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

% **DECIDED ON: 06.07.2015**

+ **W.P. (C) 12596/2009, CM APPL.15601/2013, 13167/2009**

AVINASH TRIPATHI Petitioner

versus

UNION OF INDIA AND ORS Respondents

W.P. (C) 12704/2009, CM APPL.13395/2009, 2512/2010

SUNIL KUMAR Petitioner

versus

UOI AND ORS Respondents

W.P. (C) 2836/2013, CM APPL.15600/2013

AJIT KUMR BIBHUTI Petitioner

versus

UNION OF INDIA AND OTHERS Respondents

W.P. (C) 5714/2013, CM APPL.12637/2013, 15245/2013

KESHAV KUMAR AGARWAL Petitioner

versus

UOI AND ORS Respondents

Appearance: Mr. J.K. Singh, Advocate for petitioner in W.P.(C)12704/2009.

Mrs. Bharathi Raju, CGSC for UOI/R-1-3 in W.P.(C)12704/2009.

Mr. Yogender Mishra, Advocate for applicants in W.P.(C) 12596/2009, W.P.(C)2836/2013 & W.P.(C) 5714/2013.

Mr. Anurag Ahluwalia, CGSC for UOI in W.P.(C)2836/2013.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. The petitioners in all these proceedings are Assistant Executive Engineers. They claim directions under Article 226 of the

Constitution of India, contending that at the relevant points of time when their claim for promotion to the post of Executive Engineer in the Border Roads Development Board - was taken up for consideration they were wrongly overlooked, contrary to the existing policy.

2. The petitioners in W.P.(C) 12596/2009 and 12704/2009, Mr. Avinash Tripathi and Mr. Sunil Kumar, contend that their claim for promotion - first considered on 30.09.2009 by the Departmental Promotion Committee ('DPC') was wrongly overlooked. In the other two petitions, i.e., W.P.(C) 2836/2013 and 5714/2013, Mr. Ajit Kumar Bibhuti and Mr. Keshav Kumar Agarwal, on the other hand, contend that the promotions were wrongly denied to them at the DPC meeting held subsequently on 13.06.2011 and 04.01.2013. The Border Roads Development Board is governed by the Border Roads Engineering Service Executive Engineer (Civil) and Executive Engineer (Electrical and Mechanical) Group 'A' Posts Recruitment Rules, 2003. The said Rules framed under proviso to Article 309 direct that for the purpose of Executive Engineer - in either category (i.e., Civil, Electrical or Mechanical), the criterion is selection. When the DPC met on 30.09.2009, it ruled out the candidature of Mr. Avinash Tripathi and Mr. Sunil Kumar. They were ruled out and not promoted to the post of Executive Engineer on the ground that they were unfit as they did not possess the relevant ACR gradings of five years. In the case of Avinash Tripathi, the below bench mark grading of 'Average' was reflected in his ACR for the period 2003-04; likewise in Sunil Kumar's case, a similar grading, i.e., 'Average' was

recorded for 2006-07.

3. The respondents rely upon the guidelines of the Department of Personnel & Training ('DoPT') dated 10.04.1989, particularly, paragraph 6.2.1 which reads as follows: -

“6.2.1 Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence -

(a) The DPC should consider CRs for equal number of years in respect of all officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the officers for promotion on the basis of their service record and with particular reference to the CRs for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the DPC should see the record with particular reference to the CRs for the years equal to the required qualifying service. (If more than one CR has been written for a particular year, all the CRs for the relevant year shall be considered together as the CR for one year).

(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this is also not possible, all the available CRs should be taken into account.

(d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess

his work, conduct and performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing authority or the Accepting authority as the case may be has over-ruled the Reporting Officer or the Reviewing authority as the case may be, the remarks of the latter authority should be taken as the final remarks for the purposes of assessment provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the remarks of the Reporting Officer, Reviewing authority and Accepting authority are complementary to each other and one does not have the effect of over-ruling the other, then the remarks should be read together and the final assessment made by the DPC.”

4. The respondents contended in each of the cases that at the relevant time when the petitioners were considered for promotion, their cases could not be processed since they did not fulfil the eligibility criteria on satisfaction of which their claims could have been considered by the DPC.

