

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

+ **W.P.(C) 4889/2016**

Reserved on: 2nd August, 2017

Date of decision : 3rd November, 2017

VIVEK SRIVASTAVA

.....Petitioners

Through

Mr.Ankur Chhibber, Mr.Bhanu
Gupta, Mr.Rajesh, Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through

Mr.Anil Soni, Mr.Naginder
Benipal, Mr.Nivesh Sharma,
Advs. for R-1 to 4

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

The petitioner has filed the present petition before us
seeking the following reliefs:-

“(i) Issue a Writ of Certiorari for quashing the order dated 01.05.2014 issued by the DG, CRPF, declining to interfere with the adverse remarks in the petitioner’s APAR for the year 2007-08, the signal dated 05.01.2015, the letter dated 21.03.2016 issued by the DG, CRPF declining to consider the case of the petitioner as well as the signal dated 29.03.2016 rejecting the petitioner’s representation dated 15.10.2015; and

(ii) Issue a Writ of Mandamus directing the respondents to expunge the adverse remarks in the APAR for the year 2007-08, and, to consequentially convene a

review DPC qua the DPC held on 18.10.2013 to assess the suitability of the petitioner for promotion to the rank of CMO (OG); and

(iii) That if the petitioner is so found fit in the review DPC, then to issue a Writ of Mandamus directing the respondents to grant the petitioner all consequential benefits of promotion to the rank of CMO (OG). ”

2. The petitioner joined the Central Reserve Police Force on 1st July, 2003 in the rank of Assistant Commandant (GDMO). He was posted at Balaghat, Madhya Pradesh in April, 2004. In May, 2005, respondent no.5, C.T.Venkatesh took over the charge of the Battalion as Commandant. It is the case of the petitioner that from the very beginning itself, there was discord between him and the 5th respondent.

3. The petitioner claims that for reasons attributable to respondent no. 5, even his confirmation, after completion of probation period, was delayed. The petitioner draws our attention to a written complaint filed by him against the 5th respondent on 22nd October, 2007 on which an enquiry was ordered by the IGP Central Sector in the month of February, 2008 and resulted in an order dated 18th June, 2009 passed by

the Director General, CRPF expressing his 'displeasure' to both the 5th respondent and the petitioner.

4. As for the Annual Confidential Report (ACR) for the period 1st April, 2007 to 31st March, 2008, which is the subject matter of the present petition, we called for the original record from the respondent no.2, CRPF. We have perused the original record and find that the 5th respondent, as the Reporting Officer, had commented adversely against the petitioner in his report dated 10th June, 2008. However, the Technical Reporting Officer in his report dated 9th September, 2008 had graded the petitioner as 'a good medical officer'. R.P. Singh, Deputy Inspector General of Police, CRPF, Allahabad as the Administrative Reviewing Officer had graded the petitioner as 'औसत', i.e., 'average'. The Technical Reviewing Officer did not grade the petitioner for the said period on the ground that the petitioner had not served under him for a minimum period of 3 months. The Inspector General as Superior Reviewing Officer also did not grade the petitioner in his note dated 18th January, 2010 for the same reason. Therefore, what we have before us is

the grading of 5th respondent given on 10th June, 2008 reporting adversely against the petitioner, grading of good by the Technical Reporting Officer and grading 'average' by the Administrative Reviewing Officer.

5. The petitioner was among 67 Medical Officers found eligible for promotion to the next rank of CMO (OG) subject to them being found fit by the Departmental Promotion Committee (DPC). It was at this stage that the ACR for the period 1st April, 2007 to 31st March, 2008 was communicated to the petitioner vide Director letter dated 6th August, 2013, which the petitioner claims was received by him only on 18th October, 2013, whereas the DPC was convened on the next day.

6. The petitioner submitted his representation on 23rd November, 2013 primarily raising the ground of bias against respondent no.5 and also delay in communication of the adverse report. The same was, however, rejected by the Director General, CRPF vide his order dated 1st May, 2014. The petitioner's further representation was also rejected and the same was communicated to the petitioner vide impugned signal

dated 5th January, 2015. The petitioner, still feeling aggrieved, submitted further representations, however, vide impugned communication dated 21st March, 2016, he was informed that there was no provision for considering second appeal/representation against the adverse remarks/below bench mark grading in the ACR/APAR and, therefore, he should desist from making repeated representations on the same issue. The petitioner has impugned before us the order dated 1st May, 2014, signal dated 5th January, 2015 and the communication dated 21st March, 2016 rejecting his representations against the ACR /APAR for the years 2007-08 and has further sought a mandamus directing the respondents to expunge the said adverse remarks and to convene a review DPC to assess the suitability of the petitioner for promotion to the rank of CMO (OG).

