
(2015) 05 DEL CK 0226

In the Delhi High Court

Case No : Writ Petition (C) 2968 of 2014

Narender Prakash Kohli

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Citation : (2015) 8 AD 365 : (2015) 220 DLT 165

Hon'ble Judges : Pradeep Nandrajog, J;Pratibha Rani, J

Bench : Division Bench

Advocate : Jyoti Singh, Senior Advocate instructed by Tinu Bajwa and Dinesh Yadav, for the Appellant; G.L. Bhati, Advocate and Arun Bhardwaj, Dy. Commandant/BSF, Advocates for the Respondent

Judgement

Pradeep Nandrajog, J.

1. The issue at hand concerns the appraisal of the petitioner for the period July 15, 2008 to March 31, 2009 in which he has been graded "Average" and the adverse remark recorded therein.

2. The substance of the adverse remarks recorded in the ACR for the period in question was communicated to the petitioner on November 19, 2009 as under:-

"He is resistant to visit BOPs despite very road connectivity... He was not found very amenable to advise and suggestions... He left large number personnel without conducting their annual medical..."

3. The petitioner submitted his response on December 24, 2009; and in respect of the remark that he resisted visits to Border Outposts, the response was as under:-

"Sir, I joined 37 Bn BSF on permanent posting from 2nd Bn BSF on 15.07.08. I after joining the unit carried out my duties with keen interest and utmost dedication to the best of my efforts. I took all responsibilities entrusted to me without any hesitation. I did my best in the interest of the force. I during my stay

in the unit visited BOP on following dates till March 2009 to give medical cover to the Jawans on border.

I also remained away from the unit on following dates with variation by day or two as per memory for the purpose mentioned against each:-

In view of above, I submit that I have visited to BOPs at my own to give medical cover to the Jawans on border whenever I was free. I was on T/duty for 76 days, availed leave for 60 days stayed with unit for 121 days out of which I visited all BOPs at least once in a month and also made night halts at BOPs on Duttapulia (twice), Shrirampur and Masympur on 11/10/08, 21.01.09, 12/11/08, and 01/12/08 respectively. Besides this I have been detailed for various boards and other medical assignments at sector HQ Seemanagar from time to time."

4. Regarding the remark that the petitioner was not found very amenable to advise and suggestions, he responded as under:-

"Sir, in this regard I humbly submit that, I had never been advised nor suggested of any kind, in connection with my profession by my superior during my entire stay in the unit either in writing or verbally as per my knowledge. As per my remembrance, I was once directed by Shri Umed Singh, Commandant to prepare the computerized data of Hypertensive and Obese personnel of the unit in the Excel Software. I carried out medical checkup of 701 personnel of the unit and prepared the data of Hypertensive and Obese as well as details of personnel suffering from other ailments. To compile the entire data as well as to make a permanent data bank concern to medical field, I requested for a computer to the unit hospital, which was not made available during my stay and my desire to make permanent data bank in the unit could not be materialized. However, at no time I have not found myself amenable to any advise and suggestions please."

5. Regarding the remark that the petitioner left large number of personnel without conducting their annual medical, he responded as under:-

"Sir, I during my stay in the unit for 121 days, carried out medical examination of nearly 1000 personnel of the unit (which includes 701 personals examined for hypertension and obesity) which is on the records in the unit. In addition I also attended 1614 Nos of out patients and treated 76 admitted patients in the unit hospital. A report of carrying out medical examination in respect of 701 out of which 35 Hypertensive and Obese was forwarded to Ftr HQ BSF S/Bengal vide unit hospital letter No. Med/37Bn/1505/2008/17292 dated 28/11/08. Sir, I would also like to add that, the AME of only 138 personnel was carried out in the unit for the year 2008 before my joining. I took initiative and expedited the AME of unit personnel and raised the figure to 1000 in the remaining period of the year."

6. The petitioner gave further information which according to him was relevant for the purposes of his representation. He informed as under:-

"Sir, I would also like to submit that during my stay in the unit I took initiative to execute long pending proposal of the unit to establish mini hospital at Duttapulia

adm base and it started functioning under my professional guidance from 02.12.08. I would also further submit that during all campus round of unit HQ by the commandant in the unit, I used to accompany him and submit my suggestion in connection with hygienic and sanitation. I also carried out hygiene and sanitation round of the unit BSF campus on 18th July 08 and 12th March 09 and submitted report in this regard to the commandant for his needful. I also submit that the unit hospital was inspected by Commandant med. Dr.A Roy Choudhury, CMO (SG) on 21.01.09 and graded as "VERY GOOD" Shri C.V. Muralidhar, IPS, IG, FTR HQ SB also visited the unit hospital on 19-02-09 and appreciated about the maintenance and professionalism being carried out in the unit hospital. Sir, I would also like to mention that, at no point there was any mention about my non adhering to any of the instructions/suggestions/advice etc given to me in front of visiting/inspecting officers in the unit."

