

\$~4

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

+ **W.P.(C) 10370/2015**

COMMANDANT V.S. SHEKHAWAT Petitioner

Through: Ms. Jyoti Dutt Sharma and
Mr.C.K.Bhatt, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr.Rajesh Gogna with Mr.
Kamaldeep and Mr. P.Upendra Sai,
Advocates for BSF.
Insp. Manohar Vishwakarma, BSF.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
% **03.09.2019**

Dr. S. Muralidhar, J.:

1. The Petitioner has approached this Court with this writ petition challenging an Office Memorandum (OM) dated 28th March, 2006 issued by the Department of Personnel & Training (DoPT), Ministry of Personnel, PG & Pensions, Government of India on the subject of ‘communication of adverse entries/remarks recorded in the Annual Confidential Report (ACR)’.

2. The petition also challenges the orders passed on 17th April, 2014 by the Deputy Inspector General (Confid.) (DIG) of the Border Security Force (BSF) and 4th December, 2014 passed by the DIG rejecting the Petitioner’s representations dated 26th December, 2013 and 2nd July, 2014 seeking up-gradation in the ACR for the period 2002-03. The third prayer is for a

W.P.(C) 10370/2015

Page 1 of 14

mandamus to the Respondent to hold a review Department Promotion Committee (DPC) meeting and grant the consequential promotions to the Petitioner with enhanced notional seniority in the rank of Second-in-Command (2IC) and Commandant.

3. The facts in brief are that the Petitioner joined the BSF in the rank of Assistant Commandant (AC) on 5th October, 1987 and was subsequently promoted as Deputy Commandant (DC) in July, 1998. The Petitioner was promoted to 2IC on 21st May, 2007 and in 2011, he was promoted as Commandant. At the time of filing the writ petition, he was posted at Frontier HQ, Gandhinagar, Gujarat.

4. It is stated that the BSF Recruitment Rules, 2001 stipulated Mandatory Field Service (MFS) for its officers to be eligible for further promotions. It is averred that there was arbitrariness in deputing officers for undergoing the MFS. Some of them, like the Petitioner, who were not deputed to the MFS, suffered by not getting further promotions for which the MFS was a pre-condition. It is stated that this was questioned in W.P (C) No. 9568 of 2008 filed in this Court, which came to be disposed of on 20th October 2009 by an order that eliminated the requirement of MFS for further promotion.

5. The Petitioner states that as a result of his not being sent for MFS, he too was superseded in promotion to the rank of DC and 2IC by his juniors for the years 2004-05, 2005-06 and 2006-07. It is stated that the Petitioner's case for notional promotion as 2IC was considered at the DPCs held on 19th April 2005, 1st April, 2005 and 7th March, 2006 for the vacancy years 2004-

05, 2005-06 and 2006-07 respectively. The Petitioner was informed that after considering his record from 1998-99 to 2004-05, the DPC had graded him 'unfit' as he did not make the required bench mark.

6. At this stage it is required to be noticed that by a letter dated 23rd October, 2003 the Petitioner was made aware about an adverse remark in his ACR for 2002-03. The Petitioner made a representation against the said adverse remarks. By a letter dated 9th March, 2004 the Petitioner was informed that his case was considered at the North Bengal 40th Headquarter of BSF and that the competent authority had expunged the adverse remarks recorded in the ACR for the year 2002-03.

7. Interestingly, the Petitioner was not informed that he had been downgraded on the basis of above adverse remarks for 2002-03. According to the Petitioner, barring the above period, all his grades in his ACRs were in the range of 'good' to 'outstanding'. When the Petitioner learnt about not making the bench-mark in the review DPC held in August 2013, he made a representation on 26th December, 2013 for upgradation of his ACR for the year 2002-03 for which year, the adverse remarks in his ACR stood expunged.

8. By the first impugned letter dated 17th April 2014, the DIG rejected the representation stating that in terms of OM dated 21st March, 2006 there was no need to communicate the overall grading given in the ACR, even if it was below the bench-mark prescribed for promotion to the next higher grade. It was further stated that 'the overall grading recorded in the ACR may not be

changed in any way even after expunction of the adverse remarks either fully or partially by the competent authority'. It was further stated that prior to DoPT OM dated 13th April 2010, only adverse remarks in the ACR were required to be communicated, which was done in this case. Accordingly, it was concluded that 'the representation does not qualify for upgradation of his grading'.

9. The Petitioner made a further representation on 1st May, 2014 which was replied to on 20th June, 2014. A third representation was made to the Secretary in the Ministry of Home Affairs (MHA) on 2nd July, 2014. This again stood rejected by the second impugned order dated 4th December, 2013 by the DIG, which again only referred to the OM dated 28th March, 2006.

10. The Petitioner states that when he applied under the RTI Act, seeking the real reason for the rejection of his representations, he was not provided with such information. It is in the above circumstances that the present petition seeking the above reliefs came to be filed.

11. Pursuant to the notice issued in the present petition, a counter affidavit has been filed by the Respondents in which the basic facts as averred in the petition have not been denied. The stand of the Respondents is that the DoPT OM dated 13th April 2010, required only adverse ACR to be communicated and that this was done in the present case.

