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

Date of Decision: 25.02.2025

+ **W.P.(C) 8640/2020**

ASITAV MOHANTY

.....Petitioner

Through: Dr. S.S. Hooda & Mr.
Ayushman Aeron, Advs.

versus

UNION OF INDIA & ANR.

.....Respondents

Through: Mr. Jagdish Chandra, CGSC
with Mr. Shubham Kumar
Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE SHALINDER KAUR

NAVIN CHAWLA, J (ORAL)

1. This petition has been filed by the petitioner, challenging *inter alia* the Order dated 12.06.2020 (wrongly typed as 12.07.2020 in the prayer clause of the Writ Petition), rejecting the representation of the petitioner for grant of the Non-Functional Selection Grade ('NFSG') to the petitioner. The petitioner further claims grant of the NFSG benefit with effect from 06.06.2000.

2. It is not disputed that the petitioner was considered for grant of the NFSG by the Internal Screening Committee held on 25.09.2019 for the year 2000 (crucial date 01.01.2001), taking into account his last five Annual Confidential Reports ('ACR'). As the ACR for the year 1998-1999 contained a below-benchmark grading, that is, 'Average', and did not meet the prescribed benchmark for the grant of



the NFSG, therefore, the Committee graded the petitioner as ‘Unfit’ in light of the Office Memorandum (‘OM’) dated 09.10.1989.

3. The subsequent representation of the petitioner was also rejected by the respondents *vide* Impugned Order dated 12.06.2020, compelling the petitioner to approach this Court.

4. The learned counsel for the petitioner submits that as far as the ACR for the year 1998-1999 is concerned, apart from the grading of ‘Average’, the pen picture of the Accepting Authority also endorsed an adverse remark against the petitioner. He submits that while the adverse remarks were communicated to the petitioner *vide* Letter dated 25.02.2000, the adverse grading was never communicated to the petitioner.

5. This fact is now admitted by the respondents, who state that in view of the then prevailing instructions as contained in the OM dated 21/28.03.2006, it was only the adverse entries/remarks recorded in the ACRs that were to be communicated to the officer, and not the adverse or below-benchmark grading.

6. The petitioner admittedly represented against the adverse remarks contained in the ACR for the year 1998-1999, and his representation was accepted by the Competent Authority of the respondents *vide* Order dated 01.10.2004, thereby expunging the adverse remarks contained in the said ACR. As the petitioner was not aware of the below-benchmark grading, he could not make a representation against the same.



7. The learned counsel for the petitioner, placing reliance on the judgments of the Supreme Court in *Dev Dutt v. Union of India & Ors.* (2008) 8 SCC 725, and in *Baidyanath Mahapatra v. State of Orissa & Anr.* (1989) 4 SCC 664; and of this Court in *Commandant V.S. Shekhawat v. Union of India & Ors.*, 2019 SCC OnLine Del 9942, submits that even the below-benchmark grading, if the same is to result in a civil consequence such as the petitioner being denied the NFSG as in the present case, must be communicated to the officer, allowing the officer to represent against the same. He submits that non-communication of the same would be denial of the rights of the petitioner under Article 14 of the Constitution of India.

8. He further submits that even if the below-benchmark grading is now communicated to the petitioner, the petitioner would not have an effective remedy of representing against the same due to the long passage of time.

9. On the other hand, the learned counsel for the respondents reiterates that in terms of the OM dated 09.10.1989, for grant of the NFSG, the petitioner was to have at least two 'Very Good' gradings in the last five ACRs and his overall performance should have been assessed as 'Good'. He reiterates that as the grading of the petitioner in the ACR for the year 1998-1999 was only 'Average', the petitioner could not make the cut for grant of the NFSG.

10. He submits that in terms of the OM dated 12.05.1972, there was no necessity for the respondents to have communicated the impugned below-benchmark grading to the petitioner.



11. We have considered the submissions made by the learned counsels for the parties.

12. From the narration of the above facts, the two major things that emerge are, firstly, that the petitioner was communicated only the adverse remarks in the pen picture in the ACR for the year 1998-1999, against which the petitioner represented, and which now stands expunged by the Order dated 01.10.2004 issued by the Competent Authority of the respondents; and secondly, that the below-benchmark grading, however, was never communicated to the petitioner, thereby, denying him the opportunity to represent against the same. However, the said below-benchmark grading was taken into account by the Internal Screening Committee while considering the case of the petitioner for grant of the NFSG, and the petitioner was denied the benefit of the NFSG based thereon, thereby, visiting him with a civil consequence.

13. In ***Dev Dutt*** (supra), the Supreme Court, while considering a case where promotion was denied to the petitioner therein only because he had an entry of 'Good' instead of 'Very Good' in his ACR, which entry had not been communicated to him, observed and held as under:

"9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being



considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

11. Learned counsel for the respondent submitted that under Office Memorandum No. 21011/4/87 [Estt. 'A'] issued by the Ministry of Personnel/Public Grievance and Pensions dated 10/11-9-1987, only an adverse entry is to be communicated to the employee concerned. It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid office memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the employee



concerned and not other entries, would in our opinion become arbitrary and hence illegal, being violative of Article 14. All similar rules/government orders/office memoranda, in respect of all services under the State, whether civil, Judicial. police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored.

12. It has been held in Maneka Gandhi v. Union of India that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the ACR of a public servant is arbitrary because it deprives the employee concerned from making a representation against it and praying for its upgradation. In our opinion, every entry in the annual confidential report of every employee under the State, whether he is in civil, judicial, police or other service (except the military) must be communicated to him, so as to enable him to make a representation against it, because non-communication deprives the employee of the opportunity of making a representation against it which may affect his chances of being promoted (or get some other benefits). Moreover, the object of writing the confidential report and making entries in them is to give an opportunity to a public servant to improve his performance, vide State of U.P. Yamuna Shanker Misra. Hence such non-communication is, in our opinion, arbitrary and hence violative of Article 14 of the Constitution.

13. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry



may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.

14. In most services there is a gradation of entries, which is usually as follows:

- (i) Outstanding*
- (ii) Very Good*
- (iii) Good*
- (iv) Average*
- (v) Fair*
- (vi) Poor*

A person getting any of the entries at Items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided fairly and within a reasonable period by the authority concerned

15. If we hold that only "poor" entry is to be communicated, the consequences may be that persons getting "fair", "average", "good" or "very good" entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit)."

14. In ***Baidyanath Mahapatra*** (supra), the above principle was reiterated by the Supreme Court in the following words:

"6. The adverse entries for the years 1969-70, 1970-71, 1972-73 and 1975-76 were communicated in a lot to the appellant in 1978, although under the instructions issued by the State Government the adverse entries must be communicated by December of each year. The purpose of communicating adverse



entries to the government servant is to inform him regarding his deficiency in work and conduct and to afford him an opportunity to make, amend, and improve his work and further if the entries are not justified the communication affords him an opportunity to make representation. If the adverse remarks awarded to a government servant are communicated to him after several years, the object of communicating entries is defeated. It is therefore imperative that the adverse entries awarded to a government servant must be communicated to him within a reasonable period to afford him opportunity to improve his work and conduct and also to make representation in the event of the entry being unjustified. In the instant case, adverse entries relating to a number of years were communicated to the appellant in one lot under a letter dated February 27, 1978 contrary to the instructions issued by the State Government as contained in circular No. 29 dated February 19, 1953. Belated communication of the entries resulted in denial of reasonable opportunity to the appellant to improve his performance. Further since adverse remarks for several years were communicated with inordinate delay it was impossible for the appellant to make an effective representation against the same. The appellant's representation against the aforesaid entries was rejected on March 12, 1981 on the ground that the representation was barred by time. Since the communication of the adverse entries was itself highly belated the representation against those adverse remarks should have been considered on merits and the same could not be rejected on the ground of delay as the government itself was guilty of inordinate delay in communicating the adverse remarks to the appellant."



15. In *Commandant V.S. Shekhawat* (supra), this Court rejected the submission of the respondents therein that there is a difference between adverse grading and adverse remarks. The Court held that the OM dated 10/11.09.1987 cannot be read to mean that only the adverse entries need to be communicated and not the adverse grading. The Court further held that if the benchmark is dependent on the grading, where the officer does not make that grade in an ACR, it would be incumbent on the authority to communicate the same to such officer within a reasonable period, else it may adversely affect the officer, both, because the officer would not be able to improve his work in the future as also by denying him an opportunity of making a representation against the same if he feels that the same is unjustified. This Court held as under:

22. In the present case, admittedly the Petitioner was given only a copy of the adverse remarks and not the ACR containing the below benchmark grading at the relevant time. This deprived the Petitioner of an opportunity to seek an upgradation of his ACR, as he was not made aware of that fact. He could not have anticipated that such grading would affect his future promotion.

23. Nowhere in the counter affidavit is any valid explanation given by the Respondents for not applying the above OM dated 13th April 2010 except to state that it is prospective and not retrospective. This is a plain misreading of the para 1 of the above OM which makes is abundantly clear that the below benchmark grading in an ACR prior to 2008-09 which was going to affect an employee's future promotion has to be mandatorily be communicated to him. Therefore, the stand



taken by the Respondent in relation to the OM dated 13th April, 2010 is plainly erroneous.

24. The OM dated 28th March, 2006 ought not to be resorted to by the Respondent any longer, since the law in this regard has been made abundantly clear by the decisions of the Supreme Court in Dev Dutt (supra) and Sukhdev Singh (supra). The Court, therefore, has no hesitation in holding that the OM dated 28th March, 2006, to the extent that it is inconsistent with the law declared by the above decisions is no longer valid and cannot be relied upon by the Respondents to deny the employee concerned an opportunity of making a representation against a below benchmark grading, which has the potential of affecting his or her future promotions.

16. In view of the above, as the adverse grading was not communicated to the petitioner, the same could not have been considered by the Internal Screening Committee for denying the benefit of the NFSG to the petitioner.

17. The Impugned ACR was for the year 1998-1999, and due to lapse of substantial period thereafter, it would now not be possible for the petitioner to make an effective representation against the same. At the same time, the representation of the petitioner against the adverse remarks already stands expunged by the Competent Authority of the respondents by an Order dated 01.10.2004. There is generally a intrinsic connection between the pen picture and the grading of the officer. We, therefore, can presume that if the petitioner had been timely communicated the adverse grading, he could have effectively represented against the same, and the same may have been upgraded.



In any case, the said below-benchmark grading cannot be used to deny the benefit of the NFSG to the petitioner.

18. For the above reasons, we set aside the Impugned Communication dated 12.06.2020 and direct the respondents to grant to the petitioner the benefit of the NFSG with effect from the date on which the officers junior to the petitioner were granted such benefit, subject to the petitioner fulfilling the other conditions for the grant of the same.

19. The consequential order shall be passed by the respondents and the arrears be released to the petitioner along with interest @ 6% p.a. within a period of eight weeks from today.

20. With the above directions, the petition stands disposed of.

NAVIN CHAWLA, J

SHALINDER KAUR, J

FEBRUARY 25, 2025/sds/KP/SJ

Click here to check corrigendum, if any