

\$~27

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

+ **W.P.(C) 4855/2014**

Date of Decision: 12th April, 2017

R. K. MISHRA

..... Petitioner

Through **Sh. H.P. Chakravorti, Adv.**

versus

UNION OF INDIA AND ORS

..... Respondent

Through **Sh. Vikas Mahajan, CGSC with Mr. S.S. Rai, Adv. for R-1 & R-2.**
Sh. Naresh Kaushik & Ms. Kritika Sharma, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE ANU MALHOTRA

SANJIV KHANNA, J. (ORAL)

1. The petitioner R.K. Mishra in this writ petition impugns order dated 17.12.2012 whereby O.A. No. 20/2012 filed by him had been dismissed by the Principal Bench of Central Administrative Tribunal (Tribunal, for short).
2. The petitioner joined the Department of Telecommunication as Engineering Supervisor on 27.06.1962. He earned promotions and was appointed as Divisional Engineer on 02.04.1982.
3. On 26.02.1988, the petitioner was placed under suspension pending investigation in two criminal cases registered on a complaint by the Chief General Manager. The suspension was revoked on 02.05.1989 and thereupon the petitioner joined as the Assistant Director General, Sanchar Bhawan.

4. The petitioner had challenged his suspension in O.A. No. 1011/1990, which was allowed vide order dated 13.11.1990 on the ground that the suspension order was not passed by the competent authority. It was held that the period of suspension shall not be treated as period of suspension in the eyes of law and would not amount to a break in service, but shall be treated as period spent on duty for all purposes. The petitioner would be entitled to pay full pay and allowances for the suspension period between 26.02.1988 to 02.05.1989.

5. The criminal prosecution continued till 14.12.2010 when the criminal cases were withdrawn.

6. In the meanwhile, the petitioner had retired from the post of Assistant Director General on 31.10.1996.

7. After withdrawal of the cases, vigilance clearance was granted on 04.05.2011 and on 25.05.2011, the President of India closed the cases against the petitioner.

8. During the pendency of the investigation / prosecution, the petitioner's case alongwith others was considered for promotion to the Junior Administrative Grade by the Departmental Promotion Committee (DPC) meeting held between 11th and 13th September, 1995 for the years 1992-1993 and 1993-1994.

9. The original DPC records have been produced before us. Sealed cover procedure was adopted in the case of the petitioner for the reason that criminal prosecutions were pending. After the criminal cases was withdrawn, the sealed covers were opened and the petitioner vide letter dated 07.06.2011 was informed that he was not found fit for promotion to Junior Administrative Grade

by the DPC. The reason why the petitioner was declared to be unfit is to be found in the short reply affidavit filed by the Union Public Service Commission (UPSC) before the Tribunal. Paragraph 6.1 and 6.2 of the said affidavit reads as under : -

6.1. Further, it is also submitted that as per records available, the DPC held on 11th to 13th September, 1995 assessed Shri R.K. Mishra on the basis of the ACRs included in the consideration matrix as indicated below : -

Vacancy year – 1992-93

1987-88	1988-89	1989-90	1990-91	1991-92	Overall assessment
Very Good	Good	Good	Good	Very Good	GOOD

Vacancy year – 1993-94

1988-89	1989-90	1990-91	1991-92	1992-93	Overall assessment
Good	Good	Good	Very Good	Very Good	GOOD

“6.2. The method of selection as prevailing at the time of original DPC was ‘grading’. In accordance with the proviso contained in paras 6.2.2. & 6.3.1(ii) of the Department of Personnel & Training’s OM No.22011/5/86-Estt (D) dated 10th April, 1989, all officers in the consideration zone were assessed as “Outstanding”,

“Very Good”, “Good”, “Average” and “Unfit”. The officers assessed as ‘Outstanding’ are placed on top of the panel, followed by those overall assessed as ‘Very Good’. The Bench-mark on this case was ‘**Very Good**’. On the basis of that assessment, the DPC did not recommend his name for inclusion in the panel as he failed to attain the prescribed Bench Mark “**VERY GOOD**”.

10. It is an accepted and admitted position that below the bench mark gradings and the remarks in the Annual Confidential Reports (ACRs) for the year 1988-1989, 1989-1990 and 1990-1991 were never communicated to the petitioner. The petitioner did not, therefore, get the opportunity to make representation and ask for upgradation. Pertinently, the petitioner was under suspension for the period between 26.02.1988 to 02.05.1989, and though the suspension period was struck down, the petitioner did not work and perform duties during the said period. He was nevertheless graded as good, for this period. His grading for the earlier year was “very good”.

