

Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 50 of 2019

Date of Decision: 17.05.2023

Shri. Abhishek Kumar

Vs.

North Eastern Electric Power
Corporation Ltd. (NEEPCO)
& Ors.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. H.L. Shangreiso, Sr. Adv. with
Ms. P. Biswakarma, Adv.

For the Respondent(s) : Mr. V. K. Jindal, Sr. Adv. with
Mr. V. Kumar, Adv.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The writ petitioner being aggrieved with the downgrading in his Annual Performance Appraisal Report (APAR), grading of the first

and second part from 'Very Good' to 'Good' for the period 01.04.2015 to 27.07.2015, and from 'Outstanding' to 'Good' for the period 28.07.2015 to 31.03.2016, has preferred the instant writ petition and has also assailed the promotion order dated 18.04.2017, to the extent that promotion be given w.e.f. 01.01.2016 with all consequential benefits.

2. The brief facts surrounding the case are that, the petitioner who is presently holding the post of Senior Manager was posted under the HR Department, during the period 01.04.2015 to 27.07.2015, and thereafter was posted to the Vigilance Wing of the respondent Corporation w.e.f. 28.07.2015. The APAR for the assessment year 2015-16 of the petitioner, therefore consisted of two periods, the first being from 01.04.2015 to 27.07.2015, when the petitioner was in the HR department with the General Manager (HR) as the Reporting Officer and Director (Personnel) of the respondent Corporation being the Reviewing and Accepting Authority of the petitioner. For the second period, from 28.07.2015 to 31.03.2016, when the petitioner was posted in the Vigilance Wing of the respondent Corporation, the General Manager (E/M) was the Reporting Authority and the Chief Vigilance Officer was the Reviewing and Accepting Authority of the APAR of the petitioner.

3. The grading of the APAR for the periods described above, the consequent downgrading and the non-consideration of the APAR, especially for the latter period that is, 28.07.2015 to 31.03.2016, by the respondents which led to the supersession of the petitioner by his juniors, are the main points in issue before this Court, along with the other attendant facts and circumstances.

4. Mr. H.L. Shangreiso, learned Senior counsel assisted by Ms. P. Biswakarma, learned counsel for the petitioner has opened his submissions by contending that, the petitioner had been subjected to discrimination and hostile treatment by the respondent Corporation, which has resulted in his supersession in service by his juniors. The main ground he submits rest upon the non-communication of the downgrading from 'Outstanding' to 'Good' for the second period of APAR, that is, 28.07.2016 to 31.03.2016, which he asserts was never supplied or disclosed to him, not only prior to the convening of the DPC meeting, but also denied despite filing of RTI application on 24.07.2017. The learned Senior counsel has referred to the RTI application (Annexure – 18) and RTI appeal dated 22.06.2017 (Annexure – 20), which he submits the denial of information is in violation of Rule 6.4.3 of the NEEPCO Promotion Policy, 1997 and the settled position of law rendered in the following judgments:-

- i) *Dev Dutt vs. Union of India & Ors., (2008) 8 SCC 725*
- ii) *Union of India & Ors. vs. Joseph K.S. [MC(WA) No. 64/2021] decided on 17.03.2022 by High Court of Meghalaya.*

5. The learned Senior counsel then submits that, the harassment and victimization of the petitioner was because he was posted in the Vigilance Wing, but which however, should not have been the case, inasmuch as, the Government of India, Central Vigilance Commission to prevent such instances had issued a Circular being No. 16/3/06 on 28.03.2006, whereby it has been provided that, the ACR of personnel working in the Vigilance Department will be written by the CVO and reviewed by appropriate authority prescribed under the relevant conduct rules. It has been further submitted that, the respondent Corporation cannot take recourse to the All India Service (Performance Appraisal Report) Rules, 2007, as the same are not applicable to the respondent Corporation which has its own independent Promotion Policy Rules, 1997. This argument he submits is in view of the fact that, the Chief Vigilance Officer, who was the Reviewing Officer, had accepted the APAR on 14.10.2016, that is, after more than 1(one) month of being transferred from the post of CVO to Tripura, which was a ground taken by the respondent Corporation, to treat the said APAR

for this period as unenforceable under Clause 6 of the All India Service (Performance Appraisal Report) Rules, 2007. He further submits that, even if the said rules are applicable, the CVO was only transferred on 05.07.2016, but still in service, had also written the APAR for four officers including the petitioner, and the others apart from the writ petitioner's APAR were accepted, which shows that treating the second period of APAR as unenforceable is not only unreasonable, but arbitrary.

