R.K. Nafria Vs. Uoi and Others

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Court : Central Administrative Tribunal CAT Delhi

Decided On : Sep-03-2012

Judge : The Honourable Mr. G. George Paracken, Member (J) &Amp; the Honourable Mr. Sudhir Kumar, Member (a)

Appeal No. : OA 1315 of 2011

Appellant : R.K. Nafria

Respondent : Uoi and Others

Advocate for Def. : Shri. M.K. Bhardwaj

Advocate for Pet/Ap. : For the Applicant : Shri M.K. Bhardwaj, Advocate. For the Respondents : Shri Rajesh Katyal, Advocate.

Judgement :

Shri G. George Paracken:

The grievance of the applicant in this Original Application is that his reporting and reviewing officers have spoiled his Annual Performance Assessment Reports (`APAR' for short) for the periods from 01.06.2004 to 31.03.2005 and 25.04.2005 to 31.03.2006 without any justification but to achieve their own personal goal thus depriving him of his due promotion to the post of Superintending Engineer (Civil) and allowing his juniors to supersede him.

2. The brief facts of the case are that the applicant joined as Junior Engineer with Respondent No. 2 in the year 1976 and got his promotions to the post of Assistant Engineer in the year 1983 and to the post of Executive Engineer (Civil) in March, 1996. He became eligible for promotion to the post of Superintending Engineer (Civil) on completion of 5 years as Executive Engineer and accordingly he was required to be included in the list of eligible candidates for consideration of the Departmental Promotion Committee (`DPC' for short) held in July, 2002, in March, 2005 and in September, 2010. According to the applicant, he has been consistently getting outstanding reports and the respondents have never communicated any adverse remarks in his APARs till the last DPC held in September, 2010.

3. According to the applicant, all of a sudden, he was served with the impugned letter dated 24.12.2010 communicating the following below bench mark remarks in his APARs for the period from 01.06.2004 to 31.03.2005 and 25.04.2005 to 01.03.2005:

Period Reporting Officer Reviewing Officer Countersigning officer

1.6.04 to 31.3.05 'fair' 'I agree' 'Average'

25.4.2005 to 1.3.2006 'Good' 'Good' 'I agree'

He was also asked to make representations, if any, with regard to the aforesaid remarks.

4. As regards the APARs for the period from 01.06.2004 to 31.03.2005, he submitted that the Reporting Officer did not assess his performance with due care because he has not mentioned in his remarks whether he agrees or disagrees with the self appraisal. Further, neither the Reporting Officer nor the Reviewing Officer has ever called for any explanation from him during the aforesaid period but they wrote the report for the aforesaid period in a very casual manner. He has also stated that Shri A.K. Pathak, who was his Reporting Officer, had already left the Department and Shri R.K. Gupta who was his reviewing officer has retired from service.

5. As far as the report for the period from 25.04.2005 to 31.03.2006 is concerned, the applicant has submitted that he had been in charge of two divisions, namely, BFD-III and BFD-I. He had given the list of works completed and final bills paid by him during the period. All the targets given to him were achieved with the entire satisfaction of his superiors as shown under ‘Targets and Achievements’. However, as in the case of the earlier report, while assessing his performance, the Reporting Officer did not assess it with due care because he did not give any remarks on his self-appraisal so as to indicate whether he agreed with them or not. Therefore, the grading ‘Good’ given in Para 3.1 of the said report is totally wrong because all the structural design of BPOs and Culverts were done by him. Similarly, in column 3.2 regarding knowledge of accounts, manuals, procedures, rules and regulations, the Reporting Officer assessed him as `Good’ whereas he had maintained accounts, works procedure and rules and regulations of establishment of Border Fencing Circle-I, BFD, BFD-I, BFD-II and BFD-III during the relevant period and no irregularity was pointed out either by the reporting officer or by the reviewing officer. According to them, the assessments under para 3.4(a) and (b) are also not correct because without the knowledge of Management, Organization and Supervision of works, it is quite impossible to handle and complete the works of four divisions in such a hard area. In Para 3.4 (d)(i), there was no pending of Audit paras and no accounts arrears and hence assessment of the said para was also wrong. Again, he has stated that what is stated in Para 3.17 is ‘He has sound knowledge of computer working. He is laborious.’ However, the grading given is ‘Good’ which is contradictory. He has also stated that no shortfalls or any comments on the performance was conveyed to him by the reporting or reviewing officers during the period under report. He has, therefore, submitted that the aforesaid report was written in a very casual manner. He has also stated that both his Reporting Officer Shri R.K. Gupta and the Reviewing Officer Shri Pratap Singh had already retired from service.

