

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Date of Decision: 21st December, 2020**

+ **W.P. (C) 3533/2020**

SANJEEV DHUNDIA

..... Petitioner

Through: Mr. Ankur Chhibber, Mr.
Anshuman Mehrotra, Mr. Harsh
Dhankar and Mr. Nikunj Arora,
Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Ms. Nidhi Raman, CGSC for R-1 to
R-3/UOI

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE ASHA MENON

1. The present petition has been filed by the petitioner, a Deputy Inspector General (DIG) in the Central Reserve Police Force (CRPF), under Article 226 of the Constitution of India against the recording of his Annual Performance Assessment Report (APAR) by the respondents, particularly the respondent No. 4, with the following prayers:

“(a) Issue a writ of certiorari for quashing of the APAR for the period 01.04.2018 to 31.03.2019 to the extent whereby adverse remarks have been given to the petitioner and of the order dated 08.05.2020 whereby the representation dated 03.10.2019 of the petitioner with

respect to the expunction of untenable remarks and upgradation of grading in the APAR for the period 2018 – 2019 was rejected;

(b) Issue a writ of mandamus directing the respondents to upgrade the grading and to expunge the adverse remarks for the relevant period i.e. 01.04.2018 to 31.03.2019 and to grant all consequential benefits in light of the expunged remarks and revised grading; and

(c) Pass any such orders as the Hon'ble Court may deem fit in the light of above mentioned facts and circumstances of the case.”

2. The petitioner joined the CRPF in December, 1987 as an Assistant Commandant. The petitioner claims that due to his hard work, he had always received very good performance evaluations and had also received regular promotions in due course. In 2009, he was promoted to the rank of DIG. He has an unblemished service of more than 31 years in the Force. He had been appreciated by not only the higher authorities, including the Inspector General of Police, CRPF, but also by the President of India for his meritorious work. Since the assessment year 2010-2011 he has been graded “Outstanding”.

3. On 16th January, 2017, the petitioner was posted to West Bengal Sector as DIG and served as the DIG (Adm) of the sector for nearly 6 months after which he took charge as DIG (Ops/Int & Trg) for the remaining period of the year 2017-2018. During this period, he was the 2nd senior most officer in the sector after the Inspector General and according to him, had performed his duties most creditably. However, when in terms of the guidelines of the DoPT contained in OM dated 14th May, 2009, the petitioner received his APAR for the period 1st April,

2017 to 31st March, 2018 on 2nd April, 2019, he realised that he had been callously awarded 7.1 marks out of 10 by the Reporting and Reviewing Authorities in all attributes/traits. The petitioner had been graded as “Very Good” though certain adverse remarks like, lack of initiative, weak interpersonal relations, etc., were recorded by the Reporting Officer/respondent No.4, which were incompatible with the marks and grading. No prior warning/advisory had been issued to the petitioner by the respondent No.4 before these adverse remarks were recorded by him in the petitioner’s APAR. Thus, this improper recording of the APAR for the year 2017-2018 disclosed the bias that the respondent No.4 had against the petitioner. The Accepting Authority however, graded him “Outstanding”. The petitioner, nevertheless filed an appeal for expunction of the adverse remarks and which he submitted on 4th April, 2019 to the Home Secretary, Ministry of Home Affairs (MHA) and which was accepted vide order issued on 7th January, 2020.

4. The petitioner states that the respondent No. 4 and he had a very strained relationship. It is further averred in the petition that on 28th June, 2019, the respondent No.4 sent a complaint against the petitioner accusing him of abusing and physically assaulting his staff and the very next day, i.e., on 29th June, 2019, with the same mindset, wrote his APAR for the period 1st April, 2018 to 31st March, 2019, grading him 5.8 marks out of 10, i.e., “Good”. Certain adverse remarks were also recorded by him. Unfortunately, the Reviewing Officer and Accepting Authority also affirmed these observations. Once again, no advisory/warning had been issued to the petitioner before the recording of such adverse entries. The petitioner, once again, filed his representation dated 3rd October, 2019 to

the Home Secretary, MHA, for expunction of the adverse remarks and the lower grading recorded in the APAR for the period 2018-2019 and for upgrading the grading level which also was rejected by the MHA vide the order dated 8th May, 2020. Hence the present petition.

