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

+ **W.P.(C) 3585/2019**

RAJESH RAI

..... Petitioner

Through: Mr. Shreenath A. Khemka, Advocate.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Vinod Diwakar, CGSC with
Mr. Pratyush Miglani, Advocate.

+ **W.P.(C) 6087/2019**

RAJ KUMAR

..... Petitioner

Through: Mr. Shreenath A. Khemka, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Thakur Virender Pratap Singh
Charak with Ms. Shubhra Parashar,
Mr. Pushpender Singh Charak,
Mr. Kapil Gaur and Mr. Vinod Tiwari,
Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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11.12.2019

Dr. S. Muralidhar, J.:

1. These are two petitions which raise similar questions and are accordingly being disposed of by this common judgment.

2. W.P. (C) 3585 of 2019 is by Rajesh Rai who seeks the expunction of the below benchmark Annual Confidential Report ('ACR') for 2005-06 and the grant of non-functional financial upgradation ('NFU') with effect from 1st July, 2008.

3. W.P. (C) 6087 of 2019 is by Raj Kumar, who seeks expunction of his below benchmark ACR for 2004-05 and grant of NFU with effect from the same date i.e. 1st July, 2008.

4. At the outset, learned counsel for the Petitioners states that although they have challenged Clause 2 of the OM dated 6th January, 2010 and Clause 1 of the OM dated 13th April, 2010 as being violative of the Article 14 of the Constitution, as well as the fitness criteria of the Departmental Promotion Committee ('DPC'), they do not press those reliefs in these petitions.

5. This is the second round of litigation involving the Petitioners.

6. The facts as far as Rajesh Rai, the Petitioner in W.P.(C) 3585 of 2019 is concerned, are that he was serving as a member of the Border Roads Engineering Services in 1993. For the year 2005-06 in his ACRs, the marks given to him by the Initiating Officer ('IO'), the Reviewing Officer ('RO') and the Accepting Officer ('AO') were 7, 8 and 7 respectively. 7 was below the benchmark.

7. It is only on 28th July, 2010 that the below benchmark grading and the ACR was first communicated to Rajesh Rai. On 10th August 2010, Rajesh

Rai made a representation to the Secretary, Border Roads Development Board ('BRDB'), which came to be rejected on 9th May, 2011 by a non-speaking order. Interestingly, the said order dated 9th May, 2011 was an omnibus one rejecting representations of as many as 8 officers against their below bench mark grading in their ACRs. Meanwhile, the DPC which met in 2010 finalized the grant of NFUs. The DPC that was held on 1st August, 2011 marked Rajesh Rai as unfit for the above NFU, since his ACR for 2005-06 was retained as 'Below Bench Mark.'

8. On 4th March 2013, Rajesh Rai made a fresh representation pointing out that 4 out of 5 of his ACRs were above benchmark. When this representation was not disposed of, he filed W.P. (C) 5780 of 2013 in this Court. By a judgment dated 11th September, 2013, this Court directed the Respondents to pass a fresh speaking order.

9. For the second time on 2nd December, 2013 the Respondents rejected Rajesh Rai's representation by not actually dealing with the merits of his below benchmark grading. The stand taken by them was that the grading in his ACRs was not open to judicial review. By an order dated 19th December, 2013, Rajesh Rai was granted NFU with effect from 1st April, 2010 since the ACR for 2005-06 was no longer part of the consideration before the new DPC.

10. After the Guwahati High Court allowed writ petitions of similarly placed persons in W.P.(C) Nos. 456 (AP) of 2011 and 2494 of 2011, Rajesh Rai made yet another representation on 4th February, 2014. By an order dated 9th

June, 2014 the said representation was rejected by stating that there was no provision for reconsideration of 'below benchmark grading' given in the ACR.

11. Rajesh Rai filed another representation seeking a Review DPC by a letter dated 24th June, 2014 pointing out that the DPC that met in 2010 could not have arbitrarily changed the fitness criteria from what was being followed by the UPSC and the past DPCs.