6. However, the respondents, vide the impugned letter dated 14.12.2010, rejected his request for reviewing the APARs in accordance with the rules and the operative part of the said letter reads as under:

“(i) Period 1.6.04 to 31.3.05.

After taking into account the assessment of attributes and remarks of the Reporting officer, Reviewing officer and accepting authority, competent authority have decided not to interfere with the grading for the period.

(ii) Period 25.4.05 to 31.3.06

The officer has been graded good in most of the attribute. The Reporting Officer has commented that assessment has been done keeping in view all the relevant facts and performance of the officer. Therefore, competent authority has decided not to interfere with the grading for the period."

7. The applicant has assailed the aforesaid impugned letter on the ground that his APARs for the aforesaid two years have been recorded in a most mechanical manner ignoring the mandatory instructions, particularly regarding issuing memo, warning or advisory note. Further, according to him, the authority concerned have not assigned any reasons for upholding the downgrading by the Reporting and Reviewing officers in the impugned order dated 24.12.2010.

8. In this regard, he has relied upon the judgment of the Supreme Court in Union of India Vs. Mohan Lal Cooper and Ors. (1973 (2) SCC 836) wherein it has been held that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus.

9. He has also relied upon the judgment of the Apex Court in Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Ors. (1991 (2) SCC 716) wherein it has been held as under:

"21. Thus it is settled law that the reasons are harbinger between the mind of the maker of the order to the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. the reasons assure an inbuilt support to the conclusion/decision reached. the order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-judicial or administrative fair play requires recording of germane and relevant precise reasons. the recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High court under Article 226 or the appellate jurisdiction of this court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person."

10. Further, he has stated that while passing the impugned order, the respondents have not taken into consideration any of the contentions made by him in his representations. He had explained all the circumstances and highlighted the illegality committed by the Reporting and Reviewing Officers but the competent authority has ignored them. Such an action of the respondents is contrary to the law laid down by the Apex Court in Sukhdeo Vs. Commissioner, Amravati Division, Amravati and Anr. (1996 (5) SCC 103) wherein it has been held as under:

"5. In view of the above remarks made by the officer, the conclusion reached is obviously incorrect and it is not in public interest. A man does not become poor in public image when his relationship with the public and subordinates is good and he is a man of integrity and honesty and he has got the satisfactory intelligence for discharging his duties and is fit for promotion. How can in such circumstances his performance would be held unsatisfactory when he is capable of coordinating with subordinates and get the work done. How his technical ability is not satisfactory. The remarks are mutually inconsistent and reasons are self-evident of lack of bona fides in making these remarks. Under these circumstances, it could be characterised that the remarks were not bona fide made in public interest but was a self serving statement to weed him out from service.

6. It is settled law that when the government resorts to compulsorily retire a government servant, the entire record of service, particularly, in the last period of service is required to be closely scrutinised and the power would be reasonably exercised. In State Bank of India v. Kashinath Kher (JT at p. 578 para 15, this court has held that the controlling officer while writing confidential and character roll report, should be a superior officer higher above the cadres of the officer whose confidential reports are written. Such officer should show objectivity,

impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer, lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. In that case it was pointed out that confidential reports written and submitted by the officer of the same cadre and adopted without any independent scrutiny and assessment by the committee was held to be illegal. In this case, the power exercised is illegal and it is not expected of from that high 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. The power exercised by the controlling officer is per se illegal. The tribunal has not considered this aspect of the matter in dismissing the petition. The appellant is entitled to reinstatement with all consequential benefits. The appeal is accordingly allowed with exemplary costs quantified at Rs. 10,000.00 recoverable by the State from the officer who made the remarks."

11. Another ground taken by the applicant is that his confidential report till the year 2004 has been ‘outstanding’ and ‘very good’ and in the years 2006-07, 2007-08 and 2008-09 also remained as ‘Very Good’ and, therefore, the same could not have been just ‘Fair/Good’ for only two years particularly when his performance has remained the same or even better. In this regard, he has given a statement regarding the assessment made in his ACRs during the period from 01.09.2000 to 31.03.2011 which are as under:

Assessment

Reporting Reviewing Countersigning

01.09.2000 to 31.03.2001 Very Good Very Good Retired

01.04.2001 to 31.03.2002 Outstanding Outstanding Retired

01.04.2002 to 31.03.2003 Very Good Retired Retired

23.12.2003 to 31.03.2004 Very Good Retired Retired

01.06.2004 to 31.03.2005 Fair Good Average

25.04.2005 to 31.03.2006 Good Retired Retired

03.07.2006 to 31.03.2007 Very Good Very Good C/S

01.04.2007 to 31.03.2008 Very Good Very Good C/S

01.04.2008 to 31.03.2009 Very Good Very Good C/S

01.04.2009 to 31.03.2010 Very Good Outstanding Outstanding

01.09.2009 to 31.03.2010 Very Good Outstanding Outstanding

01.04.2010 to 31.03.2011 Outstanding Outstanding Outstanding

01.04.2010 to 31.03.2011 Outstanding Outstanding Outstanding

12. Further, according to the applicant, his reporting officer was biased and he acted in a mechanical manner. In this regard, he has relied upon the judgment of the Apex Court in J.R. Jain Vs. Union of India (1973 (2) SLR 309 (Delhi) wherein it has been held that ‘in a case where very good reports are given about an officer in a particular year but in the following year equally bad remarks are given, then this sudden shift in the assessment of the competent authority lend support to the plea of mala fide intentions of making such remarks’. He has also relied upon the judgment of the Apex Court in S.T. Ramesh Vs. State of Karnataka (AIR 2007 SC 1262) wherein it has been held as under:

“The confidential report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievements in his career. This Court has held that the performance appraisal through C.Rs. should be used as a tool for human resource development and is not to be used as a fault finding process but a developmental one. Except for the impugned adverse remarks for a short period of about 150 days, the performance of the appellant has been consistently of high quality with various achievements and prestigious postings and meritorious awards from the President of India. We have already seen that the appellant has been graded as "very good", "excellent" and "outstanding" throughout his career. It is difficult to appreciate as to how it could become adverse during the period of 150 days for which the adverse remarks were made. Furthermore, despite such adverse remarks, the Government of Karnataka, considering his merit and ability and outstanding qualities, has already promoted the appellant as the Inspector General of Police.”

13. The further contention of the applicant is that he was also not given any opportunity by issuing memo or warning to improve his excellence as required by the law laid down by the Apex Court in the case of State of UP Vs. Yamuna Shankar Mishra and Anr. (1997 (4) SCC 7).

14. He has also relied upon the instructions issued by the Govt. of India, Department of Personnel and Training O.M. No. 21011/1/2005-Estt (A) Pt.II dated 14.05.2009, according to which, the respondents were required to communicate the APARs to the applicant within 15 days from the date of the aforesaid OM and much before the holding of DPC for promotion to the post of Superintendent Engineer. However, the respondents communicated aforesaid downgrading to the applicant after holding the DPC which was convened on 27.09.2010 and 30.09.2010 whereas the downgrading in his APARs was communicated to him only on 28.10.2010. The said OM is reproduced as under:

“Subject:- Maintenance and preparation of Annual Performance Appraisal Reports-communication of all entries for fairness and transparency in public admission.

The undersigned is directed to invite the attention of the Ministries/Departments to the existing provisions in regard to preparation and maintenance of Annual Confidential Reports which inter alia provide that only adverse remarks should be communicated to the officer reported upon for representation, if any. The Supreme Court has held in their judgment dated 12.5.2008 in the case of Dev Dutt vs. Union of India (Civil Appeal No. 7631 of 2002) that the object of writing the confidential report and making entries is to give an opportunity to the public servant to improve the performance. The 2nd Administrative Reforms Commission in their 10th Report has also recommended that the performance appraisal system for all services be made more consultative and transparent on the lines of the PAR of the All India Services.

2. Keeping in view the above position, the matter regarding communication of entries in the ACRs in the case of civil services under the Government of India has been further reviewed and the undersigned is directed to convey the following decisions of the Government:-

The existing nomenclature of the Annual Confidential Report will be modified as Annual Performance Assessment Report (APAR).

The full APAR including the overall grade and assessment of integrity shall be communicated to the concerned officer after the Report is complete with the remarks of the Reviewing Officer and the Accepting Authority wherever such system is in vogue. Where Government servant has only one supervisory level above him as in the case of personal staff attached to officers, such communication shall be made after the reporting officer has completed the performance assessment.

The Section entrusted with the maintenance of APARs after its receipt shall disclose the same to the officer reported upon.

The concerned officer shall be given the opportunity to make any representation against the entries and the final grading given in the Report within a period of fifteen days from the date of receipt of the entries in the APAR. The representation shall be restricted to the specific factual observations contained in the report leading to assessment of the officer in terms of attributes, work output etc. While communicating the entries, it shall be made clear that in case no representation is received within the fifteen days, it shall be deemed that he/she has no representation to make. If the concerned APAR Section does not receive any information from the concerned officer on or before fifteen days from the date of disclosure, the APAR will be treated as final.

The new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the reporting period 2008-09 which is to be initiated after Ist April, 2009.

