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

Decided on: 04.01.2016

+ **W.P.(C) 2358/2013**

MR. DEEP CHAND NAG Petitioner

Through: None.

versus

UNION OF INDIA AND ORS Respondents

Through: Mr Gaurav Upadhyay, Adv for
Ms Monika Arora, CGSC

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. On the previous two dates of hearing, there was no appearance on the petitioner's behalf. Even today, there is no appearance on behalf of the petitioner. However, adjournment slips had been circulated.

2. The petitioner's grievance is that he was not considered and promoted to the post of Executive Engineer and that his junior in the cadre of Assistant Executive Engineer was granted such benefit overlooking him unjustly.

3. The facts, in brief, are that the petitioner joined the General Reserve Engineer Force (GREF)—wing of the Border Roads Organization after due selection by the Union Public Service

Commission and reported for duties on 24.06.2002 in the grade of Assistant Executive Engineer. The promotion from that post is to the cadre of Executive Engineer. Being a Group 'A' selection post, a bench mark of five "Goods" is prescribed for promotion by the Circulars/Office Memoranda of the Department of Personnel and Training (DoPT) dated 10.04.1989 and 08.02.2002.

4. The petitioner was apparently overlooked and his junior Shri Lakshmikant Wankhede was promoted pursuant to the DPC which met for this purpose on 12.06.2011. At the relevant time, apparently, the petitioner was apprised of the fact that for part of the period under consideration, i.e., 01.04.2005 to 30.09.2005, his performance had deteriorated to certain extent inasmuch as the final ACR grading was recorded as "Average". The petitioner represented against his ACR gradings and that representation was rejected on 28.02.2011. Against this, the petitioner approached the Uttarakhand High Court by filing Writ Petition No. 305/2011. That High Court disposed of the writ petition on 20.10.2011 requiring the respondents to decide the petitioner's representation by a reasoned speaking order within three months from the date of production of the certified copy.

5. Pursuant to the directions of the Uttarakhand High Court, the respondents considered the petitioner's representation dated 09.08.2011. The petitioner—in his said representation—had taken exception to the fact that he was rated as 'Average' with five points by the Accepting Officer even though the initiating and reviewing officer had concurred with each other and rated his performance as "Good" granting seven points. In this, the petitioner had relied upon

certain extracts from Swamy's Manual on Establishment and Administration particularly the DG, P&T letter dated 21.01.1983. It was contended that this letter envisioned only one review i.e. by the reviewing officer and the concept of review by superior or higher officer did not exist. The respondent GREF considered the petitioner's representations and noted—by its impugned order dated 30.12.2011 that his request for upgradation had been rejected on 28.02.2011. It also took note of the fact that in accordance with the extant DPC guidelines, particularly the one dated 08.02.2002, a candidate/officer had to fulfil the prescribed bench mark to be considered for promotion to those positions/posts based upon the selection criteria. The respondents also dealt with the contention based upon the letter dated 21.01.1983.

6. The petitioner argues in these proceedings that the rejection of his representation in the entire circumstances of the case was not justified. It is conceded in the writ petition that in a later meeting of the DPC, the petitioner was promoted with effect from 01.02.2013. It is stated that the main argument is that the respondents are not bound by the DoPT memoranda alone, but rather by UPSC guidelines, especially a part thereof to the extent that if four years' ACRs fulfil the bench mark, then the individual concerned can and should be promoted. It is stressed here that the petitioner had "Good" grading for the four and a half years and if the clarification/letter of 21.01.1983 were to be given effect to, the appraisal of the Accepting Officer should be ignored. The petition also urges that the subsequent Office Memoranda dated 08.09.1998 and 16.06.2000 issued by the

DoPT have not been considered and if they are, he would be eligible for promotion on the date when his junior was promoted.

7. The respondents in their counter-affidavit rely upon the speaking order. It is contended that in terms of the existing rules, the final authority to appraise the performance of an officer is the Accepting Officer who is superior to the initiating and reviewing officer. In view of these arrangements, the contention based upon the office memoranda and letter dated 21.01.1983 is meritless.

