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

Reserved on: 25th November, 2019

Decided on: 4th December, 2019

W.P.(C) 13147/2018

AVTAR SINGH ARORA

....Petitioner

Through: Mr. M.K. Bhardwaj, Advocate.

versus

UNION OF INDIA & ORS.

... Respondents

Through: Mr. Arun Bhardwaj and Mr.
Naresh Kaushik, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. The Petitioner, who is an Additional Director General (Electrical & Mechanical) [‘ADG (E&M)] in the Central Public Works Department (‘CPWD’), has filed the present petition challenging the order of the Central Administrative Tribunal (‘CAT’) dated 22nd November, 2018 in OA No.2350/2018, filed by the Petitioner. Respondent No. 1 is the Union of India through the Secretary, Ministry of Housing and Urban Affairs, Respondent No.2 is the

Director General, Ministry of Housing and Urban Affairs and Respondent No. 3 is the Union Public Services Commission ('UPSC').

2. By the above impugned order, the CAT rejected the Petitioner's prayer for setting aside the decision of the Departmental Promotion Committee ('DPC') dated 4th December, 2017, whereby the Petitioner was declared 'unfit' for promotion to the post of Special Director General (Electricity & Mechanical) ['SDG (E&M)'].

3. The background facts are that the Petitioner joined as an Assistant Executive Engineer (E&M) in 1983. He was able to secure timely promotions, and in 2012, got promoted as Chief Engineer. On 6th August, 2014 the Petitioner was communicated his Annual Performance Appraisal Report ('APAR') for the period between 13th June, 2013 and 31st March, 2014. In the APAR for the said period, the Petitioner was given zero points against Column No. 3.1 (ii) and a grading of 5.63 by the Reviewing Authority ('RA'). The Reporting Officer ('RO'), on the other hand, gave the Petitioner 7 points in the aforementioned column and awarded him a grading of 7. The Accepting Authority ('AA') gave the Petitioner a grading of 5 points. Based on the said grade points the Petitioner was awarded an overall grading of 'Good', which was a below benchmark grading.

4. Aggrieved by the above grading, the Petitioner submitted a representation dated 14th August, 2014 to the Deputy Director (Admn-II), Director General,

CPWD. By an order dated 13th February, 2015, the Minister of Urban Development, who was the Competent Authority ('CA'), upgraded the Petitioner's APAR to 'Very Good' by awarding him 6.57 grade points.

5. In its meeting on 18th December, 2015, the DPC considered officers for promotion to the post of ADG (E&M) and the Petitioner's name was recommended. Based on the DPC's recommendation, an Office Order dated 1st April, 2016 was issued promoting the Petitioner to the post of ADG (E&M).

6. In the DPC meeting convened on 4th December, 2017, the Petitioner's case for promotion to the post of SDG (E&M) against the vacancy year 2018, was considered. The DPC found the Petitioner to be 'unfit' for promotion to the said post on the following basis:

“While examining the APAR for the year-2013-14 (from 13.06.2013 to 31.03;2014) the Committee noted that the Reporting Officer has given 7.00 numerical grading and the Reviewing Officer has given final, grading 5.63, while the Accepting Authority has given 5.00 numerical grading. The Committee also went through the letter-dated 13.02.2015 by which the grade-point has been raised to 6.57 by the Competent Authority. The remarks or attributes recorded in various columns of the APAR also do not commensurate with the overall grading. The Committee, therefore, took a conscious decision to grade the officer for the year 2013-14 as “Good” only. Based on this, the Committee assessed Shri Avtar Singh Arora as unfit for promotion to the post of Special Director General (Electrical & Mechanical) in the Central Public Works Department, Ministry of Housing & Urban Affairs for the vacancy year 2018.”

7. Aggrieved by the above decision reached by the DPC in its meeting on 4th December 2017, the Petitioner submitted a representation to the Minister of State, Ministry of Housing and Urban Affairs urging that a Review DPC be conducted to revise his APAR to 'Very Good', and consider his case for promotion to SDG (E&M).

8. On 31st May, 2018 the Petitioner filed an RTI under the Right to Information Act, 2005 enquiring about the decision in connection with the aforesaid representation. In a response dated 1st June, 2018, the Petitioner received the office notings in relation to his representation. It is stated that ultimately the Petitioner's representation came to be rejected. He then filed O.A. No. 2350/2018 before the CAT challenging the minutes of the DPC convened on 4th December, 2017.