The competent authority for considering adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation.

The competent authority after due consideration may reject the representation or may accept and modify the APAR accordingly. The decision of the competent authority and the final grading shall be communicated to the officer reported upon within fifteen days of receipt of the decision of the competent authority by the concerned APAR Section.

3. All Ministries/Departments are requested to bring to the notice of all the offices under them for strict implementation of the above instructions."

Moreover, according to him, since the Reporting Officer Shri A.K. Pathak and the Reviewing Officer Shri A.L. Garg and Accepting Authority of the APAR for the year 2004-05 and Reviewing Officer Shri Pratap Singh and Accepting Authority Shri H.S. Dogra of the APAR for the year 2005-06 had already retired, the same were required to be ignored.

15. The learned counsel for the applicant Shri M.K. Bhardwaj, relying upon the judgment of the Apex Court in Sukhdeo's case (supra) has argued that the DPC while assessing the suitability of the applicant for promotion should have

considered his earlier service record and particularly the latest ACRs.

16. He has also relied upon the judgment of the Apex Court in M.A. Rajasekhar Vs. State of Karnataka and Anr. (1996 (7) JT 708): (1996 (10) SCC 369) and submitted that the authorities concerned have to act fairly and objectively. The relevant part of the said order reads as under:

“4. Calling that in question, the appellant filed an OA. It is now settled law that the object of making adverse remarks is to assess the competence of an officer on merits and performance of an officer concerned so as to grade him in various categories as outstanding, very good, good, satisfactory and average, etc. The competent authority and the reviewing authority have to act fairly or objectively in assessing the character, integrity and performance of the incumbent. It is seen that in the review order, various grounds on which the various criteria are to be complied with were specifically noted thus:

"3. A perusal of Annx. A-1 goes to show that in most of the aspects the work of the applicant is satisfactory. According to the form in which the confidential remarks of the officers are to be written, the reporting officer is required to indicate his assessment of the officer on the following aspects of his work: 1. Knowledge of work; 2. Power of expression; 3. Power of acquiring general information; 4. Attention to detail; 5. Industry; 6. Judgment; 7. Speed of disposal; 8. Willingness to accept responsibility and to take decision; 9. Relationship with subordinates and colleagues; 10. Public relations; 11. Integrity. The report about all the above aspects is satisfactory. There is no adverse report about integrity. However, the underlined remarks in Annx. A-1 are made. The last sentence in those remarks indicates that the intention of the officer who wrote those remarks was to treat the remarks as advisory. He has stated that the officer should evince more interest. When all the ten aspects of the work which are required to be assessed by the rules are satisfactory the alleged adverse remarks get considerably diluted and we are of the considered opinion that the ends of justice would be served if the remarks are treated as advisory with a direction that they should not be made use of against the applicant for any purpose."

5. It was found that his integrity was not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances, the remark that he "does not act dispassionately when faced with dilemma" must be pointed out with reference to specific instances in which he did not perform that duty satisfactorily so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in a dilemma and lacked objectivity, in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not been done by the respondents, it would be obvious that the above adverse remark was not consistent with law.

6. Accordingly the appeal is allowed. The adverse remark stands expunged. No costs.

17. Again, he has relied upon the Order of this Tribunal in OA 3410/2010 ‘Rohit Kumar Parmar Vs. Union of India and Ors. decided on 30.03.2011 and submitted that when the record of the applicant has been ‘Very Good’ for six years out of eight years, the rejection of his representation was without proper application of mind. The relevant part of the said order reads as under:

“5. Having considered the rival contentions, we are of the considered opinion that the process of recording of ACRs, rejection of representations against below benchmark grading and their consideration by the DPC suffer from several infirmities. The grading of the Applicant in the ACRs of the years 1999-2000 to 2008-09, is as follows:-

“Year Grading

1999-2000 Very Good

2000-01 Outstanding

2001-02 Very Good

01.04.2003-04.07.2002 Very Good

07.2003 -03.2004 Good

2004-05 Not recorded

2005-06 Good

2006-07 Very Good

2008-09 Very Good”