5. The learned counsel for the petitioner submitted that the recording of the APAR by the respondent No. 4 was against all guidelines issued by the Government in this regard and against the law laid down by the courts. Relying on Swamy's Compilation and the Standing Order No. 56/2001 with regard to the preparation and maintenance of annual confidential reports of officers, he submitted that before recording of lower grading such as "Average" or other adverse remarks, the individual should be suitably advised in writing well in advance, so that the officer had an opportunity to improve himself over the period of one year. It was also argued that an incident that had allegedly occurred after the period for which the APAR was to be recorded, could not be considered for assessing an officer in a given year. Therefore, the complaint in respect of an incident that occurred in June, 2019 could not have been considered while recording the APAR for the year 2018-19. Therefore, procedurally too, the recording was faulty and bias was writ large in the recording of the APAR of the petitioner and the same was required to be set aside. Reliance has been placed on the judgements of the Supreme Court in *M.A.Rajasekhar v. State of Karnataka*, (1996) 10 SCC 369 and *State of UP v. Yamuna Shanker Mishra and Another*, (1997) 4 SCC 7 and *Sukhdeo v. Commissioner Amravati Division* (1996) 5 SCC 103 and the judgement of the Delhi High Court in *SK Sharma v. Union of India and others*, 2015 SCC OnLine Del 13399.

6. Ms.Nidhi Raman, learned counsel submitted on behalf of the respondents that the petitioner's case had no merit. It was submitted that it was in order to eliminate possibility of bias that a three-tier system of assessment was in place. It was submitted that the Standing Orders had been fully complied with while recording the APAR of the petitioner. A time schedule was prescribed for recording of APAR upto 30th June and 29th June was well within this time, and nothing could be attached to this fact that the APAR was recorded on that date. Since the incident had occurred on 13th June, 2019, notice of it could have been taken by respondent No.4 while recording the APAR. It was also submitted that in the entire petition, nowhere has the petitioner given an explanation for his misconduct though he had in fact apologized to the constables with whom he had misbehaved. Moreover, vide two communications dated 7th August, 2018 and 14th August, 2018, the petitioner had been given opportunities to improve himself. This was also due compliance of the guidelines. She distinguished all the cited case laws on facts and submitted that if the petitioner had doubts about the fairness of his Reporting Officer, he could have made a complaint to the superior officers for being assessed by some other officer. But the petitioner had made no such complaint. She therefore prayed that the petition be dismissed.

7. These contentions were, however, countered by learned counsel for the petitioner by submitting that the two letters cited by the learned counsel for the respondents, were not memos or advisories and were only intended to assess work done. Even in these letters, no specific area was pointed out to the petitioner by the respondent No.4, where his work was

found unsatisfactory. As regards the vague remark that the petitioner had no control over anger, once the petitioner was found to be of SHAPE 1, his psychological condition could not be in doubt. Though it has not been filed, the learned counsel for the petitioner informed this Court, that the petitioner had been assessed as “Outstanding” for the subsequent year as well. Thus, except for the period during which the respondent No.4 was his Reporting Officer, his APAR had remained “Outstanding” and it was not logically possible that his efficiency would have plummeted to “Good” from “Outstanding” and then the very next year skyrocketed again to “Outstanding”.

8. It would be useful to refer to Swamy’s Compilation on confidential reports of central government employees, placed on record by the petitioner. While cautioning that the “main focus of the Reporting Officer should be developmental, rather than judgemental”, it states the object of recording the Annual Performance Assessment Report (APAR) in the following words:

“4.Thus the system of APAR has two principal objectives. First and foremost is to improve the performance of the subordinate in his present job. The second one is to assess his potentialities and provide him appropriate feedback and guidance for correcting his deficiencies and improve his performance.”

9. It is therefore clear that APAR is not meant to fix officers so that their future career is jeopardized. Rather, it is intended to inform them how well or otherwise they have performed the job assigned and plan

their career development in a systematic manner, so that when they come to know their defects they can take remedial measures.

10. No doubt, the Supreme Court in ***Sukhdeo (supra)*** was dealing with a case of compulsory retirement. However, some of its observations regarding adverse remarks and the principles of natural justice can be noted profitably:

“6. In this case, the power exercised is illegal and it is not expected of from that highly responsible officer who made the remarks. When an officer makes the remarks he must eschew making vague remarks causing jeopardy to the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy. In this case, the controlling officer has not used due diligence in making remarks. It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact and would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in writing for improvement and yet was not availed of so that it would form part of the record.....”.

11. Again, the Supreme Court in ***Yamuna Shanker Mishra (supra)***, observed as below:

“7. It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence..... The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. It should be founded upon facts or circumstances. Though sometimes, it may not be part of the record, but the conduct, reputation and character acquire public knowledge notoriety and may be within his knowledge. Before forming an opinion to be adverse, reporting officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgement, conduct, behaviour, integrity or conduct/corrupt proclivity. If despite being given such an opportunity, the officer fails to perform the duty, correct his conduct or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services constantly rises to higher levels and it becomes a successful tool to manage

the services with officers of integrity, honesty, efficiency and devotion.”