7. Considering the representation the Competent Authority rejected the same and refused to expunge the adverse remarks recorded in the ACR vide order dated April 27, 2010. The order gives no reasons to reject the representation made by the petitioner against the adverse remarks. The order is cryptic. It reads as under:-

"Reference your representation dated 24th December 2009, received vide H.Qrs, Punjab Frontier, BSF letter No.IG's Sectt/Adv rmks/10/01-03 dated 5th Jan 2010.

2. The undersigned has been directed to inform you that your above representation addressed to Inspector General, South Bengal Frontier, BSF for expunction of adverse remarks recorded in your ACR for the period from 15.07.2008 to 31.03.2009 has been examined at this HQ in detail and the Competent Authority after careful consideration of your representation is pleased to reject the same being devoid of merit."

8. The petitioner preferred a representation on October 16, 2010 to the Director General BSF which was rejected by an equally cryptic order on June 01, 2011. A non-statutory representation made by the petitioner was rejected by the Special DG BSF on October 31, 2013 by an order which is equally cryptic.

9. The petitioner therefore lays a challenge to the order dated April 27, 2010, order dated June 01, 2011 and the order October 31, 2013.

10. Since in the meanwhile a DPC was held and because of the adverse remark in the ACR coupled with petitioner being graded "Average" he was superseded, the instant writ petition was filed not only laying a challenge to the three orders but praying further that after the adverse remarks are quashed and the ACR grading suitably upgraded direction be issued to hold a review DPC and if found fit for promotion the petitioner be promoted with all consequential benefits.

11. Before we deal with the contentions urged by learned senior counsel for the petitioner it would be advisable if we note the pen profiling of the petitioner in the ACRs for the two preceding years as also the two succeeding years, for the

reason they would be relevant for our discussion.

12. The petitioner joined BSF on April 28, 2003 as an Assistant Commandant/ Medical Officer and served in the BSF Academy till June 15, 2004 and thereafter at Sopore in the State of Jammu and Kashmir from July 01, 2004 to June 30, 2006 and thereafter at Aizwal from June 15, 2006 to June, 2008 with some tenure spent at Kolkata in between. From July 15, 2008 till September, 2009 the petitioner was at Dhubulia in the State of West Bengal and thereafter till July, 2012 at Amarkote in the State of Punjab.

13. The ACR grading of the petitioner for the year 2006-07 is Very Good. The same grading has been accorded to the petitioner for the next year i.e. 2007-08. The Average grading with the adverse remark pertains to the period July 15, 2008 to March 31, 2009. Being on leave in the months of April, May and June 2008 no ACR grading has been recorded. For the next year i.e. 2009-10, the petitioner has been awarded grading Very Good and so also for the next year 2010-11.

14. In other words for the two preceding and the two succeeding years ACR grading of the petitioner is Very Good and we find that it drops to Average for the year in between.

15. A perusal of the adverse remark communicated to the petitioner, contents whereof have been noted by us in paragraph 2 above, would show that it has three factual contents which could translate into two adverse traits. The three factual contents being : (i) He is resistant to visit BOPs despite road connectivity; (ii) He was not found very amenable to advise and suggestions; and (iii) He left large number personnel without conducting their annual medical. The first and the third limb of the adverse remark would show the petitioner in poor light regarding work ethics and would suggest that the petitioner shirks work. The second limb of the adverse remark would show the petitioner in poor light regarding his capacity to work in a team by showing aversion to accepting advise and suggestions.

16. The ACR proforma, is of the kind which one usually come across for Government servant. Part-I and Part-II of the proforma have to be filled up by the appraiser. Part-III-A by the Administrative Reporting Officer, Part- III-B by the Technical Reporting Officer, Part-IV-A by the Administrative Reviewing Officer, Part-IV-B by the Technical Reviewing Officer and Part- v. by the Superior Reviewing Officer.