The record of the Applicant has been `Very Good’ in six years out of the eight years for which ACRs have been recorded between 1999-2000 to 2008-09. These ACRs of the two years have been recorded after considerable delay, as discussed above, contrary to the repeated instructions, which provide a time limit of one month. The reason for such time limit is not far to seek. The officers at the level of Joint Secretary and Additional Secretary are required to act as reporting and reviewing authorities in cases of large number of officers. It is reasonable to expect that with highly taxing load of work and need to record on a large number of ACRs, the impressions about the work of an individual officer would get blurred with passage of time and eventually get obliterated. Reporting and reviewing after a lapse of more than two years can result in unjust assessment of an officer. Further, the report has been communicated almost five years after it was recorded. The reviewing officer has retired on superannuation. This should have been sufficient reason for ignoring the ACR. However, the competent authority proceeds to reject the representation only on the comments of the reporting officer, which only reiterate that he would stick by the grading given by him to the officer reported upon. The reporting officer has not answered the points raised in the representation of the Applicant. The representation has not been examined at all by the officials who submitted the relevant file to the Defence Secretary, who perfunctorily records that he saw no reason to intervene in the assessment made by the reporting and reviewing authority, apparently without knowing anything about the Applicant’s representation. The Applicant has been treated unjustly. The rejection of his representation has been without proper application of mind. Moreover, in the light of the judgment of the Honourable High Court in Ranjana Kale (supra), upheld by the Honourable Supreme Court and the judgment in Abhijit

Ghosh Dastidar (supra), the DPC should not have considered the ACRs of 2003-04 and 2005-06 and instead should have considered ACRs of earlier two years.

6. On the basis of the above discussion, the OA succeeds. The impugned orders are quashed to the extent they affect the Applicant. The Respondents are directed to convene a meeting of review DPC to consider the Applicant for promotion to SAG by ignoring his ACRs for the period 2003-04 and 2005-06 and instead consider his ACRs for two earlier years. If the Applicant is found `fit' for promotion by the DPC, he would be promoted from the date his immediate junior was promoted. These directions would be complied with within three months from the date of receipt of a copy of this order. No costs."

18. The respondents in their reply have submitted that 'the question of treatment to be given to below bench mark ACRs of period prior to 2008-09, which are to be considered by future DPCs was considered by Govt. and DOPandT vide its order dated 13.04.2010 (Annexure R-2) clarified that below bench mark ACRs prior to the period 2008-09 which would be reckonable for assessment of fitness in future DPC should be communicated and representation if any disposed of by competent authority before such ACRs are placed for the DPC. Only below bench mark ACR for the period relevant to promotion need to be sent and no need to send below bench mark ACR of other years.' They have also stated that as per existing instructions, APAR should be examined by the competent authority in consultation, if necessary, with the Reporting and the Reviewing Officers/Countersigning/Accepting Officer if any. While considering the representation, the competent authority decides the matter objectively on the basis of material placed before it taking into account the contentions of the officer, the view of the Reporting and Reviewing Officer/Countersigning/Accepting Officers if they are still in service on the points raised in the representation vis--vis the remarks/gradings given by them in the APAR. Accordingly, the applicant was communicated the below bench mark grading for the period 01.06.2004 to 31.03.2005 and 25.04.2005 to 01.03.2006. They have also submitted that as per the existing instructions comments of the Reporting/Reviewing/Countersigning Officers were required to be called before examining the representations. In respect of period 01.06.2004 to 31.03.2005 all the assessing officers have retired

hence their comments could not be sought. Similarly, for the period 25.04.2005 to 31.03.2006, the Reviewing and Countersigning Officers have retired. However, comments of reporting officer Shri R.K. Gupta, SE were sought on the representation against below grading for the period 25.04.2005 to 31.03.2006. Shri R.K. Gupta, Reporting Officer furnished his comments which are as follows:

"The grounds given in the representation dated 28.10.10 of Shri R.K. Nafria, EE (C) have been carefully considered. It is found that assessment in the APAR including the grading has been done keeping in view all the relevant facts and performance of the officers during the period of the report. Therefore, no change is required in the APAR of Shri R.K. Nafria, EE (C)."

19. Further, according to the respondents, the Supreme Court has held in number of judicial pronouncement that having regard to the limited scope of judicial review of the merits of selection made for appointment to a service or a civil post, the courts are not expected to play the role of an appellate authority or an umpire in the acts and proceedings of the DPC and that it could not sit in judgment over the selection made by the DPC unless the selection is assailed as being vitiated by mala fides or on the ground of being arbitrary. Even otherwise, the law is well settled that the DPC is not merely guided by the grading in the ACRs and it can devise its own methods to assess the performance of the applicant. Hence, in view of the legal and factual position as explained hereinabove, the present OA is without any merit and the same is liable to be dismissed with costs.