5. Counsel for the petitioners rely upon the revised guidelines issued by the DoPT on 08.02.2002 and submits that even though the DPC is under an obligation to consider equal number of ACRs,

nevertheless, in respect of posts for which they are to be promoted, the guidelines do not permit supersession. This submission is premised upon the following provisions in the said OM of 2002:

“3.2 ‘Bench-mark’ for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as ‘fit’ or ‘unfit’ only. Only those who are graded ‘fit’ (i.e. who meet the prescribed bench mark) by the DPC shall be included and arranged in the select panel in order to their inter-se seniority in the feeder grade. Those officers who are graded ‘unfit’ (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded ‘fit’ (in terms of the prescribed bench-mark) by the DPC.

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3.4 Promotion to the revised pay-scale (grade) of Rs.12,000-16,500 and above

- (i) *The mode of promotion, as indicated in paragraph 3.1 above, shall be ‘selection’.*
- (ii) *The bench-mark for promotion, as it is now, shall continue to be ‘very good’. This will ensure element of higher selectivity in comparison to selection promotions to the grades lower than the aforesaid level where the bench-mark, as indicated in the following paragraphs, shall be ‘good’ only.*
- (iii) *The DPC shall for promotions to said pay-scale (grade) and above, grade officers as ‘fit’ or ‘unfit’ only with reference to the bench-mark of ‘very good’. Only those who are graded as ‘fit’ shall be included in the select*

panel prepared by the DPC in order of their inter-se seniority in the feeder grade. Thus, as already explained in paragraph 3.2 above, there shall be no supersession in promotion among those who are found 'fit' by the DPC in terms of the aforesaid prescribed bench-mark of 'very good'."

6. Counsel for the writ petitioners also point out that the respondents themselves have admitted in the reply that there is no uniformity in the manner of implementation of the DPC guidelines. In this regard, reliance is placed upon an affidavit of one Shri Tapan Das filed on 12.01.2015 in W.P.(C)5714/2013. The said affidavit concedes *inter alia* that one Shri Lakshmikant G. Wankhede was promoted as Executive Engineer in 2002 despite the fact that he did not possess five "good" ACR gradings and that for a substantial period of seven months his ACR was graded as "Average". It is stated that this fact was noticed by this Court in the present proceedings when on 30.07.2014, a short affidavit was elicited from the respondents. It is further submitted that Mr. Sunil Kumar, petitioner in W.P.(C)12704/2009 was granted promotion when the DPC met on the last occasion on 04.01.2013. Counsel highlights that this was despite the fact that he did not possess the requisite "Good" ACR gradings in the year 2006 & 2007.

7. This Court had required the respondents to clarify the correct position on 16.05.2013. The respondents filed an affidavit - the affidavit of one Shri Rampal Singh of Border Roads Development Board in W.P.(C)12704/2009 is on the record. The affidavit states *inter alia* that promotions to the post of Executive Engineer from the

feeder cadre of Assistant Executive Engineer are to be made on selection basis and that previous five years' ACRs are to be considered by the DPC. The respondents' further position is that in each of the five years under consideration, the concerned individual has to possess "good" ACR grading. At the same time, the affidavit discloses that certain aberrations had occurred. The affidavit also relies upon a Memorandum which discussed the entire matter. Relevant extracts of the said Memorandum read as follows: -

"3. A DPC for promotion from the grade of Asstt. Executive Engineer (Civil) in PB-3 Rs.15600-39100/- with Grade Pay of Rs.5400 to the grade of Executive Engineer (Civil) in PB-3 with Grade Pay of Rs.6600/- in Border Roads Organisation for the panel year 2009-10 was held under the Chairmanship of Secretary BRDB on 30.9.2009. As per the DOP&T guidelines, the preceding five years ACRs from 2003-04 to 2007-08 were relevant and accordingly evaluated. The benchmark as prescribed by DOP&T applicable in the case is 'Good'. Having evaluated the records of the eligible officers, the DPC had assessed S/Shri Avinash Tripathi and Sunil Kumar as 'Unfit' due to below bench mark. Final gradings in the ACRs of these officers are as under:

<i>Name</i>	<i>2003-04</i>	<i>2004-05</i>	<i>2005-06</i>	<i>2006-07</i>	<i>2007-08</i>
<i>Avinash Tripathi</i>	<i>Average</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Very Good</i>
<i>Sunil Kumar</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Average</i>	<i>One part good & one part Very Good</i>

It is reiterated that due to one below bench mark grading (Average) of each officer, DPC had assessed them 'Unfit' for promotion.

