

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

Judgment delivered on: October 01, 2014

+ W.P. (C) No. 5649/2013

SHRI TARSEM KUMAR Petitioner

Through: Mr. S.N. Kaul, Advocate

Versus

UNION OF INDIA AND OTHERS Respondents

Through: Mr. Sunil Kumar and Mr. T.P. Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

JUDGMENT

KAILASH GAMBHIR, J

1. The petitioner, a regular Commandant in CISF, who was decorated with the President Police Medal for his meritorious service in the year 2007 has invoked the jurisdiction of this Court under Article 226/227 of the Constitution of India seeking quashing of the order dated 17th February 2011 passed by Respondent No. 2 whereby his representation dated 2nd August 2010 seeking expunction of his “Average” grading and upgradation of the same to “Very Good” in the ACR/APAR of the year 2008-2009, was rejected. The petitioner also seeks directions to the

respondents to hold a Review DPC for his promotion from the post of Commandant to Senior Commandant from the date when his immediate juniors were promoted to such higher post on regular basis, along with grant of all consequential reliefs and allowances etc.

2. The facts giving rise to the present petition are that the petitioner was appointed in the CISF as a Special Officer in the year 1975. Based on his exemplary service record, he earned promotions to higher ranks from time to time alongwith his batch mates. The last promotion earned by the petitioner was that of a regular Commandant in CISF with effect from 1.2.2006. In the year 2008, the petitioner was transferred from CISF, Eastern Zone, Head Quarters, Patna, Bihar to CISF Unit, Amritsar Punjab and was posted as Chief Airport Security Officer, Amritsar Airport on 13th June 2008. In March 2009, the petitioner was transferred from Amritsar Airport to the office of Director General, CISF, New Delhi on the post of Assistant Inspector General (Operations). While being posted as Assistant Inspector General (Operations), he was communicated his APAR (ACR for the year 2008-2009). In this ACR, the Reporting Officer had assessed him as 'Very Good'; however, the Reviewing Authority not agreeing with the assessment of the Reporting Officer downgraded the

petitioner to 'Average' grade which was also endorsed by the Accepting Officer. This ACR of the petitioner for the year 2008-2009 is at the heart of the controversy in the present matter.

3. It is the case of the petitioner that in his self appraisal report, he had clearly stated that all the targets which were fixed by the Reporting Officer during the period when his ACRs were drawn, were duly achieved by him therefore, there was no shortfall of any kind on the part of the petitioner. The petitioner also stated that there were other significant achievements which were duly mentioned by him in the relevant columns of the said ACR form. It is also the case of the petitioner that the Reporting Officer had fully agreed with the targets, objectives which were achieved by the petitioner and in fact on an objective analysis of the performance of the petitioner, the Reporting Officer graded him as 'Very Good'. It is also the case of the petitioner that the Reviewing Officer without giving any weightage to the grading as assessed by the Reporting Officer downgraded him, by rating him as 'Average'. As averred by the petitioner, no reasons whatsoever were disclosed by the Reviewing Officer to demonstrate his disagreement with

the assessment made by the Reporting Officer or any other justification to lower down the grading of the petitioner straightaway to 'Average'.

4. It is also the case of the petitioner that there existed no adverse material of any kind which could necessitate overruling of remarks made by the Reporting Officer by the Reviewing Officer; that in Para (iv) of the ACR in question, the only reason given by the Reviewing Officer was that the petitioner had to be removed on administrative grounds and therefore, his work and conduct can be categorised as just 'Average'. As per the petitioner, this observation of the Reviewing Authority is arbitrary, lacks cogent basis and is a view which no reasonable person of prudence can justify because it is unfounded and unsupported by any record or evidence. It is also the case of the petitioner that in fact he had completed a fairly good tenure at Amritsar Airport and was brought back to CISF Headquarters in the office of Director General on an important post of Assistant Inspector General (Operations). As per the petitioner, had there been anything adverse against him, then he would not have been assigned such an important job and that too at the Headquarters of the CISF at New Delhi.