6. The learned Senior counsel submits that, under Rule 6.4.3 of the NEEPCO Promotion Policy, 1997, the second APAR should have been accepted as it is of the longer period for the assessment year 2015-16, and the consideration of the first period only which is shorter by the respondent Corporation is contrary in its own rules, and as such, bad in law. It is also been argued that, the petitioner's case for promotion did not receive proper consideration, as it was not considered on merit for promotion w.e.f. 01.01.2016, in view of the fact that, there was no rejection on merit by the DPC, in its first sitting on 03.02.2017, but the non-finalization was due to the fact that, the DPC was not properly constituted, and as such, in the review DPC held on 17.04.2017, this anomaly should have been corrected. To further buttress his points, the learned Senior counsel submits that, had his case for promotion been

rejected on merit by the DPC in its first sitting, as per the Rules 7B and 24, he would not been entitled to be considered again for promotion in the review DPC dated 17.04.2017. Hence, he submits there is no denial that, the petitioner is entitled for promotion w.e.f. 01.01.2016, and not from 01.07.2016, as allowed by the respondent Corporation.

7. The learned Senior counsel submits that, the writ petitioner was entitled to higher grading/points, as per Rule 6.4.3 of the NEEPCO Promotion Policy, 1997, as his APAR grades for the year 2013-14 is 'Very Good', 2014-15 'Outstanding' and 2015-16 'Outstanding', which was however denied by the respondents, by treating the second APAR written by the CVO as non-enforceable and merely treated the entire 2015-16 as only 'Good', as revealed by the RTI reply. He submits that, had the initial entries not been downgraded, the grading/points would have been much higher. Apart from other submissions made, such as, the improper constitution of the meeting in arriving at a decision, due to the absence of independent Directors and the fact that, no resolution was adopted by the Board, with regard to the promotion order dated 18.04.2017, the impugned order was vitiated and liable to be interfered with.

8. Mr. V.K. Jindal, learned Senior counsel assisted by Mr. V. Kumar, learned counsel for the respondent Corporation submits that,

for the period commencing 01.04.2015 to 27.07.2015, the petitioner was posted at HR Department of the respondent Corporation and during this period the General Manager (HR) was the Reporting Officer and the Director (Personnel) was the Reviewing and Accepting Authority. It is submitted that, the Reporting Officer for the said period 01.04.2015 to 27.07.2015 had graded the petitioner as 'Very Good' and had allotted 67.1 marks, with the remark "Needs supervision. Generally, a good Officer", which on perusal by the Reviewing/Accepting Officer was moderated on an independent assessment to 'Good' and allotted 57 marks. It is submitted that, the moderation in the grade made by the Director (Personnel) was well within his rights, as per Rule 6.4.3 of the Rules of 1997, and that the APAR being for the period of less than 3(three) months was not required to be communicated to the petitioner.

9. For the second period of the APAR, that is, 28.07.2015 to 31.03.2016, while the petitioner was posted at the Vigilance Wing, the learned Senior counsel submits that the General Manager (E/M) was the Reporting Officer and the Chief Vigilance Officer was the Reviewing/Accepting Authority, and that, in the event of inconsistency between the assessment of the Reporting Officer and the Reviewing Officer, the CMD of the respondent Corporation was required to

resolve the issue, as per the Circular No. 16/3/06 dated 28.03.2006. It is submitted that, the petitioner initiated the APAR for the second part only on 26.09.2016, after expiry of 6 (six) months of the assessment year 2015-16, that too at a time when the Reviewing/Accepting Officer (CVO) had already been transferred on 04.07.2016, and the CVO on 17.10.2016, 1(one) month after demitting office as CVO, made his own assessment and upgraded the grading of the writ petitioner from 'Very Good' to 'Outstanding', and had remarked therein that, the Reporting Officer had under assessed the Officer reported upon.