4. Subsequently, Shri Avinash Tripathi was assessed 'Fit' for the panel year 2010-11 for which the ACRs from the year 2004-05 to 2008-09 were relevant and evaluated. In the ACR of 2008-09 he was graded 'Very Good'. Shri Sunil Kumar was again assessed as Unfit "ILLEGIBLE"

5. Furthermore, for the panel year 2010-11, following four officers namely S/Shri Pankaj Dixit, Sant Kumar Singh, Ajit Kumar Bibhuti, and Deep Chand Nag were also assessed 'Unfit' as below bench mark:

<i>Name</i>	<i>2004-05</i>	<i>2005-06</i>	<i>2006-07</i>	<i>2007-08</i>	<i>2008-09</i>
<i>Pankaj Dixit</i>	<i>Part Good and Part Very Good</i>	<i>Average</i>	<i>Average</i>	<i>Very Good</i>	<i>Good</i>
<i>Sant Kumar Singh</i>	<i>Good</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Average</i>	<i>Part Average and Part Good</i>
<i>Ajit Kumar Bibhuti</i>	<i>Good</i>	<i>Average</i>	<i>Very Good</i>	<i>Very Good</i>	<i>Very Good</i>
<i>Deep Chand Nag</i>	<i>Good</i>	<i>Part Average and Part Good</i>	<i>Good</i>	<i>Good</i>	<i>Good</i>

6. Thereafter the DPC for the panel year 2011-12 was held on 23.9.2011. ACRs for the years from 2005-06 to 2009-10 were relevant for evaluation for this DPC. All the above 'unfit' officers were again assessed 'Unfit' as below bench mark. ACR gradings of all these officers in the 2009-10 ACRs were Very Good or above. Some other officers were also assessed 'Unfit' for the same reasons.

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“10. Thus, it may be noted that except for the deciding the suitability of officers for JS level and above posts and for NFSG in Group 'A' services, DOP&T has not issued any specific instructions about the requirement of any fixed number of ACRs out of five ACRs which should meet the bench mark to assess an officer as 'fit' by the DPC. DOP&T has also not given any instructions or formula for deciding the overall performance of an officer by the DPC.

11. It is submitted that in the orders dated 17.9.2012 and 28.9.2012 Hon'ble Delhi High Court had recorded the issue of applicability of UPSC guidelines referred to above. In this connection, the above stated DOP&T guidelines were furnished to the Government Counsels to bring to the notice of the Hon'ble Court about the same and that UPSC guidelines are their internal guidelines and not universally applicable to the DPCs in other Departments.”

8. The petitioners further rely upon the decision of a Division Bench of this Court in *Sant Kumar Singh v. UOI*, W.P.(C)355/2012, decided on 05.08.2014. In that case, the Court recorded that - just like in the case of Shri Sunil Kumar - that the petitioner had been denied promotions repeatedly but was granted that relief in 2013 despite there being no change in the circumstances. The petitioner there, i.e., Sant Kumar Singh had been graded as “average” for 2007-08, “part Average” and “part Good” for 2008-09, he was denied promotion successively for two years but subsequently promoted as Executive Engineer pursuant to the DPC meet on 04.01.2013. The Court had then frowned upon the failure of the respondents to communicate the adverse ACRs to the petitioner and proceeded to hold *inter alia* as follows: -