12. Before this Court, learned counsel for the Respondents has placed reliance on the “APAR Procedure and Instruction 2012”, issued by the BSF. There are two distinct portions of these instructions which are relevant to the present case. Para 3.9 deals with “Part VI Pen Picture of the Officer” which indicates what should not be included in Pen Picture. *Inter alia*, it states that the Pen Picture should include the following:

“(i) Reasons for awarding lower than average marks by the Initiating/Reporting and Reviewing officer.

(ii) Any outstanding qualities and achievements or significant weakness.

(iii) Reasons for saying that he has reached his ‘ceiling’ or ‘limit’.”

13. It further proceeds to state what shall not be included in the Pen Picture, which reads thus:

“(i) Facts relating to pendency of COI/SCOI/ROE/GSFC and vigilance cases

(ii) Facts relating to failure in courses

(iii) Facts relating to award of displeasure, warning, caution and advice of superior except when despite such warning etc, the officer has not improved

(iv) Any other statement of acts like award of punishment, etc.

(v) Remarks like “Doubtful character”, complaints received about his taking illegal gratification”

14. The second para that was pointed out by learned counsel for the Respondents reads as under:

“13.3 The responsibility of the Initiating/Reporting and Reviewing Officers in this regard cannot be over emphasized. It has been seen that gradings are sometimes given in a reckless and irresponsible manner. To ensure proper checks and balances, certain modifications have been introduced in the revised APAR from which would give an insight into the factual position to the Initiating/Reporting and Reviewing Officers while making an objective appraisal of the work and conduct of the officer reported upon.”

15. It must be noticed that the remarks made in the Petitioner's ACR for 2002-03 stood expunged and the only question that was required to be addressed was whether his downgrading was also required to be consequently changed. A plain reading of the above paragraphs of the Instruction Manual shows that they are silent on whether upon expunction of the adverse remarks in the ACR, the grading is also required to be changed.

16. The Court is, therefore, unable to discern the instructions as making a clear distinction between remarks in an ACR and the consequential grading. The stand taken by the Respondents stems from the OM dated 28th March, 2006, which is not consistent with the law declared by the Supreme Court in judgments subsequent to the said OM. The said OM reads as under:

“Subject: Communication of adverse entries/remarks recorded in the ACR.

The undersigned is directed to state that in accordance with the existing instructions of this Department, adverse entries/remarks recorded in the ACR of the official have to be communicated to him for further improvement in his performance and the official concerned has also an option to make a representation against the adverse remarks within the prescribed time limit. According to the existing instructions, the

overall grading given in the ACR should however, not be communicated even when the grading given is below the bench mark prescribed for promotion to the next higher grade. The overall grading recorded in the ACR has also not to be changed in any way even after the expunction of the adverse remarks either fully or partially by the competent authority.

The Hon'ble Supreme Court has declared in its judgement, dated 22.11.2005 in *UOI and Anr. Vs. Major Bahadur Singh* (Civil Appeal No. 4482 of 2003) that the 'judgement of the court, dated 31.01.1996 in *UP Jal Nigam and Ors. Vs. Prabhat Chandra Jain and Ors* SLP (Civil) No.16988/95 has no universal application and the judgement itself shows that it was intended to be meant only for the employees of UP Jal Nigam.

All Ministries/departments are accordingly requested to ensure that any challenge to the existing instructions of this Department in regard to the communication of adverse remarks in any court taking shelter in the Supreme Court judgment in *UP Jal Nigam* or any other judgment based on *UP Jal Nigam* judgment is properly defended keeping in view the above declaration of the Supreme Court in *UOI vs. Major Bahadur Singh*.”

17. It must be noted that the judgment of the Supreme Court in *UP Jal Nigam v. Prabhat Chandra Jain (1996) 2 SCC 363* referred to in the above OM was distinguished by the Supreme Court in *Dev Dutt v. Union of India (2008) 8 SCC 725*. There, the Supreme Court made it explicit that “every entry must be communicated to the employee concerned, so that he may have an opportunity of making a representation against it if he is aggrieved”. The Supreme Court rejected the contention of the Respondent Union of India that only an adverse entry needs to be communicated to an employee. The Supreme Court emphasized that it was not the nomenclature that was

relevant, but the “effect which the entry is having which determines whether it is an adverse entry or not”. In particular, it was pointed out that “the grant of ‘good’ entry is of no satisfaction to the incumbent if it in fact make it ineligible for promotion or has an adverse effect on his chances”.

18. In paras 13 to 18 of the decision in *Dev Dutt v. Union of India* (*supra*) it was held as under:

“13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a ‘good’ or ‘average’ or ‘fair’ entry certainly has less chances of being selected than a person having a ‘very good’ or ‘outstanding’ entry.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding
- (ii) Very Good
- (iii) Good
- (iv) Average
- (v) Fair
- (vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the concerned authority.

15. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit).

16. In our opinion if the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration.

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 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.”

