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

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W.P.(C) 4332/2012

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Date of decision : 3rd July, 2013

B.N.SANAWAN

..... Petitioner

Through : Ms. Rekha Palli, Adv. with
Ms.Punam Singh, Adv.

versus

UOI AND ORS

..... Respondents

Through : Mr. Ruchir Mishra, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J (Oral)

1. The petitioner in the instant case prays for issuance of a writ of Certiorari quashing the orders dated 10th February, 2012, 20th December, 2011 and the order dated 22nd January, 2008 passed by the respondent No. 2 rejecting the petitioner's representation in respect of certain adverse remarks which had been recorded in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006. The petitioner has also prayed for issuance of

writ of Mandamus seeking a direction to the respondents to hold a Review DPC for considering the case of the petitioner for promotion to the rank of Second-in-Command w.e.f. 12th May, 2011 along with all the consequential benefits.

2. The facts giving rise to the petition are within a narrow compass and are mainly undisputed. To the extent necessary the same are briefly noted hereinafter.

3. The petitioner joined the Indo Tibetan Border Police (ITBP) in the year 1995 as an Assistant Commandant and thereafter, on 1st July, 2004 was promoted as Deputy Commandant. On 23rd July, 2007, the following Memorandum communicating the three adverse remarks given to him in his Annual Confidential Report for the period w.e.f. 4th June, 2005 to 31st March, 2006 was sent to the petitioner :-

"S.No.	Particulars of Column	Adverse remarks.
1.	Is he energetic and of active habits	Yes, for his own interests.
2.	Dependability	Not dependable for sensitive job. Officer was assigned task of setting question papers for candidates appearing in "C" List. His carelessness in not despatching required no. of question papers to examination centre resulted in administrative inconvenience.
3.	Integrity	Decision to be taken

after finalization of enquiry report.”

4. The petitioner was further informed vide the Memorandum dated 23rd July, 2007 that only one representation would be entertained against the adverse remarks noted above. It is important to note that in terms of the prevailing Rules and Policies, the petitioner was not furnished a copy of the Annual Confidential Report. As such the petitioner made a general representation on 9th August, 2007 against the adverse remarks which came to be rejected vide an order dated 22nd January, 2008 passed by the respondents.

5. The Department of Personnel and Training of the Government of India issued an Office Memorandum dated 13th April, 2010 directing the respondents to give copies of all the below bench mark ACRs to the concerned. Pursuant to the Directives contained in the said Memo, the petitioner was supplied with three of his ACRs including the ACR for the period w.e.f 4th June, 2005 to 31st March, 2006. It was on receipt of this ACR, that the petitioner for the first time came to know that his performance has been graded as ‘average’ by the Initiating Officer.

6. It is undisputed before us that the ITBP follows three tier assessment for recording of the ACRs of its personnel. As such the ACR recorded by the Initiating authority is placed for the first

review by Reviewing Officer and a second consideration is accorded to it by the Senior Reviewing Officer, who in the ITBP is called Counter-signing Officer. So far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the Reviewing Officer upgraded the petitioner's performance from 'average' to 'good'. It was also specifically noted therein that there was no advisory or correspondence to show poor performance by the petitioner and, therefore, his ACR was upgraded to 'Good'. The Counter Signing Officer had endorsed his agreement with the Reviewing Officer thereupon. As such, so far as the petitioner's ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 is concerned, the same attained finality with the final assessment as 'Good'.

7. We may note that on receipt of the communication of the above upgradation by the Reviewing Officer, the petitioner made a second representation dated 30th August, 2010 wherein, he prayed for upgradation of his ACR to 'very good' and for expunction of adverse remarks on the basis of the comments of the Reviewing Officer. The petitioner in effect sought a review of the rejection order dated 22nd January, 2008 which was obviously erroneous in the light of the review of the petitioner's ACR and his upgradation from 'average' to 'good'.

8. This representation of the petitioner was rejected vide order dated 13th June, 2011 whereby the respondents informed that after duly taking into consideration the representation of the petitioner

and all the relevant facts and evidence on record, the department had come to the conclusion that there was no merit in the representation calling for revision of his grading from 'good' to 'very good' and had rejected the same being devoid of merit.