12. It is apparent that in the light of the objectives of assessing an officer, the assessment should include the positive and negative traits and the shortcomings have to be brought to the notice of the concerned officer in writing if the intention is to incorporate in the APAR, improvement upon written advisories. Without such written advisories, it would be improper for a Reporting Officer to make adverse remarks about performance or attitude in the evaluation he makes of the officer. The pen picture of the petitioner written by the respondent No. 4 on 29th June, 2019 is reproduced below for ready reference:

“Unless and until he is nudged no initiatives taken on his own. He was asked an explanation (vide letter No.A.XII.2/2018-WBS-PS dated 07/08/2018 and 14/08/2018) for his non-performance for which appropriate reply yet to be received. Attitude and behaviour towards subordinates staffs are not officer like. Temperament is mercurial and no control over his Anger. I rate him as a ‘Good’ officer.”

13. The reliance of the respondents in the present case, on the letters dated 7th August, 2018 and 14th August, 2018, as being advisories, is misconceived. These letters and the reply of the petitioner dated 14th August, 2018 have been placed as Annexure P-2 colly. to the Additional Affidavit filed by him. The letter dated 7th August, 2018 (at page 370 of the electronic file) is to the following effect:

**“OFFICE OF THE INSPECTOR GENERAL OF
POLICE, WEST BENGAL SECTOR, CRPF, HC BLOCK,
SECTOR-3, SALT LAKE, KOLKATA”**

No. A.XII.2/2018-WBS-PS

Dated, the 07 August, 2018.

To

Shri Sanjeev Dhundia,
DIG (Ops. Int & Trg),
WBS, CRPF,
Kolkata

Subject: **PERFORMANCE OF RESPONSIBILITIES:
REG.**

The DIG(Org), CRPF vide their letter No. O.IV.7/2013-Org-D.A.3 dated 11.07.2016 has delineated the duties of DIG (Ops, Int & Trg) posted in the Sector HQ as per Annexure-II.

2. *Please submit the details of initiatives undertaken and work done by you during the period 01.04.2018 to 30.06.2018 with respect to the duties mentioned in Annexure-II of the letter under reference, particularly on points at Sl.Nos. 17, 20, 21, 22, 23, 24, 25, 26, 28 and 29. The information should reach the undersigned within three days.*

*Sd/-
7/8/18*

**(S Raveendran)
Inspector General”**

14. It is seen that it merely calls upon the petitioner to give details of what he has done in respect of the duties as delineated in the letter of the DIG (Org) to which he submitted his response (at page 371). Apparently,

the respondent No. 4 was not satisfied with the reply and so issued the letter dated 14th August, 2018 (at page 374). A perusal thereof would show that it alleges that the petitioner's response lacks specifics and calls upon him to furnish the dates of various activities and visits claimed in the response. It nowhere specifies the shortcomings noticed in the performance of the duties as disclosed by the petitioner in his response. It does not call upon the petitioner to improve on his performance, neither in defined areas nor in general. In short, these letters cannot be termed as 'advisories' in writing, as understood in the light of the observations of the Supreme Court extracted above.

15. With regard to his observation that the petitioner had a mercurial temper, the record does not bear it out. The incident of June, 2019 is stated to have been preceded by an earlier incident. What must be borne in mind is that this prior incident had occurred in the year 2017. Therefore, how was the abusive incident occurring in 2017 or in June, 2019 relevant for the assessment year 2018-2019. It was improper for the respondent No. 4 to have coloured his assessment by events that occurred much prior to or subsequent to the year of assessment. In any case, the fact that the petitioner was found in SHAPE 1 dispels any doubt on the state of his mental health. The adverse remarks were therefore totally uncalled for.

16. What can constitute bias has been spelt out succinctly in the judgement of this court in ***SK Sharma (supra)***. It was observed:

"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."

17. This court, as reflected in several decisions, has been reluctant to accept a situation where an officer consistently assessed as "Outstanding" or "Very Good" becomes "Good" or "Average" in one or two years in the absence of any cogent data justifying it. No doubt, an APAR is intended for an annual assessment of performance. There may be differences in the performance of an officer from one year to the next. However, the

differences should not occur on account of different Reporting Officers. The performance cannot also be erratically or whimsically assessed that in the midst of consistent 'excellent' performances an officer slides to 'good' or 'average' or 'below average' performances in a couple of instances. What is more, whenever the Reporting Officer notices any such slide, it is incumbent upon him/her to find out the reason for the decline in performance and to resolve the issue(s) causing the fall in the performance of the officer who has till then been 'excellent' in the discharge of his duties.