12. After another judgment of the High Court of Guwahati in W.P. (C) 2136 of 2016 Rajesh Rai made yet another representation on 27th February, 2019 praying for a Review DPC to be constituted. Thereafter, the present petition came to be filed.

13. Now turning to W.P. (C) 6087 of 2019, the facts are that the Petitioner Raj Kumar has been serving as a member of the Border Roads Organization ('BRO') since 19th April, 1993. He was expecting his NFU in the pay band of INR 37,400-67,000 with Grade Pay of INR 8700 with effect from 1st July, 2008. A DPC was constituted in 2010 for that purpose.

14. In his ACR for 2004-05 the marks awarded by the IO, RO and AO were 7, 8 and 7 respectively. It was noted that although the RO had upgraded Raj Kumar's grading to 8 on the ground that Raj Kumar had been very good in his performance, the AO while recording more or less the same qualitative attributes as the RO, downgraded him to 7 without assigning any reason. Raj Kumar was not informed about such downgrading at the relevant time and

the same was communicated to him only on 28th July, 2010 i.e. after more than 5 years.

15. Upon receiving the aforesaid communication, Raj Kumar made a representation on 13th August, 2010, which was rejected by an omnibus order dated 9th May, 2011. After the judgment of this Court on 11th March, 2013 in W.P. (C) 5780 of 2013, Raj Kumar made a fresh representation. This was dismissed by a letter dated 2nd December, 2013 without actually examining the merits of the downgrading.

16. Ultimately, Raj Kumar was granted NFU with effect from 1st April, 2010 through an Office Order dated 19th December, 2013 after the ACR for 2004-05 was no longer part of consideration.

17. Raj Kumar, however, made a further representation dated 13th January, 2014 for seeking Review DPC for grant of NFU with effect from July, 2008, which was rejected by the Respondents by a letter dated 2nd December, 2013.

18. After the judgments of the Guwahati High Court referred to hereinbefore, a fresh representation was made by Raj Kumar in 2014 and another on 31st August, 2015. By a letter dated 18th September, 2015 the prayer was rejected. The last representation sent on 29th April, 2019 was also rejected and that is how the present petition has been filed.

19. This Court has heard the submissions of Mr. Shreenath A. Khemka, learned counsel appearing for the Petitioners, Mr. Vinod Diwakar, learned
W.P.(C) 3585/2019 and W.P.(C) 6087/2019

CGSC and Mr. Thakur Virender Pratap Singh Charak, learned counsel for the Respondents.

20. The Court has examined the relevant ACR in each case. As far as the ACR for the period 10th May, 2005 to 17th March, 2006 in the case of Rajesh Rai (the Petitioner in W.P.(C) 3585/2019), the IO's comments were as under:

“Officer is of calm and quite in nature. Officer will have to move pain and responsibility in disposal of official works & preparation of estimate (loads & bridges) building of planting as other official correspondence. Timely submission of report and returning as others required documents from highest function should be reasoned. Over all grading is Good.”

21. The IO gave the Petitioner a grading of 7. The ACR then travelled to the RO who stated as under:

“Well cultured, calm and willing officer. He is having sufficient experience and (illegible) of his profession. He is responsible and hardworking as well as having aptitude for work. He is (illegible). He performed to his capabilities and duly contributed. His overall performance is graded 'Very Good'.”

22. The ACR was next seen by the AO who noted:

“An intelligent and hardworking officer was adequate professional knowledge. His performance as 2I/C TF was satisfactory and I grade him Good”

23. It is seen that while the RO enhanced the grading to 8, the AO despite concurring with the RO, and without giving any reasons lowered it to 7.

24. In the considered view of the Court the lowering of grading to 7 by the AO was contrary to the settled legal position that the AO has to give reasons if he did not agree with the RO. Strangely, the AO on the one hand seems to be agreeing with the RO already having enhanced the grading, and on the other, he has not given any reason for lowering the grading from 8 to 7.

25. The Court has also perused the ACR of Raj Kumar for the relevant period i.e. 1st April, 2004 to 2nd January, 2005. The remark of the IO was as under:

“An officer with sound professional knowledge. Who takes adequate interest in the assigned tasks.

