

GAHC030004922022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/122/2022

H. Vanlalruatpuia
S/o H. Vanhnuaithanga
R/o MINECO, Khatla, Aizawl, Mizoram.

VERSUS

The State of Mizoram and 18 Ors.
r/b the Chief Secy. to the GOM,
Aizawl.

2:The Commissioner/Secy.
GOM
PWD

3:The Secretary
GOM
DP and AR

4:The Engineer-in-Chief
PWD
GOM

5:The Mizoram Public Service Commission r/b the Chairman

6:R. Lalrinmawia
E.E. (Works-II)

7:Zodingliana
E.E. (Planning) Lunglei Circle

8:H. Lalnunpuia
Sr.SDO
Serchhip Sub-Division
PWD
GOM

9:K. Luaiminthanga
Sr. SDO
Aizawl Road South Division

10:Samuel Zothankhuma
Sr. SDO
Project Sub-Division III
PWD
GOM

11:Jimmy Vanlalsiama Bawikhar
Sr. SDO
Hqrs. Project Sub-Division-I
PWD
GOM

12:Lalawmpuii
Sr. SDO
Projectu Sub-Division II
PWD
GOM

13:David Laltanpuia
Sr.SDO
Sateek Sub-Division
Aibawk
PWD
GOM

14:R. Lalchungnunga
Sr. SDO (TC)
Aizawl Road North Division

15:H. Lalthanpuia
Sr. SDO Serchhip Sub-Division

16:ZD Laltlanzova
Sr. AE
Office of the Engineer-in-Chief
PWD

17:Zarzoliana
Sr. SDO
Hqrs. Sub-Division-II

18:Zothansanga Ralte
Sr. SDO
Aizawl Road North Sub-Division-II

19:Thangchhuana Pautu
Sr. AE (PMGSY

Advocate for the Petitioner : Mr A.R. Malhotra

Advocate for the Respondent : Mr J C Lalnunsanga for R5

B E F O R E
HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing & Judgment : 05.08.2024

JUDGMENT & ORDER (ORAL)

Heard Mr. A R Malhotra, learned counsel for the petitioner and Mrs. Linda L Fambawl, learned Addl. Advocate General appearing for the respondent Nos. 1 to 4. None appears for the remaining respondents despite notice.

[2.] Brief facts essential for disposal of the writ petition is that the

petitioner was appointed to the Grade-V Post of the Public Works Cadre, Public Works Department, vide Notification dated 17.12.1999 alongwith three other persons. He was initially on probation for a period of 2 years and after completion of 2 years, the petitioner admittedly was regularized. In the final inter-se-seniority list of Junior Grade Engineers (Civil) Graduate Engineers, the petitioner was placed at Sl. No. 42. The private respondent Nos. 6 to 19 were placed below the petitioner at Sl. Nos. 43 to 57.

[3.] The State respondents in the Department of Personnel & Administrative Reforms (General Service Wing) vide Notification dated 04.08.2015 pursuant to the decision of the Council of Ministers in the meeting held on 23.07.2015 and in exercise of the powers conferred by the provisio to Article 309 of the Constitution of India, allowed non-functional upgradation in respect of the members of the Junior Grade of the Mizoram Engineering Service, subject to the conditions provided herein. Following the same, another Notification dated 12.08.2015 was issued wherein it was provided amongst others that the bench mark for such upgradation shall be as prescribed under paragraph 3.5(i) of the DPC Guidelines issued vide O.M dated 15.07.2010. The O.M dated 15.07.2010 at paragraph No. 3.5(i) provides the bench mark of 'Very Good' for Group 'A' and Group 'B' Gazetted posts and which is relevant for the instant case. Paragraph No. 3.5(ii) further provides that officers getting at least 4 prescribed bench marks in their ACRs for the 5 years being considered will be graded as 'Fit' by the DPC for their promotion.