7. The official respondents, i.e., the Ministry of Home Affairs and CRPF have filed a common reply to the petition whereas the 5th respondent, C.T.Venkatesh has chosen not to appear or file any reply. The respondents have, of course,

denied any bias of C.T.Venkatesh while writing the ACR of the petitioner and as far as delay in communication of the ACRs, they have submitted that the same were duly communicated to the petitioner in due compliance with DOPT OM no.21011/1/2010-Estt. Dated 13th April, 2010.

8. We have heard the learned counsel for the parties. At the outset, we appreciate limitation of our powers while examining the ACRs of an officer. It cannot be disputed that normally the Court are loath to interfere in cases of complaints against adverse remarks and to substitute their own judgment for that of the Reporting or Reviewing Officer. It is because senior officers alone are best suited to judge the qualities of officers working under them and about their competence in the performance of official duties entrusted to them. Despite allegation of possible abuse of power by a prejudiced superior officer in some cases, the service record contained in the confidential reports, by and large, reflects the work and performance of the officer, with relevant period. There is a

system of checks and balances, as opinions and comments are recorded by hierarchy of officers.

9. At the same time, it is also well settled that ACRs play a vital and significant role in the assessment, evaluation and formulation of opinion on the yearly profile of an officer and, therefore, have to be reported objectively and fairly with due diligence and caution. They can have a significant impact on career progression and promotion prospects of an officer.

10. Making annual entries in the confidential records of subordinate officials by superiors has a public policy and is a purposive requirement. It is one of the recognized and time tested method of exercising administrative and disciplinary control by a superior authority over the subordinates. Such entries may potentially shape the future career of a subordinate officer and therefore, casts an obligation on the authority to follow principles of fairness, neutrality and objectivity while recording any adverse or below bench mark grading in the ACR of an officer.

11. Natural justice being part of Article 14 of the Constitution of India, needs to be complied with when adverse or below the bench mark gradings are recorded. It is for this reason that the Supreme Court in case of ***Dev Dutt vs. Union of India & Ors.*** 2008 8 SCC 725 held that the principles of natural justice require that all entries (whether poor, fair, average, good or very good) in annual confidential report of a public servant whether in civil, judicial, police or any other State Service (except military), must be communicated to the officer within a reasonable period so that he can make a representation for its upgradation.

12. One of the important principles of natural justice is a rule against bias. It is difficult to prove the state of mind of a person, and therefore, the element of bias or mala fides is to be gathered by the Court from the attending relevant facts and circumstances of a given case. The existence of elements of bias is to be inferred as per the standard and comprehension of a reasonable man. It was held by the Supreme Court in the case of ***A.K.Kraipak & Ors. vs. Union of India & Ors.*** (1969) 2

SCC 262 that a mere suspension of bias is not sufficient, there must be a reasonable likelihood of bias. In deciding the question of bias, court must take into consideration human probabilities and ordinary course of human conduct.

13. This High Court in the case of ***Major Prithviraj Patnaik vs. Union of India & Ors.*** ILR (2007) 1 Del 572 has held that an administrative action suffering from real likelihood of bias cannot be sustained. Similarly in the judgment dated 8th October, 2015 in the case of ***S.K.Sharma vs. Union of India & Ors.*** 2015 SCC online Del 13399, this High Court applied the above principle while quashing the ACR written by an officer against whom the subordinate's wife had made a complaint. We reproduce hereinbelow the relevant portion of the said judgment:-

“13) In the present case, no doubt the fifth respondent was entitled to and did initiate the process of recording the petitioner's ACR, being his superior officer. The initiation of the process which is administrative-however, did not mean that the fifth respondent was compelled to go ahead and complete recording the ACR. The complaints of harassment were levelled against him almost contemporaneously. No one suggests that the fifth respondent was duty bound or compelled to write the ACR after he became aware that there was likelihood of

his bias in the process of its recording. When the Court considers that the complaints to the NHRC and NCW were preferred within a couple of months of October, 2007, the fact that the fifth respondent had become aware of these developments is undeniable.