5. It is also the case of the petitioner that the Accepting Authority had followed the footsteps of the Reviewing Authority by accepting the remarks of the Reviewing Authority without due application of mind and without any objectivity. Counsel for the Petitioner also invited attention of this Court to para 2 of the order dated 17.2.2011, wherein the respondents have wrongly stated that the representation was preferred by the Petitioner to DG/CISF, which is totally contrary to the factual position as the same was made by the Petitioner to the President of India, New Delhi. Counsel also argued that in the order dated 17.2.2011, the respondents have deliberately not disclosed the name of the Competent Authority who rejected the representation of the Petitioner and such deliberate suppression on the part of the respondents is enough to indicate that the representation of the Petitioner was never placed before the Home Secretary, Government of India who was the only Competent Authority to decide his representation.

6. It is also the case of the petitioner that he was communicated about the APAR (ACR) for the year 2008-09 at a belated stage, after a delay of about ten months and on receipt of the same, the petitioner immediately made a representation dated 2.8.2010 addressed to the President of India

with the request of expunging the 'Average' grading and upgrading the same to 'Very Good' in terms of the assessment made by the Reporting Officer. It is also the case of the petitioner that the President of India is the superior authority to the Accepting Authority, so far as the ACR concerning the petitioner was concerned. By order dated 17.2.2011, the petitioner was informed by the office of Director General, CISF, that the Representation dated 2.8.2010 was devoid of any merit and therefore, the same was rejected. It is also the case of the petitioner that DPC for promotion from Commandant to Senior Commandant was held on 18.4.2011 and 23.01.2012 and in both the said DPCs, the petitioner was not considered fit to be promoted to the higher rank of Senior Commandant due to his 'Average' grading in the year 2008-2009, although juniors to the petitioner got promoted. The petitioner had also submitted an exhaustive representation on 2.8.2010 addressed to the President of India but the same was also rejected by the Competent Authority by passing a non-speaking order. As per the petitioner, gross injustice has been meted out to him because of the illegal acts of the Reviewing Officer, Accepting Officer and the members of the DPC and due to the same, the entire decorated career of the petitioner has been

stigmatised, after being denied of his legitimate right to get promoted to the rank of Senior Commandant.

7. In the counter affidavit filed by the Respondent Nos. 1 to 4, the stand taken is that, as Chief Airport Security Officer, the petitioner was responsible for the complete security of the Airport and during his period of posting at Amritsar Airport, it was graded as sensitive Airport in the category of hypersensitive and sensitive Airports. It is also the case of the respondents that taking into account the security threat, a decoy check alongwith confidential inquiry was also conducted at Amritsar Airport by the Reviewing Officer and the inquiry revealed a complete collapse of gazetted level of leadership of the Unit. It was on account of such collapse that the Reviewing Officer vide his letter dated 11.2.2009 had requested the Director General, CISF to transfer the petitioner from Amritsar Airport on administrative grounds. Based on this inquiry report, the respondents have justified the downgrading of the Petitioner to 'Average' by the Reviewing Officer and reasons to this effect were spelt out in the ACR. The respondents further contends that a copy of the said ACR was duly communicated to the Petitioner on 21st July 2010 and a time period of 15 days was given to him to submit his representation; a

representation was made on 2nd August 2010 and which the comments of Reviewing Officer were invited. The latter categorically stated that there was a complete lapse in the security arrangement at the Amritsar Airport under the leadership of the Petitioner and under these circumstances, he was recommended for being posted out of the said position on administrative grounds and thus, his performance was correctly assessed to the level of 'Average'. It is also the case of the respondents that the Competent Authority after taking into consideration the entries in the ACR made by the Reporting Officer and Reviewing Officer and comments furnished by the Reviewing Officer, found the representation of the petitioner being devoid of merit and rejected the same vide their letter dated 17.2.2011. It is also the case of the respondents that the post of Senior Commandant is a selection post as per Government of India instructions. The benchmark for promotion to the post of Senior Commandant is 'Very Good' in the ACRs of the preceding five years. That in the duly convened DPC under the aegis of UPSC, 1999 the Petitioner was assessed unfit based on the records of ACR and in terms of the guidelines of DoPT.