[4.] Subsequently, in terms of the Notifications dated 04.08.2015, 12.08.2015 and the O.M dated 15.07.2010, the private respondent Nos. 6, 7, 9 to 14 were upgraded to the Senior Grade (Non Functional) of the Public Works Cadre. The respondent Nos. 6, 7 & 14 were upgraded w.e.f. 24.11.2015 while

the respondent Nos. 9 to 13 were upgraded w.e.f. 04.08.2015. As for respondent No. 12, she was upgraded w.e.f. 01.07.2018. The remaining respondents were upgraded either w.e.f. 04.08.2015 or 05.09.2018.

[5.] The petitioner, having not been upgraded alongwith private respondents, submitted his representation upon coming to learn that there were deficiency in his ACR gradings for the year ending 2006 to 2009. The grievance of the petitioner was considered ultimately and vide Office Order dated 26.10.2017, his ACRs for the 4 years ending were upgraded from 'Good' to 'Very Good'. Despite the upgradation and the representation of the petitioner for upgrading him to the Senior Grade (Non Functional), he was not given such benefit since according to the official respondents the DPC which met on 02.12.2015 had considered the 5 (five) ACRs for the year ending 2011 to 2015. The petitioner, therefore, again approached the respondent authorities with his representation for upgradation of his ACRs ending 2012 & 2013, on the ground that the same had not been communicated to him and the same were not reported by the authority concerned. The ACR of the petitioner, insofar as the year ending 31.03.2013 was reviewed and his grading was accordingly upgraded to that of 'Very Good' vide Office Order dated 17.01.2019 by the Engineer-in-Chief, PWD, Mizoram. Insofar as, the ACR ending 31.03.2012 is concerned, the petitioner contends that the same was also suitably reviewed by the competent authority. However, despite all efforts to get a copy of the upgraded ACR, the petitioner could not get the same. He was, however, provided the note sheet by the respondent authority concerned on his request which indicates that review was done. The petitioner, in the meantime, had been upgraded to the Senior Grade (Non-Functional) post vide Order dated 01.04.2019 w.e.f. 08.03.2019. The petitioner contends that since he was promoted only w.e.f. 08.03.2019 and

therefore apprehending that his promotion to the Senior Grade of the service on functional basis would be effected in the long run, he submitted a representation on 29.05.2020 before the Secretary to the Govt. of Mizoram, PWD. The same was responded to by the respondent authority concerned stating that his seniority position in the Junior Grade of the service remains the same. In other words, none of his juniors have been placed above him in the seniority list of Junior Grade. However, when the provisional seniority list of Senior Grade (Non Functional) was issued on 05.08.2022, the petitioner found himself placed below his juniors at Sl. No. 43 of the said list. Despite submitting a representation on 18.08.2022, the respondent authorities came up with the final seniority list on 21.10.2022, wherein he continued to remain below his juniors by showing the date of his promotion to the Senior Grade (Non Functional), as 08.03.2019. Aggrieved with the same, the petitioner is before this Court.

[6.] Mr. A R Malhotra, learned counsel submits that the petitioner, upon coming to learn that his ACR for the years ending to 2012 & 2013 were below the bench mark prescribed, submitted his representation before the competent authority. The ACR for the year ending 2013 was reviewed by the competent authority by grading him 'Very Good'. Similarly, the ACR ending the year 2012 was also considered by the competent authority and reviewed. However, a copy of the order to this effect could not be furnished to the petitioner despite him having submitted applications. The learned counsel submits that from the stand taken by the respondents, there is no dispute to the fact that the ACRs under consideration were for the years ending 2011 to 2015. Therefore, taking into account, the upgradation of his ACR for the year ending 2013 and also to the fact that there is no dispute about the petitioner having secured the bench mark for the other years leaving aside 2012, the

petitioner is entitled to be considered for promotion to the Senior Grade Non-Functional by conducting a review DPC for the said purpose. In this connection, the learned counsel relies upon the provisions of the O.M dated 15.07.2010, more particularly paragraph No. 3.5(i) & (ii). The learned counsel has also relied upon the O.M dated 28.02.2018 (Annexure R-4 of the reply affidavit), more particularly paragraph No. 12(e) of the said O.M. Referring to the said provision, the learned counsel submits that officers who secure at least 4 bench marks out of the 5 ACRs under consideration are to be graded as 'Fit' for promotion. Since the petitioner has clearly secured 4 bench marks out of the 5 ACRs to be considered, he is entitled to be promoted w.e.f. the date of which his juniors were promoted.