20. The learned counsel for the respondents Shri Rajesh Katyal has also denied the contentions of the learned counsel for the applicant that the representations against the remarks recorded in applicant's ACRs have been considered in a mechanical manner. In this regard, he has also produced the departmental record containing the examination of his case which is as under:

"In this file we are examining the APAR of Sh. R.K. Nafaria Executive Engineer (C) during the period from 1-6-2004 to 31-3-2005 and 24-4-05 to 31-3-06 grading of which is below bench mark. A copy of the APAR in question was forwarded to the officer concerned on 20-9-2010 (P-1 cor.) and he has represented against the grading on 28-10-2010 (P-2 to 4/cor.). Comments of the Reporting Officer were called for and Reporting Officer has submitted his comments on 18-11-2010 (p-22/cor.). The Reporting Officer stood by his grading which has already been awarded to Sh. R.K. Nafaria EE (C) which is Good' (ACRs P-5 to 20/C).

S.N. Period Remarks Reporting Officer Remarks Reviewing Officer Remarks Accepting Officer

1 1-6-04 to 31-3-05 Fair

Sh. A.K. Pathak, SE (retd.) I agree

(Sh. A.L. Garg CE (retd.) Countersigned

Sh. B. Mazumdar, ADG (Retd.)

2 25-4-05 to 31-3-06 Good

Sh. R.K. Gupta, SE Good

(Sh. Pratap Singh, CE (retd.) Countersigned

Sh. R. Subramanian E in C (Retired)

For the period 1.6.04 to 31.3.05.

In this particular case Reporting, Reviewing and Accepting Authority have since retired. Hence, comments of the Reporting, Reviewing and Accepting Officer could not be sought.

Sh. R.K. Nafaria stated that I have given the full details of duties which performed during the period. It has been mentioned that I had been in-charge of two Division i.e. BFD-III and BFD-I. I have also given the list of works completed and final bills paid by me during the period. All the target given to me were achieved by me with the entire satisfaction of my superiors as shown under Targets and achievements.

While assessing the performance, the reporting officer did not assess the performance with due care because he has not mentioned any remarks on the self appraisal whether he is agree or disagree.

Period 25-4-05 to 31-3-06.

In this particular case Reviewing and Accepting Authority have since retired. Hence, comments of the Reviewing and Accepting Officer could not be sought.

The reporting officer stated that in the matter, the grounds given in the representation of Sh. R.K. Nafaria have been carefully considered. It is found that assessment in the APAR including has been done keeping in view all the relevant facts and performance of the officer during the period of the report. Therefore, no change is required in the APAR.

Sh. R.K. Nafaria EE (C) in his representation dated 28-10-2010 against his ACRs 1-6-2004 to 31-3-2005 and 25-4-2005 to 31-3-2006. He requested that his below bench mark of APAR ‘Good’ grading may kindly be upgraded ‘Very Good’.

In view of the comments of the reporting officer on the representation made by Sh. R.K. Nafaria EE) against below bench mark in his ACR for the period 1-6-2004 to 31-3-2005 and 25-4-2005 to 31-3-2006 as indicated above, it is for consideration whether the said ‘Good’ grading be retained or upgraded ‘Very Good’.

Shri R.K. Nafaria, EE has requested for reviewing his ACRs for the periods 1.6.2004 to 31.3.2005 and 25.4.2005 to 31.3.2006 vide his representation dated 28.10.2010.

1. 1.6.2004 to 31.3.2005

The reported officer has sought review on following grounds:

He was incharge of two divisions i.e. BFD-III and BFD-I.

All the targets given achieved by him.

The Reporting Officer did not assess the performance with due care because he has not mentioned any remarks on the self appraisal whether he agrees or disagrees.

No letter of explanation call was ever issued.

The APAR for the period has been written in a very casual manner.

As per ACR for this period it is observed that many columns under professional knowledge category have been left blank. In respect of general assessment good grading has been awarded for 5 attributes and fair grading has been awarded for 3 attributes. The Reporting Officer has assessed the officer as fair which has been agreed by the Reviewing Officer. The Accepting Authority has remarked `accepted as average'. Comments of Reporting, Reviewing and Accepting Officers could not be obtained due to retirement.

2. 25.4.2005 to 31.3.2006

The Reported Officer has again mentioned that he was incahrge of two divisions and achieved all the targets given to him. The Reporting Officer did not assess the performance with due care. The grading given in paras 3.1, 3.2, 3.4 is wrong because all the structural design of BOPs and culverts done by him. He had maintained accounts, work procedure and rules and regulations of establishment. He has also stated that it was quite impossible to handle and complete the work of 4 divisions in such a hard area without the knowledge of management, organization and supervision of work. He has also brought out about the contradictory remarks of Reporting Officer in para 3.17 which says 'he has sound knowledge of computer working.' He is laborious grading `good'.