8. Addressing arguments on behalf of the Petitioner, Mr. S.N. Kaul, learned counsel, vehemently contended that the Reviewing Officer had totally ignored the positive remarks given by the Reporting Officer in the ACR for the period 2008-09 especially the remarks where he stated that the Petitioner had completed all the assigned targets as were fixed by the Reporting Officer. Counsel thus submitted that no reasonable basis or justifiable reasons were disclosed by the Reviewing Officer to suggest that the petitioner deserved downgrading for the said year 2008-09 despite all the positive remarks made by the Reporting Officer.

9. Counsel also submitted that there exist clear directives in Part V of the ACR that where there is disagreement between the remarks, then the reasons are to be recorded but in this case the Reviewing Officer and Accepting Authority had utterly failed to give any cogent reasons to justify their remarks against the well founded remarks given by the Reporting Officer, on all the parameters contained in Part III and IV of the Report. Counsel also submitted that the Petitioner was posted back to the CISF on a routine posting and not because of the alleged administrative grounds, i.e., due to the alleged collapse of the security arrangement at Amritsar Airport. Counsel further submitted that there

was an unreasonable and inordinate delay of ten months on the part of the respondents in conveying the said adverse remarks to the petitioner, although under the relevant guidelines, a period of one month has been laid down to complete this process.

10. Counsel for the petitioner also laid strong emphasis on his argument that the representation dated 2.8.2010 was addressed by the petitioner to the President of India but in flagrant violation of relevant guidelines, the said representation of the petitioner was not decided by the officer higher to the rank of Accepting Officer, which in the case of the petitioner was the Home Secretary, but the same was decided by the same Accepting Officer who had earlier accepted the report of the Reviewing Officer. Counsel thus, submitted that the decision taken by the same Accepting Officer to reject the representation of the Petitioner which is otherwise a non-speaking order is *non est* in the eyes of law. Therefore, in the absence of any decision taken by the Home Secretary on the representation of the Petitioner, the DPC ought to have promoted the Petitioner to the next higher rank of Senior Commandant without taking into consideration the said ACR for the year 2008-09. Counsel also submitted that the petitioner has an unblemished record of almost 38

years in service in CISF and even with regard to the ACR for the year 2008-09, he was assessed as 'Very Good' by the Reporting Officer but by one arbitrary and whimsical act of the Reviewing Officer blindly accepted by the Accepting Officer, the entire career of the petitioner has been put to stake. Counsel also submitted that the petitioner is due to retire very shortly and he has also suffered great embarrassment as juniors to him have already been promoted. Counsel strongly urged that this Court may give immediate direction to the respondents to hold the review DPC and while considering the case of the Petitioner for promotion for the rank of senior Commandant the Review DPC should ignore the ACR for the year 2008-09 as non-existent and *non-est*.

11. The learned counsel for the respondents while maintaining the stand of the respondents canvassed in the counter affidavit, candidly stated that the representation dated 28.08.2012 of the Petitioner can be decided afresh by the Home Secretary, Ministry of Home Affairs, Government of India who is the Competent Authority in the case of the petitioner and higher in rank to the rank of Accepting Officer, through the Director General, CISF. In support of his argument, counsel for the petitioner has drawn attention of this court to the recent judgment of the

Apex Court in *Sukhdev Singh vs. Union of India and others*, (2013) 9 SCC 573 and to relevant DoPT guidelines. They have been referred to in the subsequent part of this judgment.

12. We have heard learned counsel for the parties at some length and having reflected on their arguments, we are of the view that:

13. Promotion is the only incentive in a service career. In the absence of any promotion to a higher rank, not only will the growth and development of the individual officer stop but equally the department or the institution gets affected. Stagnation of an employee, without there being any chance of promotion to further higher rank, could well deter the employee from taking any initiative to achieve higher targets, goals and objectives for the ultimate development and growth of the department and office which his office serves.