19. Subsequently, a three judge bench of the Supreme Court in ***Sukhdev Singh v. Union of India AIR 2013 SC 2741*** considered the issue and in para 8 held as under:

“In our opinion, the view taken in ***Dev Dutt*** that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.”

20. Consistent with the view expressed in ***Dev Dutt*** (*supra*), the DoPT issued an OM dated 13th April 2010, which reads as under:

“Subject: Below Benchmark grading in ACRs prior to the reporting period 2008-09 and objective consideration of representation by the competent authority against remarks in the APAR or for upgradation of the final grading.

The undersigned is directed to say that prior to reporting period 2008-09, only the adverse remarks in the ACRs had to be communicated to the concerned officer for representation, if any to be considered by the competent authority. The question of treating the grading in the ACR which is below the benchmark for next promotion has been considered in this Department and it has been decided that if an employee is to be considered for promotion in a future DPC and his ACRs prior to the period 2008-09 which would be reckonable for assessment of his fitness in such future DPCs contain final grading which are below the benchmark for his next promotion before such ACRs are placed before the DPC, the concerned employee will be given a copy of the relevant ACR for his representation, if any, within 15 days of such communication. It may be noted that only below benchmark ACR for the period relevant to promotion need be sent. There is no need to send the below benchmark ACRs of other years.

2. As per existing instructions, representations against the remarks or for upgradation of the final grading given in the APAR (previously known as ACR) should be examined by the competent authority in consultation, if necessary, with the Reporting and Reviewing Officer, if any. While considering the representation, the competent authority decides the matter objectively in a quasi-judicial manner on the basis of material placed before it. This would imply that the competent authority shall take into account the contentions of the officer who has represented against the particular remarks/grading in the APAR and the view of the Reporting and Reviewing officer if they are still in service on the points raised in the representation vis-à-vis the remarks/grading given by them in the APAR. The UPSC has informed this Department that the Commission has observed that while deciding such representation, the competent authorities sometimes do not take into account the view of Reporting/Reviewing Officers if they are still in service. The Commission has further observed that in a majority of such cases, the competent authority does not give specific reasons for

upgrading the below benchmark ACR/APAR grading at par with the benchmark for next promotion.

3. All Ministries/Departments are therefore requested to inform the competent authorities while forwarding such cases to them to decide on the representations against the remarks or for upgradation of the grading in the APAR that the decision on the representation may be taken objectively after taking into account the views of the concerned Reporting/Reviewing Officers if they are still in service and in case of upgradation of the final grading given in the APAR, specific reasons therefor may also be given in the order of the competent authority.”

21. It will thus be seen that the above OM dated 13th April 2010 makes it clear that if an employee is to be considered for promotion ‘in a future DPC’ and his ACRs prior to 2008-09 are to be reckoned for assessment of his fitness and contain a final grading which is below the benchmark for the next promotion, then such employee has to mandatorily be given a copy of the relevant ACRs to enable him to make a representation.

22. In the present case, admittedly the Petitioner was given only a copy of the adverse remarks and not the ACR containing the below benchmark grading at the relevant time. This deprived the Petitioner of an opportunity to seek an upgradation of his ACR, as he was not made aware of that fact. He could not have anticipated that such grading would affect his future promotion.

23. Nowhere in the counter affidavit is any valid explanation given by the Respondents for not applying the above OM dated 13th April 2010 except to state that it is prospective and not retrospective. This is a plain misreading of

the para 1 of the above OM which makes is abundantly clear that the below benchmark grading in an ACR prior to 2008-09 which was going to affect an employee's future promotion has to be mandatorily be communicated to him. Therefore, the stand taken by the Respondent in relation to the OM dated 13th April, 2010 is plainly erroneous.

24. The OM dated 28th March, 2006 ought not to be resorted to by the Respondent any longer, since the law in this regard has been made abundantly clear by the decisions of the Supreme Court in ***Dev Dutt*** (*supra*) and ***Sukhdev Singh*** (*supra*). The Court, therefore, has no hesitation in holding that the OM dated 28th March, 2006, to the extent that it is inconsistent with the law declared by the above decisions is no longer valid and cannot be relied upon by the Respondents to deny the employee concerned an opportunity of making a representation against a below benchmark grading, which has the potential of affecting his or her future promotions.

25. For the aforementioned reasons the Court hereby quashes the decision communicated to the Petitioner by the impugned orders dated 17th April, 2014 and 4th December, 2014 rejecting his representations whereby he was seeking upgradation of his ACR for 2002-03.

26. A direction is now issued to the Respondents to hold a review DPC to consider the Petitioner's prayer of upgradation of his ACR/APAR of 2002-03 consequent upon the expunction of the adverse remarks therein. This exercise be completed within a period of six weeks from today. Within a

further period of four weeks thereafter, orders will be issued granting the notional seniority with reference to the promotion to the Petitioner to the ranks of 2IC and Commandant and this should be communicated to the Petitioner not later than two weeks thereafter. All consequential benefits will enure to the Petitioner. The petition is allowed with the above directions.

27. Copy of the order be given *dasti*.

SEPTEMBER 3, 2019

mr

S. MURALIDHAR, J.

TALWANT SINGH, J.