9. The stand taken by the Petitioner before the CAT is identical to his averments in the present writ petition. The Respondents filed short counter-affidavits in response to the Petitioner's O.A., placing reliance on OMs issued by the DoPT dated 10th April, 1989 and 9th May, 2014 in respect of the functioning of DPCs to contend that DPCs enjoyed full discretion to arrive at a determination of a candidate's suitability for promotion to a higher post. Respondent No. 3 also sought to contend the reliance by the Petitioner on the decision of the Supreme Court in *Abhijeet Ghosh Dastidar v. Union of India and Ors. (2009) 16 SCC 146*, was misplaced since the APAR for 2013 - 14 had

been duly communicated to the Petitioner. The rejoinder filed by the Petitioner herein largely reiterated his stand in the O.A.

10. The said impugned order of the CAT placed reliance on paragraph 5 of the OM dated 9th May, 2014 issued by the DoPT. In dismissing the O.A. filed by the Petitioner, the CAT held as under:

“9. In this regard, it needs to be observed that the higher the level of the post under consideration by the DPC, the closer would be the scrutiny of the APARs. The persons to be selected to hold the posts at higher level are required to be of high accomplishments, and unstinted integrity. Seniority and average performance alone will not do. The instructions are to the effect that even where the APARs are consistently 'Very Good' for the period in question, the other attributes of the Officer, having a bearing on his suitability to the post, need to be examined. The scrutiny is required to be much more where the APAR of any year for the period in question has been upgraded by the competent authority.”

11. After noting that it was not necessary for the CAT to refer to the details of the evaluation made by the DPC, the CAT observed that both the RA and the AA had “furnished cogent reasons in support of their conclusions”, in contrast to the failure of the RO “to present a pen picture of the officer under consideration” as per the instructions noted in the proforma document of the APAR. The CAT also held that the judgments of this Court dated 4th August, 2014 in W.P.(C) 7423/2013 (*Govt. of NCT of Delhi v. Rakesh Beniwal*) and 22nd August, 2016 in W.P.(C) 1050/2015 (*Union of India v. Amiya Kumar Jena*) did not apply to the instant case.

12. On 5th December, 2018, when this petition was first listed, the Court passed the following order:

“1. The petitioner has preferred the present writ petition to assail the order dated 02.11.2018 passed by the Central Administrative Tribunal (CAT) in OA No. 2350/2018.

2. The Tribunal had rejected the said OA of the petitioner wherein, the petitioner assailed his non-selection as Special Director General (E&M) in CPWD. For the said post, DPC was held on 04.12.2017. The rejection of the petitioner’s candidature was on account of DPC finding that the upgradation of the APAR of the petitioner for the year 2013-14 by the competent authority i.e. Hon’ble Minister was not justified and on the basis of the record, the said upgradation from “Good” to “Very Good” was not made out. The minutes of the DPC in so far as they are relevant are as follows:

“7. Attention of the Committee was also invited to the instructions contained in DOP&T O.M. No. 35034/97-Estt(D) dated 08.02.2002, which provide inter-alia that the DPC shall determine the merit of those being assessed for promotion with reference to the prescribed benchmark and accordingly grade the officers as “Fit” or “Unfit”. Only those who are graded “Fit” (i.e. who meet the prescribed benchmark) by the DPC shall be included and arranged in the select panel in order of their inter-se seniority in the feeder grade. Those officers who are graded “Unfit” (in terms of the prescribed benchmark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded “Fit” (in terms of the prescribed benchmark) by the DPC.

8. While examining the APAR for the year 2013-14 (from 13.06.2013 to 31.03.2014) the Committee noted that the Reporting Officer has given 7.00 numerical grading and the Reviewing Officer has given final grading 5.63, while the Accepting Authority has given 5.00 numerical grading. The Committee also went through the letter dated 13.02.2015 by which the grade point has been raised to 6.57 by the Competent Authority in the Ministry in which no valid and justifiable reasons for upgrading the said APAR has been specified. The office records also do not present any acceptable reasons warranting to assert the upgradation made by the Competent Authority. The remarks / attributes recorded in various columns of the APAR also do not commensurate with the overall grading. The Committee, therefore, took a conscious decision to grade the officer for the year 2013-14 as “Good” only. Based on this, the Committee assessed Shri Avtar Singh Arora as ‘Unfit’ for promotion to the post of Special Director General (Electrical & Mechanical) in the Central Public Works Department, Ministry of Housing & Urban Affairs for the vacancy year 2018.”