14. The Annual Confidential Report (ACR/APAR) is a vital mode of assessment of the performance of an officer in the previous year. It is through this document that the suitability of an officer's promotion and career advancement is adjudged. It would be appropriate to reproduce the instructions which forms part of the format of confidential report of gazetted officer (non IPS):

“INSTRUCTIONS

1. *The Confidential Report is an important document. It provides the basic and vital inputs for assessing the performance of an officer and for his/her further advancement in his/her career. The Officer reported upon, the Reporting Officer and the Reviewing Officer should, therefore, undertake the duty of filling out the form with a high sense of responsibility.*

2. *Performance appraisal through Confidential reports should be used as a tool for human resource development. Reporting Officer should realize that the objective is to develop an Officer also that he/she realizes his/her true potential. It is not meant to be a fault/finding process but a developmental one. The reporting and the Reviewing Officer should not shy away from reporting shortcomings in performance, attitudes or overall personality of the officer reported upon.*

3. *The items should be filled with due care and attention and after devoting adequate time. Any attempt to fill the report in a casual or superficial manner will be easily discernible to the higher authorities.*

4. *If the Reviewing Officer is satisfied that the Reporting Officer had made the report without due care and attention he/she shall record a remark to that effect in Item 2 of Part IV or Part V as the case may be. The Government shall enter the remarks in the Confidential Roll of the Reporting Officer.*

5. *Every answer shall be given in a narrative form. The space provided indicates the desired length of the answer. Words and phrases should be chosen carefully and should accurately reflect the intention of the Officer recording the answer. Please use unambiguous and simple language. Please do not use omnibus expressions like 'outstanding, "very good", "good" "average", "below average", while giving your comments against any of the attributes except where specifically called for the same.*

6. *The Reporting Officer shall, in the beginning of the year, assign targets to each of the Officers with respect to whom he is required to report upon for completion during the year. Performance appraisal should be a joint exercise between the officer reported upon and the Reporting Officer. The targets/goals/objectives be set at the commencement of the reporting year. In the case of an Officer taking up a*

new assignment/post in the course of the reporting year, such targets/goals/objectives shall be set at the time of assumption of the new change/assignment.

7. The targets/goals/objectives set; should be clearly known and understood by both the officers concerned while fixing the targets for achievement, priority should be assigned item wise, taking into consideration the nature and the area of work and any special features that may be specific to the nature of the work of the officer to be reported upon.

8. Although performance appraisal is an year-end exercise in order that it may be a tool for human resource development, the Reporting Officer should at regular intervals review the performance and take necessary corrective steps by way of advice, etc.

9. It should be the endeavour of each appraiser to present the truest possible picture of the appraisee in regard to his/her performance, conduct, behaviour and potential.

10. Assessment should be confined to the appraisee's performance during the period of report only.

11. Some posts of the same rank may be more exacting than others. The degree of stress and strain in any post may also vary from time to time. These facts should be borne in mind during appraisal and should be commented upon appropriately.

12. Aspects on which an appraisee is to be evaluated on different attributes are delineated below each column. The appraiser should deal with these and other aspects relevant to the attributes.

13. The item relating to "Public Relation" need to be filled in by the Reporting Officer only where the duties of the Officer reported upon are such that he/she comes in contact with members of the public.

NOTE:

The following procedure should be followed in filling up the column item relating to integrity:-

(i) If the Officer's integrity is beyond doubt, it may be so stated.

(ii) If there is any doubt or suspicion, the item should be left blank and action taken as under:

(a) A separate secret note should be recorded and followed up. A copy of the note should also be sent together with the Confidential Report to the next Superior Officer who will ensure that the follow up action is taken expeditiously. Where it is not possible either to certify integrity or to record the secrete note, the Reporting Officer should state either that he has not watched the officer's as the case may be.

(b) If, as a result of the follow up action of the doubts or suspicions are cleared, the Officer's integrity should be certified and an entry made accordingly in the Confidential Report.

(c) If the doubts or suspicions are confirmed, this fact should also be recorded and duly communicated to the officer reported upon concerned.

(d) If, as a result of the follow up action, the doubts or suspicions are neither cleared nor confirmed, the Officer's conduct should be watched for a further period and thereafter action taken as indicated at (b) and (c) above.