17. For the period July 15, 2008 to March 31, 2009 the Administrative Reporting Officer, under the attributes and inter personal skills of the petitioner, has recorded as under:-

Attributes

Inter Personal Skills

18. The corresponding recording in the ACR proforma for the year 2006- 07 is as under:-

Attributes

Inter Personal Skills

19. The corresponding recording in the ACR proforma for the year 2007- 08 is as under:-

Attributes

Inter Personal Skills

20. The corresponding recording in the ACR proforma for the year 2009- 10 is as under:-

Attributes

Inter Personal Skills

21. We find for the year 2010-11 the proforma for ACR has been changed. Comparing the heads of the previous year attributes and inter- personal skills, there has been slight modification and addition of heads in the said year. Box grading on the scale of 10 is awarded by the authorities. The same is as under:-

Assessment of Personal attributes (weightage to this Section would be 30%)

Assessment of functional competency (weightage to this Section would be 30%)

22. A bare perusal of the recordings in the ACR proformas for the two preceding and two succeeding years makes it striking that on the attributes of attitude towards work, the petitioner has been appraised to be a dedicated, diligent, responsible and a hard working officer and further has been opined to be capable of working hard under pressure. He has been appraised as a senior who supervises and monitors the work of his subordinates meticulously and closely with a positive attitude. He has been opined to be an excellent guide and a very good administrator. For the year 2010-11 on these attributes he has been given seven marks on the scale of ten. Regarding his skills to monitor key areas he has been opined to be focused. On the issue of maintaining discipline he has been opined to have maintained very good discipline. As a part of a team, regarding attributes of being amenable to advice and suggestions, the petitioner has been opined to be very good and a person who fits well in the team and can keep going smoothly with his subordinates and superior officers. He has been opined to be a person who maintains esprit-de-corps.

23. The sudden drop in performance on these attributes for the appraisal period July 15, 2008 to March 31, 2009 from "Very Good" (as a matter of fact if one closely sees and analyzes the traits on the various parameters pen- Reporting Authority Reviewing Authority profiled in the two preceding and succeeding ACR proformas one can safely say that the petitioner is actually bordering towards

being appraised "Excellent") to "Average" is enough to raise the eyebrows on the fairness of the petitioner being appraised; a leopard does not lose his spots overnight, much less turns into a jackal.

24. A perusal of the petitioner's response to the first adverse remark that he resisted visits to Border Outpost, contents of which response we have noted in paragraph 3 above, would show that the petitioner gave details of the visits made by him to the Border Outposts with further information of the days he remained away from the Unit due to he being on leave or on official duty. The information given by the petitioner would evince that out of 268 days comprising the ACR period he was at the unit for a duration of only 121 days and for 139 days he was mostly on temporary duty outside the unit and for some duration on leave. It was expected of the Competent Authority to take note of the fact that the data provided by the petitioner showed that his presence in the unit was frequently interrupted by scheduled commitments in which the petitioner had no role to play.

25. Pertaining to the second adverse remark that the petitioner was not found very amenable to advice and suggestions, the response of the petitioner, noted by us in paragraph 4 above, would show that during the period in question no superior officer gave him any suggestion or an advice in connection with his work. As per the petitioner he remembered not having implemented one suggestion given by the Commandant Sh.Umedh Singh regarding computerization of the data of the force personnel who were hypertensive and obese. The petitioner informed that he medically examined 701 personnel but could not computerize the data because in spite of request being made no computer was made available to him.

26. Regarding the last adverse remark that the petitioner left large number of personnel without conducting their annual medical, the petitioner responded, as noted by us in paragraph 5 above, that he had medically examined nearly 1000 personnel of the unit which included 701 persons examined for hypertension and obesity. He informed of having attended to 1614 patients in the category of "Outpatients" and having treated 76 patients admitted in the unit hospital.

27. Further information given by the petitioner, contents whereof have been noted by us in paragraph 6 above, the petitioner informed that he had to spend time to execute the long pending proposal of the unit to establish a mini hospital at Duttapulia administration base and that the mini hospital became functional under his guidance from December 02, 2008. The petitioner further informed that he had carried out hygiene and sanitation round of the unit BSF campus on two dates and that when the Chief Medical Officer Dr.A.Roy Chaudhary visited the unit hospital for inspection he wrote a note of appreciation about the maintenance of the unit hospital and the professionalism shown by the petitioner.