18. In the present case, the petitioner has consistently been recorded as a 'very good' and 'outstanding' officer, as is clear from the APARs placed as Annexure P-3 in the electronic file, and as is not disputed by the respondents. When the same Reporting Officer, i.e. respondent No. 4 had assessed the petitioner as "Very Good" with adverse remarks, for the previous year i.e. 1st April, 2017 to 31st March 2018, the Accepting Authority upgraded it to "Outstanding" despite such adverse remarks and which remarks were subsequently expunged by the MHA. The very next year, the respondent No. 4 graded the petitioner only as "Good". The letter of 14th August, 2018 is itself reflective of the prejudice of the respondent No. 4 for he seems to have been peeved with the petitioner for having described in his reply of 14th August, 2018, that, he had liaised with BPR&D, CDTs, IIT Kharagpur to design various courses suitable for Force officers and personnel and obtain seats in the same, as he has remarked in his letter dated 14th August, 2018 that the initiative for designing the courses had been undertaken by him, i.e. respondent No. 4 and not the petitioner and that "*taking credit of the work done by a senior*

was not proper” and it *“should have been avoided”*. This seems to be the only piece of “advice” that the respondent No. 4 had given in writing, to the petitioner! But again, there is nothing to show that the petitioner had subsequently, too, claimed for himself, the work done by his senior officers, including the respondent No. 4. The petitioner has offered a plausible explanation for not submitting a reply to this second letter of the respondent No.4. According to him, the reply had not been sent in writing on account of the discussion he had had on 14th August, 2018 with the respondent No. 4. The respondents in their counter affidavit have admitted that such a meeting had in fact taken place. It is probably on account of the lack of trust between the two that the petitioner recorded what transpired on the same letter (page 374 of the electronic file).

19. The petitioner has succeeded in establishing bias on the part of the respondent No. 4 in assessing him for the year 2018-2019. There is nothing on the record which shows that the performance of the petitioner had dropped drastically in that year which deserved a grading of “Good”. The previous incident of abuse of staff had occurred in 2017 and the other case had happened, according to the respondent No.4, in June, 2019. The complaint given by the respondent No. 4 recommending departmental action against the petitioner on 28th June, 2019, a day before he recorded the APAR, reflects the state of mind of the Reporting Officer, and there was real likelihood of bias. He should have held his hand, if he was unable to collect his thoughts, to correctly assess the petitioner. Writing in the APAR that the petitioner had not shown initiative or had to be prodded or had to be nudged into action, without quoting specific instances, which were also followed up and substantiated by written

advisories for improvement, and relying on letters sent in the early part of the assessment year, which in any case do not qualify as advisories, to make such adverse remarks in the APAR, leaving no opportunity for the petitioner to improve his performance, militates against principles of natural justice and the objectives of recording the APARs. No efforts seem to have been made by the respondent No.4 to find out the causes why the performance of the petitioner who was an 'outstanding' officer had in that year fallen so steeply, and to thereafter, make efforts to remove the issues interfering with excellence in performance of his duties. Moreover, when no written advisories were issued to the petitioner to improve his performance, it cannot be concluded that the petitioner had continued with unsatisfactory performance despite cautioning and opportunities to improve, to substantiate the adverse remarks recorded by the respondent No.4.

20. In the circumstances, we find no justification for the respondent No.4 to have recorded adverse remarks and to have downgraded the petitioner to the grading of "Good" in the APAR of the petitioner for the period 1st April, 2018 to 31st March, 2019. The order dated 8th May, 2020 rejecting the representation of the petitioner against the adverse remarks and downgrading without considering all these factors and reflecting a non-application of mind, deserves to be and is hereby set aside. The respondents are directed to expunge the adverse remarks and the grading of 'Good' for the relevant period i.e. 1st April, 2018 to 31st March, 2019 and to grant all consequential benefits to the petitioner including a revised benchmark grading of 'Very Good' and to ensure that the DPC, which may be constituted to consider the petitioner for promotion as and when it

is due, shall ignore this grading of “Good” for the said period, for the purposes of promotion of the petitioner.

21. The petition is accordingly allowed.

ASHA MENON, J.

RAJIV SAHAI ENDLAW, J.

DECEMBER 21, 2020

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