10. It has further been submitted that, the CMD on the APAR being forwarded to him, then on 14.10.2016, accepted only the marks awarded by the Reporting Officer, and declined to accept the marks and grading of the Reviewing/Accepting Authority, in pursuance to Rule 6 of the All India Service (Performance Appraisal Report) Rules, 2007. This he contends, was in view of the fact that, the said Appraisal Report Rules provided that, it shall not be competent for the Reviewing/Accepting Authority to review any Performance Appraisal Report, after 1(one) month from the date of demitting office. Accordingly, he submits, the assessment and upgradation by the CVO was treated as unenforceable, as he had been transferred and had reviewed the APAR of the petitioner after 1(one) month demitting

office. He therefore submits that, the allegation of the writ petitioner that the downgrading was done without competency is incorrect and as the said period that is, 28.07.2015 to 31.03.2016, being treated as unenforceable, the APAR of the petitioner for the period under HR Department that is, 01.04.2015 to 27.07.2015, was only taken into consideration by the DPC.

11. On the claim of the petitioner that, his promotion from the post of Manager (HR) to Senior Manager (HR), be treated to be w.e.f. 01.01.2016 notionally with all financial benefits, it is submitted that, the petitioner is not entitled to the same, as he was not recommended by a second DPC, having not secured the requisite marks in the interview, after the first DPC had been annulled on his objection due to irregular constitution. The learned Senior counsel submits that, the denial of promotion as alleged by the petitioner to be due to the downgrading of his APAR, is factually incorrect, inasmuch as, promotion of Executives is based on many other parameters, and not confined to the APAR, which is just one of the parameters. It is further submitted that, the contention of the writ petitioner that, the third DPC that was constituted, wherein he was recommended for promotion is a Review DPC is incorrect, as a Review DPC is constituted only under Rule 23 of the NEEPCO (Promotion Policy Rules), 1997, and as such,

the third DPC was a fresh DPC and there was no violation of the Rules, 1997, in constituting the same.

12. The learned Senior counsel on the other grounds set up by the petitioner that is, being placed junior to similarly situated executives submits that the same is not sustainable, as on not being recommended for promotion by the second DPC, the petitioner did not assail the promotion orders emanating therefrom, and as such, he being promoted on a later date is bound to be placed below earlier similarly situated executives in the inter-se seniority list in the cadre. The learned Senior counsel has referred to the case of ***A.K. Soumini vs. State Bank of Travancore and another*** reported in (2003) 7 SCC 238, to support his arguments of the non-entitlement of the petitioner to retrospective service benefits. The learned Senior counsel then concludes his arguments by submitting that, the petitioner was rightly promoted to the post of Senior Manager (HR) w.e.f. 01.07.2016, with financial benefits from the date of joining the said post vide promotional order on 18.04.2017, and as such, there has been no deprivation of his rights, nor has any rule been violated.

13. Heard the learned counsels for the parties.

14. Before advertng to the facts in detail, it can be easily discerned that the entire subject matter in controversy, is the

consideration and non-consideration of the relevant APAR of the writ petitioner for the period of 2015-2016, by the respondent Corporation.

As has been noted earlier, the petitioner was posted for the first period of over 3(three) months of the relevant assessment year, from 01.04.2015 to 27.07.2015 in the HR Department. A perusal of the APAR for this period reflects that the petitioner was graded **‘Very Good’** by the Reporting Officer, though with a remark **“Needs supervision. Generally, a Good Officer”**. However, the Reviewing and Accepting authority i.e. the Director of Personnel, downgraded the grading given by the Reporting Officer from **‘Very Good’** to **‘Good’**.

In the reviewing column, it was remarked as follows:-

“He has sharp declining trend in his performance. An average performer who needs to be constantly monitored & supervised. Work endorsed directly by DP could not be done by him in time.”

In the column where the grade was moderated it has been remarked as follows :-

“The rating “VG, 67” given by GM is on higher side which contradicts his remarks “Needs Supervision”. Hence rated “Good 57” Director Personnel.”

Thus, the grading of the petitioner for the first period was **‘Good’** on being downgraded from **‘Very Good’**.