9. It is implicit in this communication that the respondents had fully accepted and endorsed the upgradation of the petitioner's ACR to 'good' and thus accepted the comments of the Reviewing Officer as well as the Counter-Signing Officer.

10. We are informed that despite the above position and the pendency of the petitioner's representation, the respondent proceeded to hold a Departmental Committee on 12th May, 2011 for promotion of officers to the post of Second-in-Command. The petitioner contends that he was entitled to consideration and promotion in view of the upgradation of his ACR, as he fulfilled the bench mark of three very good and two good reports in his last 5 ACRs. However, the respondents took a stand that there were adverse remarks in the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2006 which had not been expunged, and hence, he did not meet the ACR bench mark. The petitioner represented against his supersession and made a further representation. The petitioner was again superseded for promotion to the rank of Second-in-Command vide Order dated 29th June, 2011 whereby his juniors were again promoted overlooking him for the same reason.

11. It appears that on the petitioner's representation, comments were sought from his Reviewing Officer (who by now had stood

appointed as Additional Director General of Police) with regard to the expunging of the adverse remarks. In the writ petition, the petitioner has categorically made the following averments:-

“13. ...That the Petitioner has, however, now learnt that based on his representation, comments were sought from his then Reviewing Officer Sh. P.P. Singh, Additional Director General of Police vide letters dated 29.10.2008 who had while upgrading him from Average to Good recommended for expunction of the adverse remarks and thereafter again when comments were sought from him vide letter dated 23.03.2011, he had vide his letter dated 20.07.2011 specifically expunged the adverse remarks and further stated that the Petitioner was a very good officer and deserved promotion...”

12. The Reviewing Officer had thus written a letter dated 20th July, 2011, copy whereof has also been placed before us. In the letter, the Reviewing Officer has referred to a D.O. letter dated 23rd March, 2011 and specifically endorsed the following comments:-

“...The secret note has no specific material in it. I don't agree to spoil someone's career on “unconfirmed report”.

Hence remark expunged.

The Officer is very good and deserves promotion...”

(Emphasis by us)

13. These averments made by the petitioner have not been disputed in the counter affidavit filed before us. It is apparent from

the above as well as letter dated 13th June, 2011 that the respondents were treating the petitioner's ACR w.e.f. 4th June, 2005 to 31st March, 2006 as a "good ACR" without any adverse remarks. Vide the communication dated 20th July, 2011 the Reviewing officer had confirmed that the adverse remarks had been expunged.

14. In this background, we find that there is merit in the petitioner's contention that the ACR w.e.f. 4th June, 2005 to 31st March, 2006 could not have been treated as an adverse ACR or as an ACR containing adverse remarks as the same has been directed to be expunged by the Reviewing Officer. Despite the above position, the respondents were treating the matter differently and the petitioner was compelled to make a further representation dated 27th December, 2011. This representation of the petitioner was also rejected by the respondents vide communication dated 20th December, 2012 stating the ground that his earlier representation on the same issue was already rejected. It was stated therein that as per the existing rules, no memorial or appeal against the rejection of the representation against adverse entries could be allowed. Hence, the case could not be reviewed after the lapse of a considerable time.

15. Due to the above reasons, the petitioner was compelled to continuously make the representations for expunction of adverse remarks. While responding to the representation of the petitioner made on 9th January, 2012, the respondents had communicated that

after duly taking into consideration the representations and all the relevant facts and evidence on record, it had come to the conclusion that there was no merit in the representation which called for a review of adverse remarks recorded in his APAR and the same was rejected being devoid of merits. The petitioner was warned for mis-representing the facts and advised that the Government servant should desist from making frequent and numerous representations on the same issue.

16. It is apparent that the respondents were endorsing the previous erroneous stand which had been taken by them on 22nd January, 2008 without considering the intervening circumstances and ignoring the review of the petitioner's ACR by the Reviewing Officer which had been confirmed by the counter-signing officer and had been duly accepted by the respondents.

