

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: October 05, 2018

Judgment delivered on: October 22, 2018

+ W.P.(C) 2466/2017

DR. O.P. NIMESH

..... Petitioner

Through: Mr. Nalin Kohli, Adv. with
Ms. Garima Sachdeva, Adv. and
Ms. Nimisha Menon, Adv.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Ravi Prakash CGSC, Mr. Farman
Ali and Mr. Varun Pathak, Adv. for
UOI

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed by the petitioner challenging the order dated February 26, 2016 whereby, officers junior to the petitioner have been promoted to the rank of IG (Medical) and also order dated 23rd January, 2017 rejecting the petitioner's representation, with a further prayer directing the respondents to hold a review DPC with reference to the DPC of 25th February, 2016 by ignoring the remarks and grading given by the petitioner's Technical Reviewing Officer and thereafter petitioner may be granted

promotion to the post of IG (Medical) retrospectively, w.e.f, 4th March, 2016 along with all consequential benefits.

2. It is the case of the petitioner that he is a Medical Doctor and had joined Border Security Force (BSF in short) as a Medical Officer on 1st January, 1983. He was promoted as Senior Medical Officer on 1st October, 1987 and thereafter as Chief Medical Officer w.e.f 25th January, 1993. Because of his consistently good performance, he was granted selection grade w.e.f 5th April, 2002. As the Doctors of All Central Police Force were placed in a Combined Cadre, known as *Central Police Forces Combined Medical Officers Cadre*, the petitioner upon his promotion as DIG (Medical) on 12th June, 2010 was posted in CRPF and joined the Composite Hospital, CRPF, Bhopal. It is his case that he carried out his duties with great dedication, but since, he was originally belonged to the BSF Cadre, there were some junior Doctors, who had a bias against him. In fact, he received a letter of appreciation on 24th July, 2012 from the Director General, CRPF. He also received a commendation card dated 31st May, 2013 from the ADG (Medical) in recognition of his sincerity and contribution for upliftment of the CRPF Cadre.

3. It is the case of the petitioner, that while he was posted in CRPF Hospital as DIG (Medical), he noticed irregularities in the working of the Composite Hospital, CRPF, Bhopal, compelling him to take corrective action which was not appreciated by some of the employees who made false allegations against him leading to award of *displeasure* on 4th December, 2012. He was transferred to SSB on 18th December, 2012. The petitioner did not challenge the “*displeasure*” as he was aware that the same was not a penalty and since his performance has already been appreciated by the Director General, CRPF. It is his case that after he had joined the SSB, he was, vide letter dated 14th June, 2013, supplied with a copy of APAR for the period 1st April, 2012 to 17th December, 2012, and was informed that in case he wanted to make any representation against the same, he can do so within 15 days of receipt of the said letter. On perusal of the APAR for the period 2012-2013, the petitioner found that his Technical Initiating Officer had graded him “*Very Good*”. His Administrative Initiating Officer had also agreed with the resume of work done by the petitioner, but given him a grading equivalent to “*Good*”, but his Technical Reviewing Officer who had during the petitioner’s entire tenure at Composite Hospital, CRPF Bhopal never visited the place / hospital, had assessed him below average and given him overall numerical grading of merely 3.66 as against grading of 7 given

by all the other officers. However, the accepting authority had overruled the aforesaid overall assessment and not only specifically written that his overall performance was “*Very Good*” but also given him overall grading of 7, therefore, he did not take any steps to challenge the arbitrary assessment of the Technical Reviewing Officer, as the same stands superseded by the accepting authority.

4. It is the petitioner’s case, while he was working as DIG (Medical) at Composite Hospital, SSB, Tezpur in the month of June, 2016, he learnt about the promotion order dated 26th February, 2016 vide which 7 officers junior to him have been promoted as IG (Medical) which order was followed by a Signal dated 4th March, 2016 from DIG (Central) (Personnel), Directorate. He was not aware of the reasons as to why he has not been promoted. He was of the view that the respondents might have considered the remarks and grading given by his Technical Reviewing Officer without appreciating the fact that the said remarks and grading of the Technical Reviewing Officer stood superseded by the accepting authority and therefore, he submitted a representation dated 27th June, 2016, to respondent no.1, which was duly forwarded vide letter dated 18th July, 2016. Since the petitioner did not receive any reply to his representation dated 27th June, 2016 and reminder thereto dated 7th September, 2016, he submitted another representation dated

21st October, 2016. It was only on 23rd January, 2017, the respondents rejected the petitioner's representation dated 27th June, 2016.