11. On the last date of hearing, we had asked the respondents to produce the original DPC records as well as the ACRs. The ACRs have not been produced as it is stated that the same have been destroyed and are not available.

12. In the given circumstances, we would have no option but to direct the respondents to convene the Review DPC and consider the case of the petitioner on the basis of available records.

13. Learned counsel for the UPSC has submitted that the decision in the case of “*Dev Dutt Vs. Union of India (2008) 8 SCC 725*” would not be applicable for ACRs in question related to the years 1988-1989, 1989-1990 and 1990-1991. The principle of communication of below the bench mark grading was not

followed at the given point of time. He has relied upon decision of Division Bench of this court in “**Writ Petition (C) No. 3269/2010, Union of India Vs. S.S. Bansal decided on 25.10.2010.**” The said decision in our opinion has no application to the present factual matrix. In S.S.Bansal (supra), the respondent / employee had sought to challenge the grading which were considered by the DPC on 25.02.2000. In the present case, the DPC meeting was no doubt held on 11th and 13th September, 1995, but the results remained under the sealed cover till 07.06.2011. Only thereafter, the petitioner came to know that he had been declared unfit. The cause of action thus arose on 07.06.2011, and on the said date, the decision in the case of “**Dev Dutt Vs. Union of India (2008) 8 SCC 725**” was applicable. Law of limitation for delay and laches was applied in **S.S. Bansal** (supra), whereas in the present case the claim of the petitioner cannot be defeated for the said reason.

14. Learned counsel for the UPSC submits that DPC can make their own grading and assessment. This is true. Albeit on this aspect, we have already recorded the affirmative assertions made by the UPSC in their affidavit filed before the Tribunal which speak. The petitioner was declared unfit on the basis of ACRs grading given to him for the years 1988-1989, 1989-1990 and 1990-1991. These were below the benchmark grading as per the UPSC. These gradings were the foundation and reason to deny promotion to the grade of Junior Administrative Grade. The DPC did not for any reason other than the grading in the ACR opine that the petitioner was unfit.

15. On the second aspect, we would note that the decision in “**Dev Dutt Vs. Union of India (2008) 8 SCC 725**” is categorical and clearly holds that below benchmark ACRs should be communicated to the officer who has right to make a representation and on upgradation the review DPC should be held to consider

the case for promotion. It would be appropriate to reproduce some of the paragraphs from the judgment in the case of *Dev Dutt* (supra):

“17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka* <http://JUDIS.NIC.IN> SUPREME COURT OF INDIA Page 11 of 23 *11 Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the Constitution.

18. Thus it is not only when there is a bench mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

* * * * *

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidal structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

* * * * *

37. 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.

* * * * *

41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

16. Following this decision in *Abhijit Ghose Dastidar v. Union of India*, 2009 16 SCC 146, the Supreme Court held that non-communication of entries of ‘good’ or below the benchmark grading has civil consequences because it may affect chances of promotion or getting other benefits.

17. In *Sukhdev Singh v. Union of India & Others*, (2013) 9 SCC 566, the Supreme Court reiterated and held that the ratio expressed in *Dev Dutt* (Supra) that every entry in the ACR must be communicated is legally sound and helps in achieving threefold objectives. It helps public servant to work harder and achieve more and better results. Secondly, he is made aware of the entry in the

ACR and if he feels dissatisfied, it enables him to make a representation for upgradation. Lastly, it brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice.

18. In the present case, ACRs are not available. We would, therefore, direct the respondents to hold a review DPC without taking into account ACRs for the period 1988-1989, 1989-1990 and 1990-1991 in which the petitioner had been given the below the benchmark grading. These will be excluded from consideration. Thereafter, the review DPC will assess the case of the petitioner and if the petitioner is held to be entitled to promotion, he would be granted promotion from the date on which his immediate junior was so promoted to the Junior Administrative Grade. The said exercise would be completed within a period of five months from the date copy of this order is received. Depending upon the result of the review DPC, consequential benefits including arrears of pay and pension would be granted.

19. This writ petition is allowed in the aforesaid terms, with no order as to costs.

SANJIV KHANNA, J

ANU MALHOTRA, J

APRIL 12, 2017

mk