

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

% *Date of decision: May 16, 2023*

+ W.P.(C) 906/2018

RITA SAXENA

..... Petitioner

Through: Mr. Akshay Makhija, Sr. Adv. with
Mr. Pratyush Sharma and Mr. Ajam
Walia, Advs.

versus

CENTER FOR RAILWAY INFORMATION SYSTEMS

..... Respondent

Through: Mr. Chandan Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

REVIEW PET. 40/2023

1. Vide this order, I shall decide the present review petition filed by the petitioner seeking review of order dated April 11, 2022.

2. The submission of Mr. Akshay Makhija, learned Senior Counsel appearing for the petitioner in support of the review petition is that there is an error apparent on the face of the record occasioned by the complete ignorance of vital material already on record in the form of Clause 9 of the instructions issued by the respondent for assessment of performance of the employees through Annual Performance Appraisal Reports ('APAR', in short)

and the mistake / failure of the petitioner to bring it to the notice of this Court, the light it throws on the true and correct interpretation of Clause 15 thereof.

3. It is his submission that a conjoint reading of Clause 9 and 15 of the instructions of the respondent makes it clear that the Reviewing Officer is only empowered to change rating on 5 point scale when he does not agree with rating given by the Reporting Officer. He submitted that the power of the Reviewing Officer to review the APAR and procedure thereof flows from the instructions of the respondent for assessment of performance of the employees through APAR.

4. He submitted that there is not even a whisper about “Grading” in the entire instructions of the respondent let alone any provision purportedly conferring any power on the Reviewing Officer to change the “Grading”. “Grading” as terminology is only mentioned in Part VII of the APAR Form itself and the “Grading” is nothing but a mere summary of the “rating marks on 5 point scale” obtained by the employee. As a natural corollary, the change in “Grading” can be only on account of change in rating on 5 point scale and as a consequences thereof and not the other way around.

5. He submitted that the respondent had reduced the “rating marks” of the petitioner from 87 to 84 at an unknown later date by deducting 3 rating marks in APAR 2013-14, i.e., deduction of one rating mark each in attributes, “Discipline” and “Relations with Superiors” under the heading (IV) General and deduction of one mark in factor “Trustworthiness leading to confidence and

reliability related to others on the basis of mutual respect, courage to stand by convictions” under the heading (VI) Personality Attributes of the Employee as a highly belated afterthought. He submitted that such action was undertaken by the respondent in order to justify the downgrading of the grading of the petitioner to “Very Good” and the same is contrary to respondent’s own instructions.

6. He also submitted that even otherwise, the Reviewing Officer has not given any remarks in violation of instructions of the respondent even while changing “rating marks on 5 point scale” on the particular aspect or aspects of APAR on which he disagreed with “rating marks” given by the Reporting Officer and reduced the “rating marks”. He submitted that no necessary particulars have been given by the Reviewing Officer pertaining to the adverse remarks, except stating “I do not agree with the grading of the reporting officer. Her grading cannot be based on capability but on performance. On the basis of performance, I rate her as very good.” Nor any specific instance(s) has been pointed out when the petitioner purportedly “did not perform” her duty satisfactorily let alone producing any material in support thereof.

7. Similarly, he submitted that no specific instances regarding any shortcoming in relation to “Discipline”, “Relations with Superiors” and “Trustworthiness leading to confidence and reliability related to others on the basis of mutual respect, courage to stand by convictions” in APAR 2013-14 or service record of the petitioner let alone producing any material in support thereof. He

stated that it is a matter of fact and record that there is no allegation or instances of ill-discipline or strained relations with superiors or untrustworthiness in the entire service record of the petitioner from the very beginning of her employment and the same is demonstrative of complete arbitrariness on the part of the Reviewing Officer while writing adverse remarks and downgrading the petitioner in APAR 2013-14.

8. He stated that it is a settled law that the adverse remarks in confidential reports of performance appraisal such as APAR must be pointed out with reference to specific instances in which employee did not perform that duty satisfactorily so that the employee would have an opportunity to correct himself / herself of the mistake and in the absence of any opportunity to correct himself / herself of the said mistake, the adverse remarks would not be consistent with law. He also stated that the qualities such as “discipline”, “relations with superiors” and “Trust-Trustworthiness leading to confidence and reliability related to others on the basis of mutual respect, courage to stand by convictions” are personal qualities pertaining to character of an individual and the same not acquired and lost overnight or for a year.