28. The petitioner has apparently made good his point with reference to objective facts and the taint in the impugned orders dated April 27, 2010, June

01, 2011 and October 31, 2013 is that none has dealt with the objective facts brought to the notice of the authorities by the petitioner. The rejection of the representations is by a cryptic order. Indeed, in the counter affidavit filed to the writ petition, to the pleadings in the various paragraphs of the writ petition where said facts have been pleaded by the petitioner, the response is silent.

29. An order, be it of an administrative nature or quasi judicial, must evince that the decision maker has applied his mind if the order impacts a civil right or has a civil consequence of the person to whom the order is directed or is a subject of the order. This is possible only when the order contains reasons. The necessity of reasons is two-fold. It shows that the decision maker has come to grips with the issue to which the decision relates to and secondly makes it known to the person affected by the decision what process of reasoning was followed by the adjudicator.

30. If a developing country fails to measure up the expectations of the people, democracy loses its significance. The general perception in the society is that poor governance in the country is due to two reasons : (i) a vitiated political climate; and (ii) bad administration. But a few realize that the root cause of poor governance may lie in the design of the democratic- administrative form adopted in the country. If the design is inappropriate, wrong kind of people would keep on exercising authority and wrong kind of conduct would be perpetuated. The solution does not lie in abandoning democratic-administration. It lies in purging the disease inducing genes. India has abundance of Human and Material resources, a vast market, a vibrant civil society, great entrepreneurial talent and growing technological and management competence, capable of achieving global primacy, but all will remain a distant dream if the quality of decision making at the administrative level remains unsatisfactory.

31. If there is a demand for good governance, there must be a road map for how to secure it and clarity on the means to pursue it.

32. Good governance, with reference to the systemic flaws of the political system which what many perceive with the undesirable traits like criminalization of politics, vote bank politics, short term considerations, wide spread corruption i.e. negative traits of politics, cannot form and should not form the subject matter of a judicial verdict; since they need a public debate and a judicial forum is hardly the appropriate place for such a debate. But, the tools of Public Management, with emphasis on accountability for output, social justice and quality of life and not just procedural correctness; with further emphasis on efficiency, productivity and service quality requiring professional management by domain experts chosen on basis of merits, in an open and transparent manner, are matters within the domain of judicial debate - judicial review over administrative decisions is recognized as a branch of administrative law.

33. Do we need to strengthen administrative law principles when we find more and more authority being granted (rightly so) to the Government and public

sector bodies. If yes, can administrative law play a role in ensuring that the Government departments and its instrumentalities, with a specific mandate and accountability for performance, are set in place as vibrant partners.

34. We think yes. How?

35. The quality of leadership determines the quality of an organization. The managers form the core and the fulcrum which catalyses the pace of activities in an organization. If judicially manageable standards can be found to insulate leadership identification from power games, it would be a welcome step - so we feel!

36. And this takes us straight into the lap of "Human Resource Strategy and Performance Appraisals". Internationally acknowledged experts like Michael Porter and C.K. Prahalad have defined the specific business capabilities required by the organization as "Core Competence". In order to achieve the required core competence for carrying forward an organization and its goals, the Human Resource function has the role of identifying the people's capabilities, since; essentially, it is these that constitute the business capabilities of the organization.

37. The learned authors have opined that traditional appraisal approach is flawed on account of many reasons, which have been listed at seriatim in the book "Human Resource Management" by P.Jyothi and D.N. Venkatesh 1st Edition at page 249. They read as under:-

(i) It is incongruent with the value-based, vision-driven, and participative modern organizations.

(ii) It promotes the legacy of the top-down and bureaucratic approach, which is out of sync with the current requirements.

(iii) The traditional appraisal has a subjective element, and most often, is influenced by the recent events rather than the performance of the employee during the entire appraising period.

(iv) The modus operandi of appraisal systems has more to do with being judgmental and finding faults, with little focus on performance improvement.

(v) The above-mentioned nature of appraisals perpetuates the distance and differences between the appraiser and appraisee, rather than providing the forum or opportunity for a healthy discussion.

(vi) The employee as well as the reporting authority is more inclined towards defending their own viewpoints, rather than arriving at any common platform which is acceptable to both.

(vii) In case of majority of organizations, the appraisal process is more of a ritual being practiced to avoid getting into trouble with the HR departments.

(viii) Theoretically speaking, the appraisal process is a way of safeguarding the position-power of the reporting authority.

(ix) Quite often, the appraisal formats are poorly designed, or once designed; they become so sanctimonious that organizations refuse to acknowledge the need to change the structure, to stay in tune with the changed requirements.