(For detailed instructions please see Ministry of Home Affairs O.M. No. 51/4/64-Estt (A) dated 21 June, 2005 reproduced in para 5.2 of Govt. of India, Cabinet Secretariat, Deptt. Of Personnel's letter No. 51/5/72-Estt (A) dated 20 May, 1972 and circulated vide CISF Directorate's Circular No. 46/72 under confidential letter No. 15/1 CISF/Confid/72 dated 17th August 1972. May also refer to CISF Directorate's Circular No. 51 under letter No. E/16001/1/74-Ad III dated 1st November, 1974 letter No. E-13014/14/78-GAI dated 8 April 1978 and letter E/16099/1/81 Pers. Dated 14 May, 1981)"

It will also be useful here to reproduce the DoPT instructions issued through Office Memorandum No. 21011/1/2005 Estt.(A) dated 6th January, 2010 and the same are as under:-

"OFFICE MEMORANDUM

Subject:- Effect on modification/expunction of adverse

remarks in the ACRs and upgradation/down-gradation of the overall grading in the ACRs prior to the period 2008-2009.

The undersigned is directed to say that instructions were issued vide O.M. of even number dated 14th May, 2009 by which the complete APAR (previously known as ACR) including the overall grading and assessment of integrity shall be communicated to the concerned officer for representation if any, with effect from the reporting period 2008-09 which was to be initiated from 1.4.2008. Prior to that only adverse remarks in the ACR were required to be communicated for representation, if any. The then existing instructions further provided that the overall grading in the ACR should remain unchanged even after modification or expunction of the entire adverse remarks. It was left to the DPC to re-determine the overall grading if it considered that the expunction of such adverse remarks had so altered the quality of the ACR. The matter has been further considered and it has been decided that in those cases where the reckonable ACRs prior to the reporting period 2008-09 are to be considered in a future DPC on which the adverse remarks of Reporting/Reviewing/Accepting Authorities have been expunged or modified by the Competent Authority, the "overall grading" in the ACR be kept blank for appropriate re-grading by the DPCs. The existing grading shall be blocked in such cases. It has also been decided that where the authority has upgraded/downgraded the overall grading without giving sufficient reasons, the DPC shall treat such an exercise as non-est/invalid. General terms, such as "I agree or disagree with the Reporting Officer/Reviewing Officer" used by the Reviewing/Accepting Authority shall not be construed as sufficient reason for upgrading/downgrading the overall grading given by the Reporting Authority/Reviewing Authority. The proposals for the DPC where ACRs upto the reporting period 2007-08 will be taken into account should specifically bring out these guidelines.

2. It is also made clear that past cases already decided will not be re-opened."

15. It would also be significant to reproduce the instructions laid down by the DoPT detailing out some of the instances for holding review D.P.C. and the same are as under:-

"When Review DPCs may be held

18.1 The proceedings of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there have been grave errors in the procedure followed by the DPC. Thus, it may be necessary to convene Review DPCs to rectify certain unintentional mistakes, e.g.—

- (a) where eligible persons were omitted to be considered; or*
- (b) where ineligible persons were considered by mistake; or*
- (c) where the seniority of a person is revised with retrospective effect resulting in a variance of the seniority list placed before the DPC; or*
- (d) where some procedural irregularity was committed by a DPC; or*
- (e) where adverse remarks in the CRs were toned down or expunged after the DPC had considered the case of the officer.*

These instance are not exhaustive but only illustrative.”

16. On who would be the Competent Authority to decide the representation made by an officer against the adverse remarks, it would be relevant to reproduce the extracts of OM No. 21011/ 1/ 2014- Estt. (A) Dy. No. 959029 dated 13.02.2014.

**"Department of Personnel and Training
(Estt (A) Desk-II**

Ref: Ministry of home Affairs Notes (ITBP) on pre-pages regarding competent authority to decide the representation given in respect of entries in the ACR/APAR. (F. No. I.17015/10/APAR CELL/Inst/2009).

2. In terms of this Department OM No. 21011/1/2010-Estt.A dated 13.4.2010 and ON No. 21011/1/2005-Estt (A) (Petitioner-II) dated 14.5.2009, the representation of the officer concerned is to be decided by the competent authority. ON dated 14.5.2009 provided that the competent authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation.

3. In terms of this Departments OM No. 51/5/72-EStt (A) dated 20.5.1972, all representations against adverse remarks should be examined by an Authority superior to the Reviewing Officer, in consultation, if necessary, with the Reporting and Reviewing officers. The said Superior Authority shall be regarded as the Competent Authority to deal with such representations."