17. The petitioner was finally promoted on 12th April, 2012 as Second-in-Command. However, as a result of the respondent's above noticed action, the petitioner stood superseded by 44 junior officers despite his meeting the bench mark as his ACR had been upgraded from 'average' to 'good' as well as the remarks of the Reviewing Officer therein to the effect that the petitioner was having good technical and practical knowledge and that there was nothing to show poor performance by him. When asked to do so, the Reviewing Officer had duly specified and clarified to the respondents vide the Communication dated 20th July, 2011 that the adverse comments in the said ACR stood duly expunged.

Therefore, the denial of the promotion to the petitioner was illegal and unjustified and as the petitioner was entitled to a favourable consideration in the DPC leading to the passing of the order dated 12th May, 2012 for the first time in which he was superseded only on account of respondents erroneously treating the ACR for the period w.e.f. 4th June, 2005 to 31st March, 2005 as adverse. By this order, juniors of the petitioner had been promoted while he had been denied the promotion.

18. Mr. Ruchir Mishra, learned counsel for the respondents has urged that there are advisories against the petitioner and that his performance could not have been upgraded from 'average' to 'good' or the ACR cannot be treated as one without having adverse remarks. He has drawn our attention to the remarks recorded by the Initiating Officer made in the relevant ACR that the petitioner was not dependable for sensitive jobs and that he had been assigned the task of sending question papers for candidates appearing in 'C' list and it is the carelessness of the petitioner in not despatching the required number of question paper to the Examination Centre which resulted in administrative inconvenience and makes reference of the secret note annexed to the relevant ACR.

19. Mr. Mishra has also referred us to an order passed by the Deputy General whereby advisory was issued to the petitioner to intimate about his financial transactions and advised to be careful with regard to the advance taken by the petitioner.

20. The advisories issued to the petitioner regarding non

intimation of a financial transaction as per the rules have not formed the basis of the Initiating Officer's comment for the period w.e.f. 4th June 2005 to 31st March, 2005. The comments referring to certain shortfall in the examination paper and the reference to a secret note has no relevance in view of the upgradation of the ACR by the Reviewing Officer and its acceptance by the Counter Signing Officer. This has thereafter been accepted even by the respondents and there comments anymore does not lie any sign of to the adverse. The respondents have accepted that there was no adverse remarks in the ACR of the petitioner for the period w.e.f. 4th June, 2005 to 31st March, 2005 for this reason, the petitioner was given the promotion. No significance can be attached to the advisories. In any case nothing would turn on the advisories which have been referred to by the respondents so far as the technical practical knowledge of the petitioner is concerned. Needless to say that in view of the communication dated 13th June, 2011 and 20th July, 2011, the respondents cannot treat the ACR of the petitioner for the period w.e.f. 4th June, 2005 to 31st March, 2006 as an adverse ACR or as one containing any adverse remarks against him.

21. So far as the ACR of the petitioner is concerned, the same had attained finality upon it being endorsed by the Counter Signing Officer and endorsing comments of the Reviewing Officer and as such, the respondents could not have treated the same as an adverse ACR or as one containing adverse remarks.

22. In the light of above mentioned facts and circumstance, we find substance in the contentions of learned counsel for the petitioner. Accordingly, the orders dated 10th February, 2012, 20th December, 2011 and 22nd January, 2008, whereby, the petitioner's representations have been rejected are not sustainable in law and are hereby set aside and quashed. As a result, the petitioner would be entitled to consideration of his candidature by Review DPC for promotion to the rank of Second-in-Command w.e.f. 12th May, 2011 which shall be effected within a period of eight weeks from today. If recommended, the petitioner shall also be entitled to notional promotion and appropriate seniority with effect from, the date on which his juniors were promoted i.e. 12th May, 2011.

23. In our considered opinion, the petitioner deserves to be given the financial benefits and accordingly, if he is found fit to be promoted by the Review DPC w.e.f. 12th May, 2011, he shall be entitled to the consequential financial benefits. The amount payable to the petitioner towards the financial benefits shall be computed by the respondents within a period of eight weeks from today and communicated to the petitioner. The payment in respect thereof be made to the petitioner within six weeks thereafter.

24. The petitioner shall also be entitled to costs of the present proceedings which are assessed @ Rs.20,000/- which shall be paid along with the next month's salary.

The writ petition is allowed in above terms.

Dasti.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

JULY 03, 2013/j