3. The submission of Mr. Bhardwaj, firstly, is that the petitioner was promoted to the post of Addl. Director General in the year 2015 by the same DPC. The constitution of the DPC qua consideration of promotion to the post of Addl. Director General and Special Director General is the same namely, the Chairman or Member, UPSC, who acts as Chairman; Secretary, Ministry of Housing & Urban Development Affairs, who acts as Member; and, Director General, CPWD, who acts as second Member. The submission of Mr. Bhardwaj is that the case of the petitioner was considered by the same DPC for promotion to the post of Addl. Director General and the said DPC did not raise any issue with

regard to the upgradation of the petitioner's APAR for the year 2013-14 (June, 2013 to March, 2014) by the competent authority from "Good" to "Very Good" on the basis of his representation. His submission is that the same DPC could not have taken a different view while considering his promotion to the post of Special Director General.

4. In so far as this submission is concerned, we do not find any merit in the same. Consideration by the DPC of the petitioner's case for promotion to the post of Spl. Director General was a fresh consideration. If this submission of the petitioner was to be accepted, there was no need to hold a fresh DPC and, merely, the ACRs for the period after the petitioner became the Addl. Director General need have been considered. However, that is not the position. The entire service record of the petitioner and other candidates was required to be considered by the DPC and was, accordingly, considered. Moreover, the present consideration by the DPC was for a still higher post, namely, Spl. Director General and therefore, the DPC was entitled to have a fresh look into the matter. There is no question of binding the present DPC with its view taken earlier, inter alia, in respect of ACR for the period 2013-14.

5. The next submission of Mr. Bhardwaj is that in terms of OM dated 09.05.2014, it was imperative for the DPC to consider the entire record, including the representation made by the petitioner for upgradation of his APAR for the year 2013-14.

6. In the present case, for the relevant period i.e. June, 2013 to March, 2014, the petitioner had been assessed as "7" on a scale of 1 to 10 by the reporting officer in respect of the attribute namely "extent of accomplishment of planned work", "accomplishment of other additional assignment/initiative undertaken", "quality of work output" and "overall grading of work output". The reviewing authority had however, assessed the petitioner at "0" in respect of

“accomplishment of other additional assignment/initiative undertake”; “Quality of work output” was assessed at “6”; and, “overall grading of work output” was assessed at “4.33”. The accepting authority had accepted the assessment made by the reviewing authority and consequently, the petitioner was graded as “Good” even though, the reporting officer had assessed him as “Very Good”. The petitioner had made his representation and on the said representation, the comments of the reporting authority, reviewing authority and accepting authority were also called for. Eventually, it appears that the case was put up before the competent authority i.e. Hon’ble Minister of Housing & Urban Development Affairs at the relevant time and his noting while the accepting the representation of the petitioner reads, as follows:

“I have gone through the representation submitted by Mr. Arora. Following point is worth noting –

c) There are three Chief Engineer level officers at Training institute i.e. CE (Civil), CE (Elect) and CA (Training). ADG (Training) could have assigned the additional work of “Administration” to any of the 3 officers. This work was in addition to the regular work of providing training in domain area.

Keeping above in mind, the plea of the officer that he took additional responsibility is allowed and his grade point is raised to 6.57”

7. The DPC has, however, recorded in its minutes that the committee went through the letter dated 13.02.2015, which was written by the Hon’ble Minister accepting the representation of the petitioner and his grading was raised to “6.57”. The DPC has observed that it found no valid reasons for upgrading the APAR. It also observed that initial records also do not present any acceptable reason warranting the upgradation made by the Competent Authority and that, remarks/attributes recorded in

various columns of APAR were also not commensurate with the overall grading. The committee took the conscious decision to grade the petitioner for the year 2013-14 “Good” only. Consequently, the petitioner was found to be unfit for the post of Spl. Director General (C&M) in CPWD by the DPC.

8. In the light of the procedure laid down in OM dated 09.03.2018, it was obligatory for the DPC to make assessment based on the entries in APAR and other material “including the representation of the Govt. servant”.

9. The only aspect, which in our view, needs consideration is whether the representation of the petitioner and the response of the reporting officer, reviewing officer and the accepting officer were placed before the DPC, when it arrived at its decision to find the petitioner unfit. Limited to this aspect, issue notice. Mr. Bhardwaj accepts notice on behalf of respondent nos. 1 and 2. Mr. Kaushik accepts notice on behalf of respondent no.3.