14) As in all cases where bias is alleged, the issue which the court has to address itself is as to whether there was likelihood of bias. The party alleging bias is not under an onus to prove bias; rather it is the danger or likelihood of bias of the public official concerned, in the circumstances of a given case. In one of the most celebrated cases, R v Bow Street Metropolitan Stipendiary Magistrate & Ors. Ex parte Pinochet Ugarte (No 2) (1999) 2 WLR 272 [‘the Pinochet case’] discussed those tests. There, the House of Lords set aside its earlier decision when it was disclosed (after delivery of judgment), in the earlier appeal, that Lord Hoffmann, (one of the members of the Appellate Committee who heard the appeal), had some link with Amnesty International. That body was an intervener in the appeal; the judge was an unpaid director of the Amnesty International Charity Ltd. (‘AICL’), a charity wholly controlled by Amnesty International. The House of Lords held that the relationship between Lord Hoffmann and Amnesty International through his directorship in AICL, led to his automatic disqualification from sitting on the hearing of the said appeal without the need to investigate whether there was a likelihood or suspicion of bias in the circumstances of that case. The Supreme Court in Badrinath (supra) and D.C. Agarwal and the other cases previously cited vividly summarized the applicable test in these cases-it is not one of proven bias; rather it is proof of reasonable likelihood of bias.

15) Applying the test of reasonable likelihood of bias, this court has no hesitation to say that given the nature of the allegations levelled against him, the fifth respondent, as a responsible officer should have desisted from completing the process of recording the ACR – which was

actually recorded in late 2008. He could have sought guidance from his superior officers having become aware of the complaint by the petitioner's wife, against him. That his evaluation was confirmed by the higher authorities (who concurred with his views in this case) is cold comfort to the petitioner. In our opinion, if the initial action itself was tainted because of bias, the resultant illegality was incurable."

14. In the present case, though we are not persuaded by other general allegations of bias raised by the petitioner like delaying his confirmation etc., as noted above, the petitioner had made a complaint against the 5th respondent, C.T.Venkatesh, on 22nd October, 2007. C.T.Venkatesh in turn, had made a complaint against the petitioner on 21st November, 2007. On these counter allegations, IGP, Central Sector, CRPF had ordered an enquiry in the month of February, 2008.

15. As has been observed by us earlier, respondent no.5 had initiated the ACR of the petitioner for the period 1st April, 2007 to 31st March, 2008 on 10th June, 2008 i.e., after the aforesaid enquiry had been ordered against him. We may only notice that the said enquiry resulted in a final order dated 18th June, 2009 of conveying 'displeasure' on both the officers, passed by the

Directorate General, CRPF. In these circumstances, we are of the opinion that there was a reasonable likelihood of bias of C.T.Venkatesh against the petitioner.

16. The respondents have contended that R.P. Singh, Administrative Reviewing Officer of the petitioner had also rated him as 'average'. Vague allegations of bias against R.P. Singh have also been made by the petitioner, however, we find no substance in the same. However, a perusal of the impugned ACR would show that the Technical Reporting Officer in part-III(D) of the report had given his general assessment of the petitioner in the following "He is a good medical officer". The Technical Reviewing Officer, who in our opinion was competent to assess the remarks of the Technical Reporting Officer, did not grade the petitioner for the said period on the ground that the petitioner had not served under him for a minimum period of three months. On the other hand, R.P. Singh, who was the Administrative Reviewing Officer, disagreed with the Technical Reporting Officer with regard to his assessment rating of the petitioner under the head of

“Professional Ethics”. R.P. Singh, recorded his disagreement with the same in the following:

“कमाण्डेंट - 117 बटालियन द्वारा रिपोर्टाधीन अधिकारी की वार्षिक गोपनीय रिपोर्ट के भाग - तीन (क) में दर्ज की गई प्रतिकूल अभ्युक्ति तथा ग्रेडिंग से मैं सहमत हूँ। इसके साथ-साथ वार्षिक गोपनीय रिपोर्ट के भाग - तीन (ख) में दर्ज की गयी तकनीकी गोपनीय रिपोर्ट से मैं सहमत नहीं हूँ क्योंकि तकनीकी वार्षिक गोपनीय रिपोर्ट लिखने वाले अधिकारी ने रिपोर्टाधीन अधिकारी के कार्यों का मूल्यांकन उनकी कार्यक्षमता से अधिक किया है। रिपोर्टाधीन अवधि के दौरान अधिकारी का कार्य औसत श्रेणी का रहा है।”

English translation as supplied by the Petitioner, reads:

“Comments and grading mentioned by the Commandant 117 Bn. at ACR Part III(A) are agreed. In addition to this, Reporting Officer reported at Part III (B) has been evaluated more than his abilities. It is not fully agreed. Performance of the officer during reporting period was an average.”