“11. In the background of the aforesaid legal position, what we find from the facts of the case in hand is that the petitioner was denied promotion to the post of Executive Engineer (Civil) twice when his case was placed before the DPCs held on 13th June 2011 and 23rd September, 2011. The two below benchmark gradings for the years 2007-08 and 2008-09 formed part of the five ACRs, which were considered by the three DPCs. We fail to comprehend as to how the petitioner was denied promotion by the first and second DPC when the same two adverse ACRs were also under consideration before the 3rd DPC. There would be no dispute to the proposition canvassed by the learned counsel for the respondents that the DPC is not to be guided merely by overall grading, if any, recorded in the ACR but it should devise its own method and procedure for objective assessment to test the suitability of the candidates under consideration, however such objectivity on the part of the DPC should be evident and not remain just as an obscure affair. No records have been produced by the respondents to satisfy the Court as to how this change in the approach of the DPC, which was held on 4 th January, 2013, came about when no substantive material was placed before them. As per the own case of the respondents, the prescribed benchmark for promotion to the post of Executive Engineer (Civil) is ‘Good’ and if it was so, then we fail to comprehend as to how the petitioner was granted promotion against a vacancy for the panel year 2012-2013 in the face of his ‘Average’ grading for the year 2007-2008 and ‘part Average’ and ‘part Good’ in the ACR gradings for the year 2008-2009. Grant of promotion to the petitioner to the post of Executive Engineer (Civil) for the panel year 2012-2013, itself negates the stand taken by the respondents that he was denied promotion earlier by the first DPC for the vacancy year 2010- 2011 and by the second DPC for the vacancy year 2011-2012 when indisputably the said two below benchmark gradings for the years 2007- 2008 and 2008-2009 formed part of the five ACRs, which were considered by the said DPCs.”

9. The respondents, on the other hand, submit that there has been

no change in the circumstances with respect to the criteria to be followed for promotion to the post of Executive Engineer. According to them, the requisite criteria always was five “Good” gradings in the preceding five years and that the petitioners’ reliance on the instances where deviations took place do not cloth them with any right to claim the relief that they have sought in the present proceedings. It is also contended that a cumulative reading of the DoPT’s instructions on this point, i.e., OM dated 10.04.1989 and 08.02.2002 clarify that the relevant bench mark gradings can be departed from only after due deliberations recorded by the concerned Department with the approval of the DoPT. The respondents urge that the petitioners have relied upon certain Circulars/Memoranda which apply only to the UPSC. The said Circulars/Instructions state that an Officer attaining at least four bench mark gradings out of five in terms of the DoPT guidelines should be assessed as fit for promotion.

10. It is evident from the above narrative that the post of Executive Engineer is a selection post - as mandated by the Rules framed under Proviso to Article 309 of the Constitution of India. As to what should be the mode of filling the posts and what ought to be the mechanism has been indicated in guidelines issued by the DoPT, for the sake of uniformity and consistency. In this regard, the stipulations containing in OM of 10.04.1989 are decisive. They indicate - especially in paragraph 6.2.1 - that not only should the same number of years is to be considered when a group of officers’ claims of promotion is to be taken into account but also that a uniform criteria in terms of benchmark has to be adhered to. Second sub-para to paragraph 6.3.1

(i) states that:

“Wherever promotions are made for induction to Group 'A' posts or Services from lower groups, the bench mark would continue to be 'Good'. However, officers graded as 'Outstanding' would rank en block senior to those who are graded as 'Very Good' and officers graded as 'Very Good' would rank en block senior to those who are graded as 'Good' and placed in the select panel accordingly up to the number of vacancies, officers with same grading maintaining their inter se seniority in the feeder post.”

11. The next submission is that for posts which are at a level of ₹3700-5000 and above, the benchmark would be “Very Good”. In the subsequent OM, i.e., of 08.02.2002, paragraph 3.2 stated that merit of those assessed for promotion with reference to the prescribed bench-mark would be assessed and the DPC would grade officers as ‘fit’ or ‘unfit’ only. It further goes to record that:

“Only those who are graded fit (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se seniority in the feeder grade. Those officers who are graded ‘unfit’ (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded ‘fit’ (in terms of the prescribed bench-mark) by the DPC.”

12. The petitioners rely heavily on paragraph 3.4 of the said revised guidelines to say that under no circumstances can there be any supersession in promotion to the grades below revised pay scale of ₹12,000-16,500. It is highlighted here that the posts of Executive Engineer carries the grade of ₹9000-15000 (pre-revised) and, therefore, falls within paragraph 3.4.

13. This Court is unpersuaded with the last submission. The purport of the revised guidelines of 2002, as indeed paragraph 6.3.1 of the 1989 guidelines, was to prescribe uniformity in promotions to various posts including the promotions to Group 'A' posts. Paragraph 2.2 categorically states that in case of promotion from lower groups to Group 'A', while the mode of promotion happens to be selection by merit, the benchmark prescribed is good. "Only those officers who obtained said benchmark are promoted in order of merit as per gradings obtained. Thus officers getting superior grade supersede those getting lower gradings".