5. Counter-affidavit has been filed by the respondents. The facts are not disputed. On the aspect of non-promotion of the petitioner to the post of IG (Medical) is concerned, it is their case that petitioner was considered by the DPC for promotion from the rank of DIG (Medical) to IG (Medical) for the year 2015-2016. The petitioner's grading for the year 2012-2013 (APAR 10.05.2012 to 09.12.2012) has been examined by the DPC. As per the DPC guidelines issued vide OM dated 10th April, 1989, the DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but it 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 CR may be inconsistent with the grading under various parameters and attributes. Accordingly, DPC considered the APAR of the petitioner in entirety and not merely by overall grading. It is stated during the course of enquiry, it was found that the petitioner was unduly inclined to his female staff and has misused his authority as Head of Office at CH CRPF, Bhopal, i.e., posting a female staff nurse as his Steno (PA) and the male steno to OPD duty. The petitioner also posted a female constable / Masalchi runner instead of constable / peon, who was also available at that time. Considering the gravity

of charges against the petitioner, the DPC formed an opinion about the petitioner not being fit to be promoted to the higher rank. The DPC observed that petitioner was given two below benchmark APAR grading out of four officers who wrote the APAR and TRWO has given him zero (3.66 marks). The DPC also considered that the overall pen-picture of the petitioner as reflected by the TRWO, ADG (Medical) who has categorically mentioned the DG's displeasure in detail in his remarks and accordingly assessed the petitioner by reflecting the true picture of his character. They also referred to DOP&T OM dated 18th February, 2018 in terms of which the benchmark prescribed is adhered to rigorously as one goes up high on the ladder. Therefore, at the Joint Secretary and the Additional Secretary level, the requirement should be of meeting the '*Very Good*' benchmark without fail. Thus, in order to ensure greater selectivity at higher level of administration, the DPC to ensure that for the promotion to the scale of Rs.37,400 – 67,000 + Grade Pay of Rs.10,000/- and above the prescribed benchmark of '*Very Good*' is invariably met in all ACR of five years under consideration. In other words, they justified the non-promotion of the petitioner on the basis of the assessment made by the DPC.

6. A rejoinder has been filed by the petitioner to the counter-affidavit filed by respondents in which the petitioner has filed an Office Memorandum

dated 27th March, 2015 wherein it is stated that the “*displeasure*” is not a penalty enlisted in Rule 11 of the CCS (CCA) Rules and therefore it cannot be considered for denial of promotion.

7. Mr. Nalin Kohli, learned counsel appearing for the petitioner would by drawing the facts as noted above stated that the petitioner could not make representation to the grading given by the Technical Reviewing Officer, as below average, by giving him the overall numerical grading of merely 3.66, as the accepting authority had in any case given him the overall grading of 7, which is “*Very Good*” thinking that the same would not have any affect on the overall grading given by the accepting authority. He concedes to the fact that the representation was given by the petitioner only on 26th July, 2016, which was rejected by the respondents on 23rd January, 2017.

8. Be that as it may, it was his submission that the “*displeasure*” expressed on 4th December, 2012 was wholly unwarranted, since the petitioner was an outsider in CRPF and as in any event he was transferred to SSB on 18th December, 2012, he did not challenge the same especially when he was aware that the same was not a penalty and his performance had already been appreciated by the DG (CRPF). Mr. Kohli requests, by relying

on the following judgments, that the relief as prayed for in the petition, be granted.

1. *Yuvraj Gupta v. Union of India*, 2016 SCC Online Del 3938

2. *Sudhindra Kumar Singh v. Director General, Border Security Force and Ors.* W.P.(C) No. 31991 of 2015 (Y) decided on 27th November, 2017.

3. *State of Haryana v. Central Administrative Tribunal, Chandigarh Bench and Ors.* , CWP. No. 18050/2005, decided on 24th July, 2008.

9. On the other hand Mr. Ravi Prakash, learned counsel appearing for the respondents has reiterated the stand taken by the respondents in their counter-affidavit that the DPC is within its right and is not guided by overall grading, if any that may be recorded in the CRs but to make its own assessment on the basis of the entries in the CRs. He referred to the OM dated 10th April, 1989, in support of his submission. In other words, he stated the DPC having considered the overall material had come to the conclusion that the petitioner is not fit for being promoted. He would rely upon the following judgments in support of his contention:

1. *Union Public Service Commission v. M. Sathiya Priya and Ors.* Civil Appeal No. 10854 of 2014 ;

2. *Sh. N.S. Yadav v. Union of India and Ors.* C.W. 3099/91 and connected case decided on 27th May, 1994;

3. *Chabungbam Ibohal Singh v. Union of India and Ors.* 1995 Supp (2) SCC 83;

4. *Union of India and Anr. v. S.K. Goel and Ors. (2007) 14 SCC 641;*

5. *UPSC v. K. Rajaiah & ors 2005 (10) SCC 15.*

10. Having heard the learned counsel for the parties, the issue which falls for consideration is whether the petitioner was rightly denied promotion. The relevant proceedings have been placed before us and against the petitioner the following has been stated:

<i>Sl. No.</i>	<i>Name</i>	<i>Designation</i>	<i>Medical Category</i>	<i>Recommendation of the DPC</i>	<i>Remarks</i>
2.	<i>Dr. O.P. Nimesh</i>	<i>DIG (Medical)</i>	<i>SHAPE-I</i>	<i>Unfit</i>	<i>Not meeting the benchmark in APAR for the year 2012-13. DG's displeasure in 2012-13</i>

11. From the above it is noted that the two aspects which weighed with the DPC in not finding the petitioner fit for promotion, are; (i) he has not met the benchmark in APAR for the year 2012-2013, and (ii) DG's displeasure in 2012-2013.