17. R.P. Singh, in relation to the para 4, Part IV(A) with regard to “General comments on the quality of professional performance and application of knowledge. (Comment specifically on professional knowledge and skill, patient care and clinical acumen, medical administration and proper utilization of technical equipments)”, reported as under:-

“अपने कार्य क्षेत्र की औसत जानकारी रखने वाले चिकित्सा अधिकारी हैं। मरीजों की देखभाल तथा उनका उपचार भी औसत स्तर का रहा है।”

English translation as supplied by the Petitioner, reads:

“Medical Officer having average knowledge about his work. Looking after patients and their treatment was also on average condition.”

18. R.P. Singh thereafter graded the petitioner as average and in the general assessment reported the following:

“अपने व्यवसाय की औसत जानकारी रखने वाले चिकित्सा अधिकारी है। रिपोर्टाधीन अवधि के दौरान अधिकारी का कार्य एवं व्यवहार औसत स्तर का रहा है।”

English translation as supplied by the Petitioner, reads:

“Medical Officer having average knowledge about his work. Looking after patients and their treatment was also on average condition.”

19. A bare reading of the above remarks would show that though R.P. Singh was the “Administrative Reviewing Officer”, and not the “Technical Reviewing Officer”, he not only disagreed with the report of the “Technical Reporting Officer” but has primarily made adverse comment on the technical knowledge of the petitioner. It is not shown, that R.P. Singh was even competent to comment about the technical knowledge of the petitioner in the medical field. Though it may not be very

relevant, we cannot lose sight of the fact that the same C.T. Venkatesh and R.P. Singh as Reporting and Administrative Reviewing Officer respectively had graded the petitioner as 'good' and 'very good' in their ACRs for the period 1st April, 2006 to 31st March, 2007. The petitioner's file reveals that for the assessment period 11th June, 2008 to 31st March, 2009, the petitioner had been graded as 'very good' by the Superior Reviewing Officer on 13th November, 2009.

20. Another important factor in the present case is that the original file reveals that on the representation made by the petitioner, comments were again sought from C.T.Venkatesh who again adversely commented upon the petitioner. This was after he had suffered 'displeasure' of the DG, CRPF on a complaint filed by the petitioner. This would have certainly weighed with the respondents while rejecting his representation vide impugned order dated 1st May, 2014.

21. The impugned order dated 01.05.2014 records that the petitioner, in his representation, has not disputed the remarks of "Administrative Reviewing Officer" who agreed with the

adverse remarks endorsed by the Reporting Officer. This observation of the Director General, CRPF is incorrect on both counts. A perusal of the representation dated 23.11.2013 made by the petitioner would show that the petitioner had challenged the grading of “Administrative Reviewing Officer” on the ground of the same being without any reason. Further, as noted above, “Administrative Reviewing Officer” had not agreed with the remarks of the “Technical Reporting Officer” but had in fact downgraded the same.

22. As far as challenge on the ground of delay in communication of adverse/below benchmark ACR is concerned, we may only state that though there certainly was a delay in communication of the ACR to the petitioner, the petitioner would not have been entitled to any relief on this ground alone. However, we are not delving deeper into this issue as the petitioner is to succeed on our findings given above.

23. In view of our above findings, we hold that the impugned ACR recorded by the 5th respondent as well as the confirmation by the “Administrative Reviewing Officer” cannot be sustained

and are hereby quashed. We direct the respondents to consider the case of the petitioner for promotion to the next rank of CMO(OG) un-influenced by the ACRs for the period 1st April, 2007 to 31st March, 2008 by holding a review DPC.

24. We may however clarify that we have not made any comment on the order dated 18.06.2009 conveying “displeasure” of Director General, CRPF to the petitioner. The said order remains on record and effect thereof, we would not comment. We further clarify that the Review DPC, as ordered by us, would consider the case of the petitioner uninfluenced by any observation made by us above and would be free to make its own assessment regarding the petitioner, keeping in view the entire relevant material.

25. The writ petition is allowed in the above terms with no order as to costs.

NAVIN CHAWLA, J

SANJIV KHANNA, J

NOVEMBER 03, 2017/ RN/vp