9. According to Mr. Makhija, admittedly despite numerous representations and filing of the Writ Petition, the original APAR with reduced “rating marks” from 87 to 84 was produced by the respondent for the very first and only time during the final arguments of the Writ Petition on April 11, 2022 as duly noted by this Court in its order / judgment dated April 11, 2022. This action

of the respondent in not communicating the reduced rating marks of the petitioner from 87 to 84 by deducting 3 rating marks in APAR 2013-14 is not only arbitrary and contrary to well settled law but the same deprived the petitioner of not only the opportunity to improve herself but also to make an adequate representation pointing out the fallacies in her assessment by the Reviewing Officer.

10. It is a settled law that every entry in the ACR of a public servant must be communicated to him, within reasonable period, whether it is a poor, fair, average, good or very good entry. The rationale behind forthwith communication of entry in the ACR to the public servant was that 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 the future; (2) he would have an opportunity of making a representation against the entry if he feels that it is unjustified, and seek upgradation of the same. In support of his submission, Mr. Makhija had relied upon the judgment of this Court in the case of *P.N. Tiwari v. Union of India & Ors.*, **MANU/DE/4162/2019**.

11. He states that the consequence of downgrading of the ratings is immense, inasmuch as the petitioner has been denied promotion as she was short of one mark.

12. On the other hand, Mr. Chandan Kumar, learned counsel appearing for the respondent would justify the order passed by this

Court. According to him, no doubt, in the impugned order, this Court had referred to the original record which was produced during hearing but, it is not a case where the conclusion drawn by this Court is a perverse one. According to him, the Reviewing Officer, who has reduced the ratings / marks which translates to the grading of “Very Good” is justified.

13. He submits, the plea which has been advanced by Mr. Makhija in the review petition is clearly as an afterthought. He has in support of his submission relied upon the judgment in the case of ***Registrar General, High Court of Patna v. Pandey Gajendra Prasad & Ors., (2012) 6 SCC 357***, to contend that the action which has been taken with due application of mind and is *bona fide* action, should not be interfered with by the Court.

14. Having heard the learned counsel for the parties, in substance the review of order dated April 11, 2022 is being sought because of the marks awarded to the petitioner which have been noted by this Court in the impugned order more specifically under part IV relating to General qualities of an Officer with attribute “*Discipline*” and part VI relating to personality attributes of the employees under the sub attribute “*Amenability to Discipline & Conduct-Adherence to accept norms and agreed systems, respect for other’s time and exercise of self-control*” the Reporting Officer had awarded 5 marks each whereas the Reviewing Officer has reduced the marks 5 to 4 in part IV under the heading general with sub attribute of “*Discipline*”.

15. On a specific query to Mr. Chandan Kumar as to how the respondent can justify under an identical attribute of “Discipline” two different marks, Mr. Chandan Kumar states that such a decision unless held to be actuated by *mala fide* should not be interfered with. In other words, it is the submission that the exercise of power by the Reviewing Officer, was *bona fide* and does not called for interference.

16. I am unable to agree with the submission made by Mr. Chandan Kumar for the simple reason that the attributes under the heading General (part-IV) and under part-VI being *pari materia* the same, the downgrading of marks from 5 to 4 under part IV does not match the marks given to the petitioner under part VI by the Reviewing Officer. No submission could be made by the petitioner in that regard when the writ petition was decided for the reason that the record was produced for the perusal of the Court and also it is the case of the petitioner that she has never been communicated downgrading of 87 marks to 84 marks which translated to “Very Good” grading. To that extent, the petitioner is prejudiced. The relevant portion of the Part-IV and Part-VI of the chart is reproduced as under:

*Part-IV
General*

<i>Factor Description</i>	<i>Outstanding</i>	<i>Very Good</i>	<i>Good</i>	<i>Average</i>	<i>Below Average</i>
<i>Discipline</i>	5	4	3	2	1

xxx

xxx

xxx

Part VI

PERSONALITY ATTRIBUTES OF THE EMPLOYEE

<i>Factor Description</i>	<i>Ratings</i>				
<i>"Amenability to Discipline & Conduct-Adherence to accept norms and agreed systems, respect for other's time and exercise of self-control"</i>	5	4	3	2	1

17. Suffice to state, two identical attributes, cannot have different marks. Mr. Kumar could not able to throw any light justifying the reduction in marks under Part-IV.

18. In that view of the matter, the order dated April 11, 2022 is reviewed to the extent the marks reduced by the reviewing authority in part IV under the attribute "Discipline" is invalid, as the same is (1) without any justifiable reasons and (2) being at variance with the marks under identical attribute. The marks shall be treated as "5" and accordingly, the total marks shall get translated to appropriate grading. The respondent shall consider the effect thereof under the rules and proceed accordingly.

19. The order dated April 11, 2022 is reviewed to the above extent.

20. The petition is disposed of.

V. KAMESWAR RAO, J

MAY 16, 2023/aky