15. For the second period i.e. from 28.07.2015 to 31.03.2015, the petitioner who was posted in the Vigilance Department, was graded as ‘**Very Good**’, by the Reporting Officer, but the Reviewing and Accepting authority at that point of time the CVO, upgraded the grading of ‘**Very Good**’ to ‘**Outstanding**’. In the reviewing column it was recorded as follows:-

“The reporting officer has under-assessed the officer reported upon. I had personally supervised the work and conduct of the officer reported upon- the reporting officer was generally out of the picture. OUTSTANDING officer with 90 POINTS; Has ‘INTEGRITY’; KNOWLEDGE, and DILIGENCE with CAPACITY TO TAKE A PRINCIPLED STAND”.

The above was thereafter accepted.

16. It appears that the above upgradation was not accepted by the CMD, who instead accepted the marks awarded by the Reporting Officer, citing the ground that the same was as per the All India Service (Performance Appraisal Report) Rules, 2007 meaning thereby the petitioner remained at the grade ‘**Very Good**’. Added to this state of affairs, the DPC that sat to consider promotions as per the stand of the respondent Corporation, did not take this second APAR into consideration, but considered only the first period of APAR for this purpose. Another significant fact as has been pleaded, which has not only not been denied,

but in fact admitted by the respondents, is that the APAR for the entire assessment year was never communicated to the petitioner.

17. This Court while going through the materials as placed has noted, that as submitted by the petitioner the respondent Corporation, is governed by its own Promotion Policy and Rules, 1997 which is applicable to all employees of the Corporation, including the petitioner. Rule 6.4.3 deals with the APAR i.e. the Annual Performance Appraisal Report. Para 3 of the said Rule reads as follows:-

“Annual Performance Appraisal Report for any period of less than 3(three) months in an appraisal year will not be taken into consideration for the purse of promotion. However, where two or more reports are written in any appraisal year by reason of an employee being posted under deferent Reporting/Reviewing/Accepting officers a single rating for a year will be determined by the Departmental Promotion Committee.”

18. With regard to adverse remarks in the Performance Appraisal, it has been laid down as follows:-

“ADVERSE REMARKS IN A PERFORMANCE APPRAISAL

When adverse remarks in the appraisal reports of the employee concerned have not been communicated to him, this fact should be taken note of by the DPC while assessing the suitability of the employee for promotion.

In case where a decision on the representation of an employee against adverse remarks has not been taken or time allowed for submission of representation is not over, the

DPC may at their discretion defer the consideration of the case until a decision on the representation is finally taken. Employees whose latest performance appraisal or special Report contains adverse remarks will not be considered for promotion and the DPC may keep this aspect in view while assessing the suitability and recommending for promotion.”

19. The respondent Corporation, however, it is noted have taken recourse to the All-India Service (Performance Appraisal Report) Rules, 2007, to validate their action of treating the APAR for the second period as unenforceable, on the ground that the Reviewing authority (CVO) had reviewed the APAR, 1(one) month after being transferred. The applicability of these Rules have also been challenged by the writ petitioner on the ground that firstly, the Review and Acceptance by the said CVO, with regard to other vigilance staff was promptly accepted and it is also noted further that, at that point of time the writ petitioner was under suspension, and as such, the APAR could be submitted earlier, and it was only after this Court set aside the suspension and transfer vide common judgment dated 18.08.2016, passed in WP(C) No. 199 of 2016 and WP(C) No. 200 of 2016, that effective steps could be taken. It is also noted that the APAR of the writ petitioner was forwarded by the Reporting Officer, along with that of the other Vigilance Officers to the then CVO, but that, only the case of the writ petitioner was taken to be unenforceable by application of

the said Appraisal Rules, 2007. The relevant rule i.e. Rule 6 (4) relied upon by the respondent is reproduced hereinbelow:-

“6. Review of the performance appraisal report.- (1) The reviewing authority shall record his remarks on the performance appraisal report, within the timeframe specified in the Schedule 2.

