegality or irregularity or such perversity in the order of the Tribunal dated 7th August, 2007 allowing the original application of the respondent and the order dated 21st July, 2009, dismissing the review application of the petitioners. While dismissing the review application, the Tribunal also relied on *R.L. Butail v. Union of India and Others*, (1971) 2 SCR 55 and *State of West Bengal v. Kamal Sen Gupta*, 2008 (9) Scale 509.

In the circumstances, there are no grounds to interfere with the orders of the Tribunal allowing the original application of the

respondent and quashing the adverse entries in his ACR for the year ending 31st March, 2006 and dismissing the review application of the petitioners by order dated 21st July, 2009. The writ petition, in the facts and circumstances, is without any merit and is therefore dismissed. The petitioners shall also be liable to pay a cost of Rs.5,000/- to the Delhi High Court legal Services Committee.

ANIL KUMAR, J.

May 10, 2010
'anb/Dev'

MOOL CHAND GARG, J.