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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 30.11.2023

+ **W.P.(C) 8128/2019**

SANTOSH KUMAR

..... Petitioner

Versus

UNION OF INDIA AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner:

Mr. Ankur Chhibber & Mr. Nikunj Arora, Advocates.

For the Respondents:

Ms. Abha Malhotra, Sr. CGC.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Petitioner seeks a direction to the respondents to conduct a review DPC in respect of the petitioner.
2. Petitioner who was then the Deputy Commandant was given adverse comments in his Annual Performance Appraisal Report (APAR) for the period 27.08.2012 to 31.03.2023. The adverse comments were communicated to the petitioner on 07.08.2013. On 03.09.2013 petitioner gave a representation against the adverse comments which representation was rejected on 31.10.2013.
3. Thereafter on 21.10.2016, the batchmates of the petitioner were promoted and petitioner once again made a representation on 28.10.2016



and 10.12.2016 which representation was ultimately accepted on 17.03.2017 by the Special Director General and the remarks were expunged and the grading of the petitioner was upgraded to “very good” from “good”. The benchmark being “very good”.

4. Petitioner thereafter requested for conduct of a review DPC as the adverse remarks had been expunged from his APAR and petitioner had been given the benchmark grading of “very good”.

5. BSF forwarded a proposal to the Ministry of Home Affairs (MHA) for holding a review DPC. The Ministry of Home Affairs declined the proposal of holding a review DPC on the ground that only one representation was allowed against an adverse APAR and since petitioner had already availed of the opportunity by filing a representation, which had been rejected, a second representation could not have been entertained and the case was returned to the BSF.

6. BSF thereafter was of the view that it would not be appropriate to intervene in the decision of the Special DG wherein he had exercised the power of expunction of adverse remarks and power having been exercised being quasi judicial, it would not be appropriate to interfere with the same. Thereafter, petitioner was considered by a subsequent DPC and granted promotion.

7. Learned counsel for the petitioner submits that since the adverse remarks have been expunged from the APAR and the grading has been upgraded, petitioner should be considered by a review DPC as of the date



when his batchmates were considered and mere subsequent promotion by a later DPC would be of no consequence.

8. Per contra, learned counsel for the respondents submits that the MHA has acted on the advice of the Department of Personnel and Training (DOPT) to the effect that once a representation is made, a second representation is not to be entertained. However, he concedes that the competent authority to record APAR of petitioner is the BSF and there is no direction by the DOPT or MHA to rewrite his APAR and that subject APAR, as of date, does not contain the adverse remarks which stand expunged under instructions of the Special Director General.

9. Reference may be had to the counter affidavit filed by the respondents wherein they have categorically noted that petitioner had given a representation of 24.06.2013 which was considered, examined and rejected by the Competent Authority and thereafter petitioner had sent another representation dated 10.12.2016. After examination of the representation dated 10.12.2016, the same was forwarded by the Headquarters DG, BSF to Headquarters Special DG, BSF with the following directions as under:

“The officer was not communicated adverse entries in his APAR duly highlighting and specifying the adverse and advisory remarks as per existing instruction. Resultantly, the officer has neither known about the existing adverse remarks in his APAR nor he has represented against the same in the past also. Therefore, the same may be examined in terms of OM No. 21011/1/2005-Estt (A)(Pt-II) dated 14.05.2009



being first representation against adverse remarks submitted by the officer”.

10. The noting of the Headquarters DG, BSF shows that petitioner had not been communicated the adverse entries in the APAR duly highlighting and specifying the adverse and advisory remarks as per the instructions of the BSF and accordingly it was held that the officer neither knew about the existing adverse remarks in his APAR nor he represented against the same in the past. It was directed that the representation dated 10.12.2016 be treated as a first representation against adverse remarks submitted by the officer. Said representation was considered by the Special DG, BSF and the adverse remarks were expunged and the final grading had been upgraded to “very good”.

11. Thereafter, the counter affidavit records that on expunction of the adverse remarks and upgradation of the final grading a proposal for holding review DPC was forwarded but the same has been returned by the MHA treating the representation of the petitioner as a second representation and holding that the same is not permissible as per the rules. When the proposal was rejected by the MHA for holding a review DPC the case was once again examined in detail by the BSF and it was opined that since the Special DG had exercised quasi judicial jurisdiction, it would not be appropriate to intervene in his decision of expunction of the adverse remarks and upgradation of the APARs.

12. In view of the stand taken in the counter affidavit, it is clear that as on date the adverse remarks stand expunged from the subject APAR of the



petitioner and his final grading stands upgraded. In the APAR as it today stands for the relevant period there are no adverse entries and the final grading upgraded. The sequitor to the same is that petitioner should have been placed before a review DPC for consideration.

13. Reference may be had to the decision of a coordinate Bench of this Court dated 19.08.2015 in *W.P.(C). 3391/2015 titled as RS Bharti V. Union Of India* wherein in similar circumstances, the MHA had declined to hold a review DPC holding that there was a second representation given against the adverse entries in the APAR. The coordinate Bench of this Court noted, as in the present case, that the adverse remarks recorded in the concerned ACR were expunged and the expunction order had not been revoked and remained in force and once the adverse comments, which constituted the stumbling block and impediment to the promotion, were removed, the logical corollary setting out for constitution of a review DPC was necessary and in denying the constitution of a review DPC, respondents were acting arbitrary. Finally, directions were issued to constitute a review DPC and consider the case of the petitioner therein to higher grade as and when his batchmates were promoted.

14. Reference may further be had to a judgment of the Supreme Court dated 21.04.2009 in *Civil Appeal No. 7033/2001 titled as Pawan N.Chandra vs. Rajasthan High Court* wherein the Supreme Court has held that once adverse remarks had been expunged the same could not be relied upon for making an observation that the concerned officer's record was not clean.



15. In the case of the petitioner since the adverse remarks against the petitioner have been expunged and his final grading upgraded, there is no impediment or stumbling block, in the case of the petitioner being considered for promotion as of the date when his batchmates were considered for promotion. Accordingly, this petition is allowed.

16. Respondents are directed to constitute a review DPC and consider the petitioner's case for promotion as of the date when his batchmates were considered and promoted.

17. This process shall be completed within a period of 08 weeks from today and in the event of petitioner being promoted, petitioner shall be granted consequential benefit of the said promotion as of the date when his batchmates were considered and granted the benefit.

18. Petition is allowed in the above terms.

19. Order *dasti* under the signature of Court Master.

SANJEEV SACHDEVA, J

MANOJ JAIN, J

NOVEMBER 30, 2023/MR