8. It is also urged that given the fact that the petitioner's request for upgradation was rejected in February, 2011, the fact remained that on the record, he did not possess five "Good" ACRs gradings as on the date the DPC met. i.e, 12.06.2011. Since he did not meet the eligibility criteria, his name was not considered. The respondents also urged that the UPSC guidelines cannot be considered binding and rely upon a decision of this Court in *Avinash Tripathi vs. Union of India and Ors.* W.P.(C) No.12596/2009 and connected cases, decided on 06.07.2015.

9. The above factual discussion would reveal that what is at issue before this Court is the petitioner's claim that he was wrongly overlooked for consideration for promotion to the post of Executive Engineer when the DPC met for that purpose on 12.06.2011. It is not disputed that the bench mark prescribed for promotion to the said post of Executive Engineer is five "Good" ACR gradings for five years preceding the year of consideration. The petitioner unfortunately was graded as "Average" for about five months between 01.04.2005 to 30.09.2005. Even though the Initiating and the Accepting Officer

appear to have graded him as “Good”, i.e., within the bench mark, but the Accepting Officer—the ultimate authority—graded him as “Average” and with five marks, i.e., below the bench mark.

10. The first question is whether this kind of grading can be called a illegal or contrary to the guidelines. In support of the submission that it is unjustified, the petitioner relies upon a letter dated 21.01.1983. Apart from the fact that the said letter has not been annexed to the petition, even from the substance relied upon, it appears that qualification in that instance depended upon the rules or guidelines which envisioned the recording of ACR as a two tier process, i.e., Accepting Officer and the Reviewing Officer. However, wherever rules or guidelines exist which specifically require that appraisals by the Initiating and Reviewing Officer need to be further accepted, they cannot be ignored in any manner, i.e., as is sought to be urged by the petitioner. In the present case, the petition has not challenged the existence of the guidelines which mandate final acceptance by the officer highest in hierarchy who has occasion to consider the performance and discharge of duties by every officer. In the circumstances, the argument of the petitioner that the appraisal by the Accepting Officer should be ignored is not sound. The said contention is consequently rejected.

11. The second argument that the petitioner’s claim also turns upon the fact that UPSC in its guidelines (in a document termed as “Important Instructions/Guidelines on DPC’s (Promotions)—Internal Guidelines of UPSC regarding Treatment of Penalties by the DPC”) has somewhere indicated that wherever the bench mark is “Good”, it

would be sufficient if an individual candidate is deemed to have fulfilled the four bench mark grading or requirement if he/she possesses four “Good” gradings rather than five. In answer to this submission, the respondents rely upon guidelines of the DoPT issued on 08.02.2002 to say that such circulars would prevail since DoPT is a nodal agency for determining the criteria and not UPSC which plays an advisory role.

12. The petitioner primarily places reliance upon the following extract of the UPSC guidelines:-

“As per the DoPT OM No.35034/7/97-Estt.(D) dated 08th February, 2002, the mode of promotion is ‘selection’. The element of selectivity shall be determined with reference to the relevant Bench Mark (‘Very Good’ or ‘Good’) prescribed for promotion. It is further provided that 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 of 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 suppression in promotion among those who are graded ‘Fit’ (in terms of the prescribed Bench Mark) by the DPC.

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 16.06.2000, should be assessed as fit for promotion and this decision is applicable to all DPCs pertaining to the vacancy year 2003-04 and subsequent years.

DoP&T, vide their OM No. 22011/3/200-Estt(D) dated 18.02.2008, have been issued instructions regarding benchmark for promotion at the level of JS and above from the panel year 2008-09. In their OM it has been mentioned that the DPC may ensure that for the promotion to the scale of Rs.18,400-22,400 and above, the prescribed benchmark of 'Very Good' is invariably met in all ACRs of five years under consideration."

13. In **Avinash Tripathi** (*supra*), the petitioner had identically urged that UPSC instructions would prevail over that of the Central Government. The Court rejected the submission and held as follows:-

"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.

14. For the foregoing reasons, we are of the opinion that there is no merit in the petitioner's claim that he was wrongly overlooked for promotion to Executive Engineer when the DPC met on 12.06.2011.

The writ petition is dismissed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 04, 2016
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