38. It is trite that Performance Appraisal requires a holistic view, the performance of the appraisee and to align the individuals objectives with that of the organization. The ultimate objective is to facilitate the organization to achieve higher levels of growth and performance. As opined by Michael Porter and C.K. Prahalad, performance appraisals have become "more of a tool for politicking and have become a pawn in the corporate power games".

39. Thus, the disease inducing genes have unfortunately permeated not only into the government departments, the public sector but even the private sector and today we find that the private sector is actively implementing the corrective methods suggested by Michael Porter and C.K. Prahalad. Why not even the government, its instrumentalities and the public sector?

40. Conscious of the fact that it would not be within our domain and jurisdiction to issue directions to the executive to implement the corrective steps taken by the private sector; but insofar as the language of the existing policy guidelines framed by the executive permits and without violence to the language of the guidelines, if it is possible for us to read the guidelines in a manner which kills the disease inducing genes and makes grow the disease free genes, being in furtherance of good governance, such interpretation requires to be adopted by us and consequential directions to be issued to the executive. Enrichment must come to the field of law from all disciplines and indeed a forensic court battle is a place where ideas merge to create new ideas and where different streams of reasoning pool their waters into the ocean of knowledge. It is from the ocean, as is the mythical Hindu belief, that poison and nectar was separated. It is from the ocean of knowledge that Judges separate nectar and poison, of course, it is nectar which is distributed. The third deficiency in the current performance appraisal methodology adopted is the subjective element which is the result of being influenced by recent events rather than the performance of the employee during the entire appraising period. The experts in the subject of "Human Resource Development and Performance Appraisal" agree that short term appraisals have a disease inducing genes because of the influence of recent events rather than the actual performance of the employee.

41. On facts, two things emerge. Firstly that on the two traits regarding which adverse remarks have been made against the petitioner in the ACR for the year 2008-09, in the two preceding and the two succeeding years on the same attributes the remarks are bordering on excellence. For the year 2008- 2009 petitioner's appraisal has resulted in he being graded "Average" but in the two preceding and succeeding years the appraisal is "Very Good" (bordering on "Excellence"). Secondly the objective facts disclosed by the petitioner in his response to the adverse remarks and his below benchmark ACR grading have not been refuted by the respondents and as a result have not been discussed at all

while considering the representations made by the petitioner. If the objective facts are correct, and in the absence of a rebuttal, we have to treat them as correct, there is a complete mismatch in the adverse comments recorded by way of a subjective satisfaction and the objective facts before us. It is trite that though an ACR appraisal relates to the satisfaction of the initiating and the reviewing officer who are presumed to be having a personal knowledge regarding the work ethics of the appraisee, but the subjective satisfaction has to be founded on objective facts. The respondents have failed to show even one objective fact on which the subjective satisfaction is recorded. The respondents have not dared to challenge the correctness of the objective facts disclosed by the petitioner and thus it has to be held that the adverse remarks in the ACR for the year 2008-09 have to be quashed.

42. We quash the adverse remark in the ACR for the year 2008-09 of the petitioner.

43. We also quash petitioner being graded "Average" and direct the Director General BSF to take guidance from our present decision and pass a fresh reasoned order dealing with the contentions urged by the petitioner which we have noted in our present decision and decide afresh as to what grading has the petitioner to be awarded for the year in question. We emphasize. The decision would be reasoned and would deal with the facts disclosed by the petitioner. The Director General BSF shall also keep in mind the preceding and the succeeding years recording of attributes of the petitioner and to be conscious of the fact that eyebrows should be raised if there is a sudden drop in appraisal in a particular period. Unless objective facts are disclosed to the contrary, the raised eyebrows would not drop. As noted above, after all a leopard does not lose his spots overnight and least become a jackal.

44. Since the adverse remarks in the ACR for the year 2008-09 has been quashed by us we direct a review DPC be held as of the date when persons junior to the petitioner were promoted. Before that, the DG BSF would take a fresh decision regarding grading to be accorded to the petitioner for the year 2008-09. The needful shall be done by the DG BSF within 8 weeks from today. Review DPC shall be held within further 12 weeks thereof. If found suitable for promotion, the petitioner would be promoted notionally from the date the person immediately junior to him was promoted. All consequential benefits shall ensue except back wages, which we deny on the principle that not having shouldered the responsibility of the higher post, the petitioner would not be entitled to wages thereof.

45. No costs.