10. The respondents shall file a short affidavit on the aforesaid aspect within one week, specifically disclosing whether the representation of the petitioner for upgradation of his APAR for the year 2013-14 along with the comments of the reporting officer, reviewing officer and accepting officer were placed before DPC. The said affidavit shall be filed by the respondent nos. 1 and 2 along with the relevant record/communications. Mr. Bhardwaj shall provide a complete paper book to the learned counsel for the respondents during the course of the day.

11. List on 18th December, 2018.

12. Any promotion made shall be subject to further orders by this Court.”

13. By order dated 4th November, 2019 the interim order comprised in the order dated 5th December, 2018 reproduced hereinabove was made absolute during the pendency of the writ petition.

14. The Respondents have filed a compliance affidavit in pursuance of the order dated 5th December, 2018. The Court has perused the records annexed thereto. It would appear that while the material placed before the DPC did include the representation dated 14th August, 2014 made by the Petitioner to the DG, CPWD, by the Respondents' own admission at paragraph 8:

“... comments of Reporting Officer, Reviewing Officer and Accepting officer were not placed before DPC separately, but the gist of comments of reporting and reviewing officers were mentioned ...”

15. Moreover, the compliance affidavit states at paragraph 9 as under:

“... comments of the Accepting authority were not sought as the Accepting authority had retired on reaching the age of superannuation when this case was being dealt with.”

16. Even a perusal of the aforesaid “gist of comments”, which have been extracted in the compliance affidavit of the Respondents, reveals that the said comments merely reiterate the stands taken by the RO and the RO in the APAR for the relevant time period.

17. At this juncture, the OM dated 9th May, 2014 of the DoPT must be taken note of. The said OM, at paragraph 5, notes as under:

“5. It is reiterated that in discharge of its statutory functions the respective DPCs are required to determine the merits of those being considered for promotion with reference to the prescribed bench-mark, by making its own assessment, on the basis of the entries and gradings contained in the APARs and other relevant material facts placed before it, and accordingly grade the officers as 'fit' or 'unfit'. Relevant material would inter alia include the orders of the competent authority on the representation of the Government servant on the entries/grading in APAR. In the event of the DPC deciding not to take cognisance of such an order, on the ground that the same is not a speaking order, the DPC shall make its assessment based on the entries in APAR and other material including the representation of the Government servant. The DPCs should substantiate its assessment by giving justifiable and sustainable reasons including the cases where the assessment of the DPC is different from the grading in APAR (original or amended after representation by the Government servant).”

18. It is on the basis of the said OM that this Court ordered notice to issue in the present petition on the limited question of whether the representation of the Petitioner for upgradation of APAR for the relevant period and the comments of the RO, RA, and AA had been considered by the DPC, as has been reproduced hereinabove.

19. As is evident for the discussion above, the said question must be answered in the negative. In *Union of India v. S. P. Nayyar (2014) 14 SCC 370*, the Supreme Court observed as under:

“12. It is settled that the High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is

perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court Under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other employee.”

20. As noted hereinbefore, the Respondents admit that the entire record, i.e. the comments of the RO, RA, and AA had not been made available to the DPC. Therefore, for this reason alone, the decision of the DPC dated 4th December, 2017 is liable to be set aside.

21. Be that as it may, the said impugned decision of the DPC also falls afoul of paragraph 5 of the said OM dated 9th May, 2014 for failing to “substantiate its assessment by giving justifiable and sustainable reasons”, in view of the fact that it decided not to take into account the upgradation of the Petitioner’s APAR for the relevant period.

22. On behalf of the UPSC reliance is placed on the decisions in ***Union Public Service Commission v. Hiranyalal Dev AIR 1988 SC 1069***; ***U. P. S. C. v. K. Rajaiah (2005) 10 SCC 15*** and ***Union Public Service Commission v. M. Sathiya Priya (2018) 15 SCC 796***. It was urged that the DPC was not bound to record the reasons for its decision to downgrade the Petitioner to ‘good’ for the year 2013-14.