4. Under OM 21011/1/2005-Estt(A) (Petitioner-II) dated 14.5.2009 issued after the Supreme Court decision in Dev Dutt case, all entries in the APAR from 2008-09 onwards are being conveyed to the officer reported upon the representation. The Supreme Court had held as follows in Dev Dutt case:-

"We also hold that the representation must be decided by an authority higher than the one who gave entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness to public servants."

5. The representation preferred against the entries in the ACR/APAR by the concerned officer should be decided by an authority superior to one who gave the entry ACR/APAR in both

situation either the organisation is following two tier (Reporting and Reviewing) or three tier (Reporting, Reviewing and Accepting Officer) system in writing of APAR.

JS (E) has seen.

*Sd/-
(Prem Chand)
Under Secretary (Estt. A) Desk-II"*

17. Before we examine the aforesaid DoPT guidelines and the instructions annexed with the Appraisal report, let us recapitulate the brief controversy at hand. The case of the petitioner is for his promotion from the rank of Commandant to Senior Commandant came up for consideration before the DPC, which was held on 18th April 2011 and 23rd April 2012 and on both the occasions he was assessed as unfit; his juniors were promoted as against the vacancies of 2011-2011 and 2012-2013. As per the laid down guidelines, the five ACRs of the preceding years, with the benchmark of 'Very Good' were to be taken into consideration by the DPC; only in the ACR of the year 2008-2009 the petitioner had been assessed as 'Average' while in the other ACRs, he had been assessed as 'Very Good'. This 'Average' ACR of 2008-2009 is in fact the heart of controversy between the parties. (The respondents have not disputed the fact that the said *below benchmark* grading in the year 2008-2009 was conveyed to the petitioner at a belated stage, i.e., after a delay of about 10

months.) The petitioner had also made a representation dated 2nd August 2010 to challenge his downgrading in the ACR for the year 2008-2009, but his grievance is that his representation was decided on 17th February 2011 in total disregard to the various guidelines issued by the DoPT time and again; and the same being conveyed by a non speaking order, without expressly dealing with the contentions raised by the petitioner in his representation. As per the petitioner, his representation should have been decided by the Officer higher to the rank of Accepting Officer in terms of the DoPT guidelines and therefore, there is no valid decision accorded by the Competent Authority on the said representation of the petitioner.

18. Indisputably, the petitioner in his overall grading in his Annual Appraisal Report in the year 2008-2009 was assessed as 'Very Good' by the Reporting Officer, but not agreeing with the assessment of the Assessing Officer, the Reviewing Officer graded him as 'Average'. The principal reason given by the Reviewing Officer in Part V of the Annual Appraisal Report is that 'the Officer had to be removed on administrative grounds and considering the same, his conduct can be categorised as 'Average'. The Director General, CISF who was the Accepting Officer,

had agreed with the remarks given by the Reviewing Officer in his Annual Appraisal Report.

19. The writing of confidential report, as we can find from the instructions attached with the Annual Appraisal Report is serious business, any casual or cavalier approach on the part of the designated officers can jeopardise the service career of the 'assessed officer'. Promotion has been held to be an essential element of service and it is expected of every management to provide realistic opportunities to every officer for boosting their morale and rewarding them promotionally for their hard work. The substantive growth in capacities to discharge work of greater responsibility has to be determined on the basis of past performance, else there will be no motivation to do better or even to maintain standards. It leads to despondency and drudgery at work. The instructions as laid down in the Annual Appraisal Report Criterion, clearly spell out that the Reporting Officer and the Reviewing Officer should undertake the duty of filling out the Annual Appraisal Report with clarity, high sense of responsibility and objectivity. It further states that the Reporting Officer should bear in mind that the objective of the assessment exercise is to develop an officer so that he/she can realise

his/her true potential. It is not meant to be a battle but a developmental process, a cumulative effort that ensures optimal outcomes. It further lays down that it should be the endeavour of each appraisal to present the truest picture of the appraisee apropos his/her performance, conduct, behaviour and potential.