In self appraisal the reported officer has mentioned achievements of all targets. In para 3 he has been graded good for 11 attributes, very good for 2 attributes, fair for 2 attributes under professional knowledge. In respect of General assessment he has been graded very good for 3 attributes, good for 3 attributes and fair for 2 attributes. The Reviewing and Accepting Officers have agreed with the assessment of the Reporting Officer. Comments of the Reporting Officer Sh. R.K. Gupta were sought who has commented that assessment has been done keeping in view all the relevant facts and performance of the officer and no change is required in the APAR. The Reviewing and Accepting Officers have since retired and no comments could be possible from them."

Sd/-8.12.10

(Kailash Chaudhry),

Deputy Director (Admn.)

DDG (Per)

We may not interfere with the grading.

Sd/-13/12

21. The learned counsel for the respondents Shri Rajesh Katyal has also relied upon the judgment of the Supreme Court in K.M. Mishra Vs. Central Bank of India and Ors. (2008 (9) SCC 120) wherein it has been held as under:

“16. On a careful consideration of the rival contentions we find no substance or merit in the appellant's objections regarding his Performance Appraisal Ratings for the three years in question.

17. Mr. Srivastava then submitted that in the preceding years the appellant had `Excellent' ratings and in the year 1995 he had `Very Good'. The rating `Good' for the year 1996-97 was thus a climb down and it was incumbent upon the authorities to intimate the appellant about his ratings for the two years in question. Since no intimation was given to the appellant the ratings for those two years should not have been taken into account and instead the ratings for the earlier years should have been considered for the purpose of promotion. We are unable to accept the submission. In Satya Narain Shukla vs. Union of India and Ors., 2006 (9) SCC 69 (81) it was held and observed as follows :

"29. The appellant also argued that the remarks made in the ACR were not communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like "good" or "very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government in unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides."

18. On hearing counsel for the parties and on a careful consideration of the materials placed on record we find no merit in the appeal and it is accordingly dismissed. In the facts and circumstances of the case there shall be no order as to costs."

22. We have heard the learned counsel for the applicant Shri M.K. Bhardwaj and the learned counsel for the respondents Shri Rajesh Katyal. The gradings awarded to the applicant in the APARs for the period from 01.06.2004 to 31.03.2005 was 'Average' and for the period from 25.04.2005 to 01.03.2006 was 'Good'. Since there were no adverse remarks in those APARs, they were not required to be communicated to the applicant at the relevant time. However, the gradings in those APARs were 'below the prescribed bench mark of 'Very Good' for promotion including in situ promotion. The requirement of communicating the entries and final grading given in the Reports was enforced by the Government of India only after the judgment of the Apex Court dated 12.05.2008 in Dev Dutt Vs. Union of India (2008 (8) SCC 725). For that purpose, the Department of Personnel and Training has issued OM dated 14.05.2009. As rightly submitted by the applicant, the respondents failed to communicate the aforesaid two APARs containing the below bench marks gradings to him in time. Admittedly, the Screening Committee Meeting to consider in situ promotion to the grade of Superintending Engineer (Civil) was held on 27.09.2010 and 30.09.2010 in which the aforesaid APARs of the applicant have been considered. As is evident from the Minutes of the Committee, the promotion was based on the twin consideration of eligibility and bench mark gradings. Those who had minimum 9 years of regular service and the bench mark of 'Very Good' have been promoted. Admittedly, the applicant has been deprived of the opportunity to make any representation against those APARs of below bench mark before his case was considered by the Screening Committee on the aforesaid dates. He was given copies of the aforesaid report only vide office diary No. 2876 dated 28.10.2010. The applicant objected to the said communication on 28.10.2010 itself stating that there was no use for him for such belated communication as Shri A.K. Pathak, SE (Civil), the