23. This Court has carefully examined each of the above decisions. The legal position as explained in *U. P. S. C. v. K. Rajaiah* (*supra*), is that “**for good reasons**, the Selection Committee can evolve its own classification which may be at variance with the gradation given in the ACRs.” The following passage from the said decision is also relevant:

“6. We cannot also endorse the view taken by the High Court that consistent with the principle of fair play, the Selection Committee ought to have recorded reasons while giving a lesser grading to the 1st respondent. The High Court relied on the decision of this Court in *National Institute of Mental Health & Neuro Sciences v. Dr. K. Kalyana Raman and Ors.* Far from supporting the view taken by the High Court, the said decision laid down the proposition that the function of the Selection Committee being administrative in nature, it is under no obligation to record the reasons for its decision when there is no rule or regulation obligating the Selection Committee to record the reasons. This Court then observed “even the principles of natural justice do not require an administrative authority or a Selection Committee or an Examiner to record reasons for the selection or non selection of the person in the absence of statutory requirement. This principle has been stated by this Court in *R.S. Das v. Union of India.*” In the next paragraph, the learned Judges indicated as to what is expected of the Selection Committee, in the following words:

“...we may state at the outset that giving of reasons for decision is different from, and in principle distinct from the requirements of procedural fairness. The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administration action ought to be observed. The Selection Committee cannot be an exception to this principle. It must take a decision reasonably without being guided by extraneous or irrelevant consideration.

But there is nothing on record to suggest that the Selection Committee did anything to the contrary..."

24. In *Union Public Service Commission v. M. Sathiya Priya* (*supra*), the above principles were reiterated and it was held that "the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules."

25. What emerges from the above decision is that while a Selection Committee need not record reasons as a broad principle, it is 'desirable' that it does if it disagrees with the ACR grading. Further, if there is a statutory requirement that it should do so, then the Committee would be obliged to. Another important aspect is that it must act without malice and not be guided by 'extraneous or irrelevant considerations.' As a corollary, material that was relevant for its decision also cannot be overlooked.

26. In the case in hand, the limited scope of enquiry by this Court was to examine if there was a departure from the procedure laid down in OM dated 9th May, 2014 which makes it obligatory for the DPC to make assessment based on the entries in APAR and other material "including the representation of the Govt. servant". It specifically states that "the DPC should substantiate its assessment by giving justifiable and sustainable reasons including the cases where the assessment of the DPC is different from the grading in APAR (original or amended after representation by the Government servant)."

27. In its order dated 5th December 2018, this Court made it clear that “the only aspect, which in our view, needs consideration is whether the representation of the petitioner and the response of the reporting officer, reviewing officer and the accepting officer were placed before the DPC, when it arrived at its decision to find the petitioner unfit.” There has, as already noticed, a procedural departure on both counts.

28. It is seen from the order of the CA that there were clear reasons for the decision to upgrade the Petitioner’s grading. Specifically, the Petitioner’s plea in his representation dated 14th August, 2014 in relation to taking on additional responsibility was considered and it was noted as under:

“There are three Chief Engineer level officers at Training Institute- i.e. CE (Civil), CE (Elect.), CA(Trg), ADG (Trg) could have assigned the additional work of “Administration” to any of the 3 officers. This work was in addition to the regular work of providing training in domain area.

The competent authority has decided to allow the plea of the officer that he took additional responsibility. Accordingly, his grade point is raised to 6.57.”

29. The CA having recorded the above reason for increasing for Petitioner’s grade points, it was incumbent upon the DPC to supply reasons for differing with it in this regard.

30. The third and important aspect of the matter is that the DPC which was to assess the suitability of the Petitioner for promotion as SDG took upon itself

the task of rewriting his APAR grading for 2013-14, when the grading of 'very good' given for that year had been acted upon and he had been promoted as ADG. It was not open to the DPC to downgrade the officer for the year 2013-14 as "Good" only and on that basis assess the Petitioner as 'Unfit' for promotion to the post of SDG (E&M) in the CPWD. While it was possible to the DPC to take a view on an overall assessment of the Petitioner, as per his APAR's as they existed, it was not within its domain at that stage to downgrade his APAR for a previous year which has already been acted upon and on that basis find him 'unfit'. This would amount to a suo-motu reviewing of a grading of a previous year on the basis of which the Petitioner had already been promoted as ADG.

31. In that view of the matter, the Court sets aside the impugned decision of the DPC, and the order of the CAT dismissing the Petitioner's O.A. The Court directs that a Review DPC be convened for consideration of the Petitioner for promotion as SDG (E&M) in the CPWD as on the date of the original DPC on the basis of the APARs as they stood on that date i.e. with no change to the Petitioner's grading for that year or any previous year. If the Petitioner is thereby found fit, he should be promoted as SDG with a notional back date of the promotion and fixation of pay but with no requirement of payment of arrears. This exercise be completed within a period of twelve weeks from today. If the Petitioner is aggrieved by any part of the consequential orders, it will be open to him to seek appropriate remedies in accordance with law.

32. The writ petition is allowed in the above terms, but in the circumstance, no order as to costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 04, 2019/abc