20. In the teeth of these instructions, and various guidelines laid down by the DoPT from time to time, it becomes abundantly clear that neither the Reporting Officer nor the Reviewing Officer, indeed not even the Accepting Officer, can adopt an erratic and a casual approach in evaluating the overall performance of an officer on the various parameters, on which he is required to be assessed. The Reviewing Officer too cannot abdicate his responsibility by just putting a stamp of approval on the remarks given by the Reporting Officer. Simultaneously, he cannot record his disagreement with the report of the Reporting Officer without spelling out the reasons for his disagreement. The position of the Accepting Officer is no different.

21. We are not expressing our views so far as recording of 'Average' grading of the petitioner in his ACR for the year 2008-2009 by the Reviewing Officer and the same being accepted by the Accepting Officer

is concerned, but we are certainly of the view that there was an inordinate delay on the part of the respondents in communicating the said 'Average' grading to the petitioner, Secondly, the Petitioner's representation of 02.08.2010 addressed to the President of India, was not decided by the officer higher in rank to the Accepting Officer. This is clearly in flagrant violation of the DoPT guidelines issued vide OM 21011/ 1/ 2005, Estt.(A) dated 14.05.2009, reproduced herein above. The OM incorporates the legal position, crystallised in the judgment of Hon'ble Supreme Court, in the case of ***Dev Dutt v. Union Of India & Anr., (2008) 8 SCC 725***, that communication of entries in an ACR is a must, and giving appropriate opportunity to represent against them is particularly important on higher posts, which are in pyramidal structure where the principle of elimination is followed in selection for promotion. The relevant paras have been exhibited under:

“Hence, in our opinion, the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the

non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned Counsel for the respondent are distinguishable.

12. Learned Counsel for the respondent submitted that under the Office Memorandum 21011/4/87 [Estt.'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11.09.1987, only an adverse entry is to be communicated to the concerned employee. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid Office Memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the concerned employee and not other entries, would in our opinion become arbitrary and hence illegal being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

13. It has been held in Maneka Gandhi v. Union of India and Anr. [1978]2SCR621 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. In our opinion, every entry in the Annual Confidential Report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. v. : (1997)IILLJISC . Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation

in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible."

21. It is also pertinent to note that the respondents have not denied the fact that the representation dated 02.08.2010 of the petitioner was not decided by the authority higher than the one who was an Accepting Officer, although that was not the case. Therefore, we have no hesitation in taking a view that the order dated 17th February 2011, passed by the DG, CISF, who was an Accepting Officer in the case of petitioner, cannot stand the test of legal scrutiny it deserves to be outright rejected. The said order also records though, that the officer had preferred a representation dated 02.08.2010 to the DG, CISF, whereas in reality the petitioner's representation was addressed to the President of India. The order dated 17.02.2011 is also a non-speaking order, and the same itself exemplifies the non application of mind on the part of the concerned authority in not dealing with the objections raised by the petitioner to challenge his 'Average' grading of ACR in 2008-2009.

22. We, however, do not find ourselves in agreement with the contention raised by counsel that the said adverse ACR of 2008-2009 should be treated as *non est* in case of the petitioner and the directions be given to the respondents to hold a review DPC for considering the case of the petitioner for his promotion to the senior rank of Senior Commandant against the vacancies for the years 2011-2012 and 2012-2013 by treating the said ACR of 2008-2009 as *non est*. On this legal position we are fortified by the Supreme Court decision in the case of ***Dev Dutt v. Union Of India & Anr., (2008) 8 SCC 725***, and the recent decision given by the three Judge Bench in ***Sukhdev Singh v. Union of India and others, (2013) 9 SCC 573***.

23. In the light of the above decisions and also considering the fact that the petitioner is due for his retirement during this year only, we deem it appropriate to direct that :-

- a) The petitioner shall file his representation afresh to challenge his '*below benchmark*' grading in the ACRs for the years 2008-2009 before the competent authority;

- b) The representation so filed by the petitioner shall be considered by an officer higher in rank to that of an Accepting Officer and the representation of the petitioner shall be decided by the Competent Authority within a period of four weeks from the date of this order.
- c) If his entry is upgraded, the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within two months thereafter;
- d) If the appellant gets selected for promotion retrospectively, he should be given the benefit of seniority from such date along with arrears of pay and all other consequential benefits.

24. With aforesaid directions, the appeal is allowed. No costs.

KAILASH GAMBHIR, J.

NAJMI WAZIRI, J.

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