14. Paragraph 2.3, on the other hand, deals with higher level of posts, i.e., above ₹12,000-16,500. In their cases, selection by merit means that officer who possesses the threshold eligibility of minimum five "Very Good" gradings in the preceding five years is promoted in the order of merit as per the grading obtained. The mainstay of petitioners' submissions is that there is lack of clarity and uniformity in the manner that the respondents understood the instructions of 1989 and 2002. The three instances have been cited to say that Assistant Executive Engineers who did not possess five "Good" gradings at the relevant time when their cases were considered for promotion were nevertheless promoted as Executive Engineers. These are, firstly the instance of Mr. Lakshmikant G.Wankhede (in the year 2002), secondly Mr. Sunil Kumar (petitioner in W.P.(C)12704/2009) who was denied promotion when the DPC recommended names on 30.09.2009 but was at the same time given the promotion in the third DPC proceedings on 04.01.2003; and thirdly of Mr. Sant Kumar

Singh, who was promoted pursuant to the DPC meeting of 04.01.2013.

15. This Court has considered the materials on record as well as the files produced during the course of hearing. Besides the petitioners' reliance upon the instructions quoted in the preceding portion of the judgment apparently issued by the DoPT, there is nothing on the record to indicate that the basic mandate of the Guidelines/Memoranda issued by the DoPT on 10.04.1989 and 08.02.2002, i.e., the individual possessing at least five "Good" ACR gradings had been departed from consciously as a norm. That the petitioners have been able to point out deviations in the administration of these norms over the last 12 years or so, considering that the rules were framed in the year 2003, *ipso facto* does not clothe them with the right to claim promotion on the basis of such exceptions. Sant Kumar Singh was, we notice, an instance similar to if not entirely identical with the case of Sunil Kumar. Both were granted promotions in subsequent years even though there was no change in the circumstances, i.e., the ACR gradings for the relevant years disentitled them to promotion. Such aberrations by themselves cannot confer any right as long as there has been no change in the norms. We notice that a total of 49 promotions were made in the meetings pursuant to the recommendations of the DPCs held on various dates (30.09.2009, 13.06.2011 and 04.01.2013). For these, cases of 77 individuals were considered. The petitioners have pointed out only three aberrations and deviations, and one of them involves one of the petitioners herein, i.e., Sunil Kumar. However, in the case of all

others, we notice that the DPC uniformly applied the DoPT's Instructions on the understanding that concerned individual/officer would be deemed eligible if she/he possesses not less than five "Good" ACRs for the preceding five years.

16. As far as the petitioners' reliance on the instructions of the UPSC is concerned, it is relevant to extract the same - which has been produced in the course of the proceedings as follows: -

"The Commission, in exercise of their constitutional functions as envisaged in Article 320 of the Constitution took a conscious decision that an officer attaining at least four bench mark gradings out of 5 ACRs, as prescribed by the Govt. of India in Department of Personnel and Training OM No.22011/9/98-Estt.(D) dated 8.9.1998, read with subsequent OM of even number dated 16.6.2000, should be assessed as fit for promotion and this decision applicable to all DPCs pertaining to the vacancy year 2003-04 and subsequent years."

The above extract, upon which the petitioners have placed reliance, is contained in a document styled as "Appointment Branch, Appointment by Promotion". These documents refer to the DoPT's Circulars including the Circulars dated 10.04.1989 and 08.02.2002. It also records that for promotion to the lowest of Group 'A' post, benchmark would be "Good". In these circumstances, the deviation, if one may say so, expressed by the Commission in the extract relied upon cannot be the sole determinative consideration to hold that for promotion to the post of Executive Engineer in the Border Roads Development Board, an individual is deemed to be eligible if she/he possesses at least four "Good" gradings in the preceding five years.

17. In view of the above reasons, the petitions are meritless. None

of the petitioners are entitled to the relief claimed. Nothing stated in the course of this order shall be treated as a ground to disentitle any individual who has otherwise received promotion.

18. The writ petitions are accordingly dismissed, along with all the pending applications.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 06, 2015
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