[7.] The learned counsel has also drawn the attention of this Court to the O.M dated 28.02.2018, more particularly Clause 35(v), Clause 36(c) and Clause 37(a) of the said O.M, which provides that in the event the adverse remarks in the ACR has been toned down or expunged after the DPC had considering the case of the officer concerned, a review DPC may be held. In such eventuality, the modified ACR should be considered as if the original ACR did not exist at all. He also submits that as per Clause 37(a), the appointing authority should scrutinize the case with a view to decide whether a review by the DPC is justified in the event of the adverse remarks having been expunged. If the same is considered justified the appointing authority has to place the same before the DPC for its review. The learned counsel, therefore, submits that having taking into account the fact that the ACRs for the years ending 2012 & 2013 had been reviewed, Court may direct the respondent authorities concerned to hold a review DPC as provided by the Office Memorandums to consider the retrospective promotion of the petitioner to the Senior Grade (Non Functional) within a time frame.

[8.] Mrs. Linda L Fambawl, learned Addl. Advocate General, on the other hand, by referring to the affidavit-in-opposition filed by the State respondents on 08.12.2023 submits that the guidelines regarding the submission of representation against the adverse entry/remarks in the ACR of the Government official concerned has been provided in the O.M dated 20.12.1990 wherein, at Clause 12 it is stated that all representations against adverse entries should be decided expeditiously by the competent authority and in any case not later than 45 days from the date of submission of the representation. She submits that in respect of the adverse entries in the ACR of the petitioner for the year ending 2012 & 2013, the same were communicated to him on 09.08.2012 & 13.08.2013 respectively. However, the petitioner had not submitted his representation within the prescribed time but only on 26.03.2018. This apart, the learned Addl. Advocate General submits that as per Annexure-1 of the O.M dated 20.12.1990, the reporting authority, reviewing authority and accepting authority of the ACRs of various Government officials/posts have been provided. As per the O.M., the reporting authority in respect of the post held by the petitioner is the Executive Engineer concerned and the reviewing authority is the Superintending Engineer, while the accepting authority is the Chief Engineer, PWD. However, in the instant case, the grading in the ACR of the petitioner for the year ending 2013 had been upgraded by the Engineer-in-Chief instead. Therefore, the upgradation is only questionable. To substantiate her submission, the learned State counsel has drawn the attention of this Court to paragraph No. 12 of the affidavit-in-opposition as well. She also submits that the stand of the respondents is that all the steps that were taken for upgradation of the ACR of the petitioner were without taking into consideration the relevant guidelines in this regard and therefore, according to the respondents, the same should be

looked into by the Department concerned.

[9.] I have considered the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

[10.] The question for determination is as to whether the petitioner can be deprived of his promotion to the Senior Grade, Non Functional for not having secured the bench mark in his ACR gradings relevant for the purpose. The ACRs which were taken into consideration according to the State respondents are for the years ending 2011 to 2015 and the petitioner failed to secure the bench mark in his ACRs for the years ending 2012 & 2013. Insofar as, the ACR for the years ending 2013 is concerned, the State respondents themselves have annexed a copy of the Order dated 17.01.2019 by which, the ACR of the petitioner was upgraded as 'Very Good' by the Engineer-in-Chief, PWD. In respect of the ACR for the year ending 2012, the petitioner in his reply affidavit has categorically stated that the same was taken into consideration by the competent authority at the relevant time and accordingly, the adverse entry in the ACR was reviewed. Although the petitioner had sought for a copy of the order by which, the ACR has been reviewed but the same could not be furnished to him. All that has been furnished is the writing in the note sheet which suggest that the some exercise had been conducted to review the ACR of the petitioner. It is, however, not clear as to what decision was taken ultimately. The O.Ms dated 15.07.2010 & 28.02.2018 amongst others provide that the bench mark in respect of Group 'A' & Group 'B' Gazetted post for the purpose of promotion is 'Very Good'. It is further provided that out of the 5 ACRs under consideration, if an officer secures at least 4 bench mark, he or she shall be graded as 'Fit' for promotion.

[11.] The petitioner in his ACR gradings, including the year 2013 which

was subsequently upgraded admittedly, has secured 4 bench marks in all and therefore, he is squarely covered by the Office Memorandums. The State respondents, on the other hand, has maintained that the ACR of the petitioner for the year ending 2013 had been upgraded by an authority other than the one who has been mentioned in the O.M dated 20.12.1990. However, despite such a contention, the State respondents in paragraph No. 12 of the counter affidavit had also stated that the ACR of the petitioner for the year ending 31.03.2012 was reviewed and upgraded to 'Very Good'. After the review of the ACR for the year ending 31.03.2013, he was considered and recommended for promotion by the Departmental Promotion Committee. Therefore, there is no violation of Article 14 & 16 of the Constitution of India. Going by the stand it appears that despite the claim that the representation of the petitioner was belated and was considered by an authority other than the one provided in the O.M dated 20.12.1990, they have accepted the fact that the ACR of the petitioner for the year ending 31.03.2013 had already been upgraded and acted upon for his promotion to the Senior Grade (Non Functional) of the service. Such being the position, it will not be open now for the respondents to revert back to their own action and dispute the upgradation of the ACR of the petitioner, insofar as the ACR for the year ending 31.03.2013 is concerned. It would be worthwhile to mention herein that if the petitioner is to again submit his representation for upgradation of his ACR to the same authority who had either reported, reviewed or accepted the grading which is short of the bench mark, it would amount to an appeal from caesar to caesar. Reference in this regard may be had from the case of *Dev Dutt vs. Union of India*, reported in (2008) 8 SCC 725.

[12.] The State respondents in their affidavit in paragraph No. 12 at page 11 have also maintained that after a thorough examination of the case,

the Department's opinion is that it should be addressed internally through a Departmental review meeting rather than in a Court of law. Likewise, in paragraph No. 15 at page 16 of the affidavit-in-opposition, it has also been stated that the issue at this stage should be taken up for consideration of the case by the Department by convening review meeting. It, therefore, goes to show that the State respondents are aware of the fact that the grievance projected by the petitioner requires consideration in the light of the guidelines provided through the Office Memorandums. It may also be seen that when the provisional seniority list of Senior Grade of the service was published on 05.08.2022, the petitioner had submitted his representation against the same on 18.08.2022. However, there is nothing on record which shows that his representation was considered and addressed by the concerned authority. A final seniority list was instead published on 21.10.2022.

[13.] Thus, upon due consideration of the case, Court is of the considered view that the petitioner has made out a case for considering his promotion to the Senior Grade of the service (Non Functional) w.e.f. the date when his juniors were promoted having regard to the provisions contained in Office Memorandums dated 15.07.2010 & 28.02.2018. The official respondents are therefore directed to convene a review DPC to consider the case of promotion of the petitioner to the Senior Grade of the MES (Non Functional) w.e.f. the date on which his next junior in the Junior Grade of the service were promoted within a period of 2 months from the date of receipt of a certified copy of this order. It is needless to say that in the event the petitioner is found to be eligible and recommended for promotion by taking into account the relevant ACRs including that of the year of ending 2013, the benefit of promotion should be given to him w.e.f. the date when his next juniors were promoted to the Senior Grade of the service.

[14.] With the above observation and direction, the Writ Petition stands disposed of.

JUDGE

Comparing Assistant