(4) Notwithstanding anything contained in sub-rules (1) and (2), it shall not be competent for the reviewing authority or the accepting authority to review any such performance appraisal report-

(a) Where the authority reviewing the performance appraisal report is a Government servant, after one month of his retirement from service, and

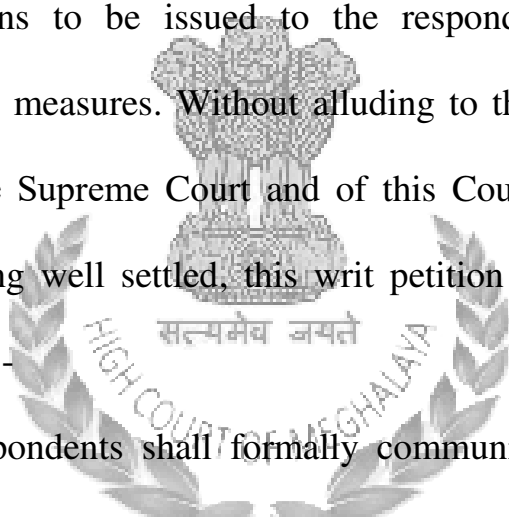
(b) In other cases, after one month of the date on which he demits office.”

20. Even if the All India Service (Performance Appraisal Report) Rules, 2007 are said to be applicable, the manner in which the same has been applied has no doubt raised many questions as to the bonafides of the respondents. This observation is made in view of the fact that, firstly, the said APAR for the period that was treated as unenforceable, was never disclosed to the writ petitioner. Secondly, in the said APAR the Reporting authority is still with the respondent Corporation, and the then CVO who was transferred was also still in Government service, and had not demitted office to come within the said meaning of Rule 6(4)(b) of the Appraisal Rules, 2007. Thirdly, the manner in which the CMD disregarded the upgradation and remarks of the CVO, while downgrading from

‘Outstanding’ to **‘Good’** and that too without communication of the same to the writ petitioner, to allow him an opportunity to represent against, is clearly arbitrary and unsustainable in law.

21. With the second period of APAR being treated as unenforceable, it was incumbent upon the respondent authorities to communicate the first period of APAR to the writ petitioner, instead of hiding behind the excuse that the same being of 3(three) months duration, was not necessary to be communicated, when infact the DPC itself, had taken this period of APAR i.e. from 01.04.2015 to 27.07.2015 into account, while considering the promotion of the writ petitioner. This action itself militates against the Promotion Policy and Rules of the respondent Corporation itself, which as quoted hereinabove, Rule 6.4.3 has clearly stipulated that when adverse remarks in the appraisal reports of the employee concerned have not been communicated to him, this fact should be taken note of by the DPC while assessing the suitability of the employee for promotion and further, in case where a decision on the representation of an employee against adverse remarks has not been taken, or time allowed for submission of representation is not over, the DPC may at their discretion defer the consideration of the case until a decision on the representation is finally taken.

22. With all these incongruities, lapses and patent illegalities, that have occurred in the exercise of assessment of the writ petitioner in the APAR by the respondent Corporation, this Court need not go any further to touch the other issues as raised, as to whether the writ petitioner was subsequently promoted by a fresh DPC, or whether the same was done by way of a review DPC. The glaring facts that have emerged from the entire sequence of events, will surely call for interference by this Court and for appropriate directions to be issued to the respondent Corporation to undertake corrective measures. Without alluding to the precedents in law both of the Hon'ble Supreme Court and of this Court on this point, the position of law being well settled, this writ petition is allowed with the following directions:-

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- (i) the respondents shall formally communicate the APAR for both periods of the assessment year 2015-16, to the writ petitioner, within a period of 2(two) weeks of this order.
 - (ii) the writ petitioner shall thereafter be allowed to represent against the same, within a period of 4(four) weeks thereafter, of formal receipt of the APAR.
 - (iii) the respondents on receipt of the representation shall decide on the same within 2(two) weeks thereafter.

23. It is further directed that, should the entries be upgraded in consideration of the representation and also taking into account the petitioner's earlier APARs, the respondent authorities shall constitute a review DPC for consideration of the petitioner's promotion w.e.f. 01.01.2016, along with all consequential reliefs. It is also directed that before such exercise, a reasoned determination shall be undertaken by the DPC, as to which single rating for the assessment year will be applied in the consideration of the said promotion, in accordance with Rule 6.4.3 of the Promotion Policy and Rules (NEEPCO). The entire exercise shall be completed within a period of 6(six) months, from the date of receipt of the representation from the writ petitioner.

24. For the foregoing reasons and as ordered above, the writ petition stands allowed to the extent indicated above, and is accordingly disposed of.

25. No order as to costs.

Judge

Meghalaya
17.05.2023
"D.Thabab-PS"