As officer in charge of RCC, his performance has been good.

Overall grading good.”

26. With the aforesaid remarks, the IO gave the Petitioner a grading of 7. The RO then noted the following remarks:

“An energetic, sincere and hard-working officer, whose performance during the period has been very good.”

27. The RO gave him a grading of 8. The AO in effect agreed with the RO and stated as under:

“A hardworking officer who has effectively commanded the RCC the overall performance of the officer has been good.”

28. The AO downgraded the Petitioner's grading from 8 to 7 without giving reasons.

29. The Court is of the view that in both the cases of Rajesh Rai and Raj Kumar the AO acted irrationally. There was no justification in arbitrarily reducing the grading in both cases when the AO was in fact in agreement with the RO, who had assessed the 2 Petitioners as 'very good' and graded them accordingly.

30. Relevant to the case at hand is a judgment dated 18th March, 2019 of a Division Bench of the Punjab and Haryana High Court in CWP 317/2019 (O&M) (*Dr. Ashok Khemka v. State of Haryana and Ors.*), where in similar circumstances the Court observed as under:

“13. We are of the considered view that the remarks recorded by the Accepting Authority are liable to be expunged. The Accepting Authority has recorded that Reviewing Authority has differed with the Reporting Authority but not given any reason for the same. However, the same is found to be absolutely incorrect as the Reviewing Authority has given brief reasoning recording that the petitioner is well known in the country for effective professional integrity under very difficult circumstances. Even Accepting Authority has not made any adverse remarks regarding the integrity of officer.

14. Reference has been made to 'excellent achievements under severe constraints'. It has also been mentioned that he is very innovative and has immense potential which can be utilized better by government. The Accepting Authority has recorded that the Reviewing Authority or the officer himself has not specified any constraint what to talk of 'severe constraints'.

.....

17. Consequently, we are of the considered view that leaving aside the time frame, the opinion of the Accepting Officer is liable to be expunged and so is the grading which is given 9.00 by the Accepting Authority. At the same time, we are of the view that the time frame fixed under the Rule for recording

PAR is not a water tight compartment and there can be some flexibility in the same. Further it comes out that the Accepting Authority has not decided the representation of the petitioner so far.”

31. Learned counsel for the Respondents sought to urge that the petition was barred by laches and that repeated representations would not give a fresh cause of action. Learned counsel for the Respondents referred to a judgment dated 24th August, 2017 of this Court in W.P.(C) 7265 of 2017 (***Mukul Kumar Misra v. Union of India***) where the petition was dismissed on the ground of delay and laches.

32. The Court finds that both the Petitioners here had in fact approached this Court at the earliest point in time after the ACRs having the below benchmark grading were communicated to them and their representations against them were rejected by an omnibus order. It is not open to the Respondents to contend that their claims are barred by laches, when binding orders which were issued by this Court in the Petitioners’ very cases have not been followed in letter and spirit by the Respondents. Despite the orders of this Court, the Respondents did not review the cases of the Petitioners on merits, but reiterated the earlier decision on the ground that they were beyond the pale of judicial review.

33. In the counter-affidavit filed on behalf of the Respondents, it is suggested that by the time the representations had been considered, both the RO and AO of the relevant year, had already left service and were not available and, therefore, the grading could not be reviewed. The Court finds

this excuse to be unacceptable. The Respondents cannot refuse to review the grading only because the officers who made the remarks and gave the grading are no longer in service. There has to be some other mechanism for dealing with such situation. The Petitioners cannot be left remediless.

34. For the reasons aforementioned, the Court expunges the below benchmark grading given in both cases in the respective ACRs for the years 2004-05 and 2005-06 and directs that in both cases the grading given by the Reviewing Officer shall be restored. The NFU will be positively granted to each Petitioner with effect from 1st July, 2008 as prayed for by each of them.

35. Both writ petitions are allowed in the above terms with no orders as to costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 11, 2019

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