12. On (i) above, there is nothing in the proceedings of the DPC, except stating that DPC in terms of guidelines of DoP&T is required to make its own assessment on the basis of entries in the ACR's, to suggest that DPC had made its own assessment on the basis of the entries in the CRs. Had it been

so, it should have depicted in what manner, the petitioner has not met the benchmark. Such an expression, surely would have made the decision more transparent. We also find that the DPC had considered the displeasure communicated to the petitioner on 4th December, 2012 for declaring the petitioner unfit for promotion. As per the DOP&T OM dated 27th March, 2015, which was in place when the DPC was held on 15th July, 2015, it is clear that, “displeasure” is not a penalty enlisted in Rule 11 of the CCS (CCA) Rules, 1965 and it could not have been considered for denying promotion. The relevant part of OM dated 27th March, 2015 is reproduced as under:-

“No.I.45026/01/2015-Pers.III

Government of India

Ministry of Home Affairs

North Block, New Delhi

Dated the 27th March, 2015

OFFICE MEMORANDUM

Subject: Instructions regarding the effect of award of DG’s displeasure of officers of the Central Armed Police Forces.

The undersigned is directed to refer to this Ministry’s letter No.I.45026/25/87-Pers-II dated June 1989 on the subject mentioned above and to issue the following fresh instructions in supersession of the aforesaid letter:-

(i) *Displeasure is not a penalty enlisted in Rule 11 of CCS(CCA) Rules, 1965 and therefore it cannot be considered for denial of promotion,*

(ii) *If a Displeasure or warning has been given to an officer / Member of the CAPF, the Reporting / Reviewing / Accepting Authority, while writing the Annual Performance Assessment Report (APAR), should take this into consideration and decide to reflect or not to reflect the same based on the improvement or otherwise noticed in the person after receipt of the displeasure or warning.*

(iii) *Once the APAR of an officer or member of the CAPF is finalized for the year or the date for finalizing such APAR is over, the displeasure or warning conveyed will become infructuous.*

2. *These revised instructions will take effect from the date of issue of this OM. In no case, cases settled before issue of this OM in the light of the instructions dated June 1989 in vogue till now, will be reopened.”*

13. Hence the two aspects which weighed with the DPC are clearly untenable and could not have resulted in the petitioner not being recommended for promotion to the post of IG (Medical). It appears, the stand of the respondents, in the counter affidavit, is an after thought only to wriggle out of an unreasoned decision taken to deny promotion to the petitioner.

14. In so far as the judgments relied upon by Mr. Prakash are concerned, in the case of *Union of India and Anr. V. S.K. Goel (supra)*, the Supreme Court held that the DPC should make its own overall assessment of all the relevant confidential reports of all the eligible officers who were being considered. In other words, the DPC enjoyed full discretion to devise its method and procedure for objective assessment of suitability and merit of the candidate being considered by it. It also held DPC proceedings / recommendations should not be interfered with unless such meetings are conducted illegally or in gross violation of standing government instructions and rules or there is mis-grading of confidential reports. There is no dispute on the said proposition of law. In the case in hand, the decision of the DPC does not reflect application of mind and is also contrary to OM dated 27th March, 2015, as “*displeasure*” could not have been considered by the DPC to deny promotion to the petitioner.

15. Insofar as the judgment of the Supreme Court in the case of *M. Sathiaya Priya and Ors. (supra)* as relied upon by Mr. Prakash for similar proposition of law is concerned, the same is also not applicable in the facts of this case for the reasons already stated above. Mr. Prakash had relied upon the judgments of the Supreme Court in *UPSC v. K. Rajaiah & Ors (supra)* and *R.S. Yadav vs. UOI & ors (supra)* for similar proposition, which

proposition, according to us is not in dispute, but in view of our conclusion above, the same have no applicability. We are of the view that the DPC proceedings held on 15th July, 2015 are illegal to the extent that petitioner was found unfit for promotion. The same are set aside to that extent. A review DPC shall be convened by the respondents for considering the case of the petitioner for promotion to the post of IG (Medical) within a period of eight weeks from the receipt of the copy of judgment and assess the petitioner by giving reasons strictly in accordance with rules and instructions. If the petitioner is found fit for promotion as IG (Medical), the same shall relate back to 4th March, 2016, the date from which Officers junior to the petitioner have been promoted with all consequential benefits. The pay of the petitioner shall be fixed on national basis on such promotion. The petition is allowed. No costs.

V. KAMESWAR RAO, J

CHIEF JUSTICE

OCTOBER 22, 2018/jg