Reporting Officer, Shri A.C. Garg, EE (Civil), the Reviewing Officer and Shri B. Majumdar, DG (Water) the Accepting Officer were the concerned officers during 01.06.2004 to 31.03.2005 and Shri R.K. Gupta, SE (Civil) the Reporting Officer, Shri Pratap Singh EE (Civil) the Reviewing Officer and Shri H.S. Dogra, Addl. DG were the officers during the period from 25.04.2005 to 31.03.2006 and all of them except Shri R.K. Gupta have retired from service. According to the Department of Personnel and Training O.M. dated 14.05.2009 extracted above, the competent authority for considering the adverse remarks under the existing instructions may consider the representation, if necessary, in consultation with the reporting and/or reviewing officer and shall decide the matter objectively based on the material placed before him within a period of thirty days from the date of receipt of the representation. Though such consultation is not mandatory, in order to arrive at an objective decision, in the absence of other material placed before the competent authority, consultation with the Reporting/Reviewing Officer was necessary. Moreover, the respondents while examining the case in their file, stated with regard to the APAR from 01.06.2004 to 31.03.2005 that the comments of the Reporting, Reviewing and Accepting Officers could not be obtained due to their retirements. As regards the APAR from 25.04.2005 to 31.03.2006, the factual position as recorded in the note is that Reviewing and Accepting Officers have already retired and their comments have not been obtained. But in the note submitted to the Competent Authority, wrong information has been fed to him stating that the Reviewing and Accepting Officers have agreed with the comments of the Reporting Officer and the comments obtained from the Reporting Officer were that the assessment has been done keeping in view all the relevant facts and performance of the officer and no change is required in the APAR. The competent authority agreed with it. In fact, except for statement of the Reporting Officer for the period 25.04.2005 to 31.03.2006, no other material was before the competent authority. The competent authority has also not given any reason to reject the explanation of the applicant. It only held ‘We may not interfere with the grading’ based on the wrong reporting from down. As held by the Apex Court in Union of India Vs. Mohan Lal Cooper and Ors. (supra) and Maharashtra State Board of Secondary and Higher Secondary Education and Ors. (supra), any decision without application of mind is nothing but an arbitrary one. The Apex Court in Delhi

Jal Board Vs. Mohinder Singh (JT 2000 (10) SC 158) held that ‘the right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Art. 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration.’ Admittedly, the DPC has considered the case of the applicant for promotion on the basis of the below bench mark gradings in his two APARs without affording an opportunity to represent against it in terms of the aforesaid O.M. of the DOPandT dated 14.05.2009.

23. In any case, the entire consideration of the representation of the applicant was done only after the meeting of the Screening Committee in which the applicant was not recommended for promotion for not having the prescribed bench mark. Therefore, it has become a fate accompli for the applicant and the consideration of his case by the DPC has rendered meaningless. Again, the Apex Court held in Mahavir Prasad Vs. State of U.P (AIR 1970 SC 1302) that recording of reasons in support of the decisions is obligatory as it ensures that the decision is arrived at according to law and is not a result of caprice, whim and fancy.

24. Another important aspect of this case is that for a number of preceding and succeeding years to the two years in dispute, he was graded either ‘Outstanding’ or ‘Very Good’. As held by the Apex Court in R.K. Jain Vs. Union of India (supra) and S.T. Ramesh Vs. State of Karnataka (supra), it is difficult to appreciate as to how his performance was so low during those two years. This is particularly so because, admittedly, none of the concerned authorities have given any opportunity to improve his performance by issuing him any notice or warning. Moreover, neither the Reporting Officer nor the Accepting Authority nor the Reviewing Authority have disagreed with self appraisals given by the applicant in both his APARs that he met the targets set for him for the periods in question.

25. In Dev Dutt’s case (supra) decided by the Apex Court on 12.05.2008, it directed the Departments concerned to convey all the below benchmark grading to the concerned person and to have his representation and in consideration thereof, if his ACR is upgraded to the level of bench mark or above, his case has to be considered for promotion. In Abhijeet Ghosh Dastidar Vs. Union of India and Ors. decided on 22.10.2008 (2009 (16) SCC 146), because petitioner therein has

already retired, the Apex Court directed the respondents to altogether ignore the below benchmark ACRs and consider his ACRs for the preceding years which were upto the benchmark. In the present case, since the applicant is still in service, it is, of course, not correct to invoke the ratio in Abhijeet Ghosh's case (supra) for the very same reason. But the decision in the said case will apply in this case for a different reason. The applicant in this case was given an opportunity to represent against the below bench mark ACRs for two years but the said opportunity given to him was a futile one. While the Screening Committee, in its meeting held on 27.09.2010 and 30.09.2010, has already rejected his case for promotion for not having the bench mark for the required number of years, the two below bench mark APARs were communicated to him only on 24.12.2010.

26. In view of the above position, the O.A. is allowed and we quash and set aside the impugned decision of the competent authority not to interfere with the gradings for the period 01.06.2004 to 31.03.2005 an 25.04.2005 to 01.03.2006 conveyed to the applicant vide the Annexure A-1 letter of the respondent dated 24.12.2010. Consequently, the respondents shall convene the Review DPC/Screening Committee and place the case of the applicant for promotion to the post of Superintending Engineer (Civil) within a period of six weeks from the date of receipt of a copy of the order. The DPC/Screening Committee so convened shall ignore the APARs of the applicant for the aforesaid period and then make their assessment. If the applicant is found eligible to be promoted, the respondents shall promote him with effect from his junior has been promoted with all consequential benefits except back wages.

27. The respondents shall comply with the aforesaid direction within a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs.