
(2005) 08 GAU CK 0085
In the Gauhati High Court
Case No : Writ Petition (C) No. 3690 of 2002

Pawan Kumar Tiwari

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Constitution of India, 1950 — Article 235, 309, 51A

Citation : (2005) 3 GLT 633

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : K.N. Choudhury, I. Choudhury and A. Begum, for the Appellant; P.N. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

R.B. Misra, J.—Heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. I. Choudhury and Mr. P.N. Choudhury, learned Counsel for the Respondents.

2. In this petition prayer has been made for issuance of writ of certiorari to set aside the impugned adverse remarks/entries made against the Petitioner in his annual confidential report for the period from 4.9.99 to 31.3.2000 and to quash the communication dated 9.8.2000 (Annexure B to the writ petition) as well as order dated 26.5.2001 (An-nexure-E to the writ petition).

3. It appears that the Petitioner was serving as the Deputy Commandant in 61 Bn. CRPF at Kashmir was informed by Signal No. T.IX-12/99-Pers. I dated 26.7.99 transferring him to AWS-III, Guwahati, and before even completing one year in the said unit, the Petitioner was again informed on 11.8.99 that he has been posted at 35 Bn. CRPF on promotional transfer instead of AWS-III, Guwahati. Feeling aggrieved, the Petitioner submitted a representation dated 13.8.99 before the Competent authority stating that he had not completed his tenure of three years and therefore, he could be retained in the 61 Bn. CRPF, when no heed was taken, the Petitioner was compelled to join the post of Deputy

Commandant, 35 Bn. CRPF where he served w.e.f. 4.9.99 to 21.12.99, and thereafter, working as Deputy Commandant, AWS-III, Group Centre, Guwahati till date. According to the Petitioner to his utter shock and surprise, the DIGP, North Eastern Sector, Shillong vide communication under memo No. R-III-1/2000/P.A. (Admn.) dated 9.8.2000 informed him the adverse remarks being recorded in his Annual Confidential Report (in short called ACR) which read as follows:

1. There is scope for improvement in his capabilities regarding dispensing of administrative and organizational duties.

2. He is in the habit of writing too many letters which is not a very good habit and tries to portray a picture that he does not like to state under the authority of officers. If some attention is given to this, he can become a good officer.

4. According to the Petitioner, he has never been verbally or in writing warned or advised either directly or indirectly which have ever been remotely related to the aforesaid adverse remarks, more particularly, during the period from 4.9.99 to 31.3.2000 which has not been exclusively been denied by the Respondents in their affidavit in opposition (counter affidavit). However feeling aggrieved by the aforesaid adverse entries/remarks, he apprised his grievances by a letter dated on 12.8.2000 (Annexure C to the writ petition) to the Inspector General of Police, CRPF, North Eastern Sector, Shillong, followed by an Anr. representation dated 31.8.2000 (Annexure D to this writ petition). However, vide letter No. R.13-2/2001-G.R. Branch dated 26.5.01 (Annexure-E) the Director General, rejected the representation of the Petitioner by referring altogether new reasons and grounds. The reasons indicated in the order dated 26.5.2001 are as follows:

....The said officer on his transfer from 61 Battalion to 35 Battalion, Manipur, had came to the Battalion with his family without the permission of the competent authority, which is against the administration. Not only this, after about 15 days of reporting to the 35 Battalion, without informing either the Commandant or the second-in-Command Officer, sent his wife to Imphal town for marketing alongwith the company as a result of which, unidentified terrorists got a chance of throwing hand-gre-nades on the last car of the convoy. Due to this incident two soldiers were injured....

5. According to the Petitioner the reasons recorded in rejection order dated. 26.5.2001 of the representation dated 31.8.2000 in reference to adverse entries/remarks in his "ACR" are no way connected with the adverse remarks themselves as the first reason was absolutely without any justification. In respect of the second reason, it is necessary to refer "Operational Hand Book, Directorate General, CRPF. Clause 10.3 which lays down the criteria for keeping families at detachment. As per the provisions of Clause 10.3, there is no bar on the part of Gazetted officers of CRPF in taking families to 35 Bn., Manipur. The relevant portion of the Clause 10.3 reads as follows:

10.3 (i) The following are the instructions regarding Gazetted Officers:

(a) Whenever a Bn. is placed under the operational control of the Army, no Gazetted Officer will be permitted to keep his family at detachment without the specific permission of Ops. DIGP.

(b) In the following areas prior permission of the Operational DIGP will have to be obtained:

(a) Nagaland (b) Mizoram

(c) No permission is required at other places on Detachment duty. However, in public interest the Commandant may by specific order ask any Gazetted Officer not to keep his family at Detachment. Such order will cease to be operative if the operational DIG's Concurrence is not obtained within a month. The Operational DIG's concurrence should be promptly communicated to the Gazetted officer concerned.

(d) At static institution Officers may keep their families at their own will.

(ii) The following instructions apply to Non-Gazetted Officers:

(a) In the following areas, only 10% may be permitted to keep their families with the permission of the Commandant.

6. According to the learned Counsel for the Petitioner, in respect of the second reason that the Petitioner had sent his wife alongwith a convoy to Imphal town for marketing without informing the Commandant of the said Battalion, there are instructions issued vide memo No. L.X.1/Ops. dated 26.6.97 providing that before the troops move out, they should be properly briefed about tasks to perform and precautions to be taken by the senior most Officer available in the Camp....On return, the troops should be debriefed again by the same Officer and any corrective measures required as a result of such debriefing should be noted, in these circumstances no question arose that the Commandant or the senior most officer available but not informed about the Petitioner's wife having gone with the Convoy.

7. According to the learned Counsel for the Petitioner that the Respondent authority has from time to time issued instructions regarding procedure to be followed while writing ACRs. One such instruction issued under memo No. R. 9/I-CRC dated 24.12.91 of Directorate General "CRPF" (Annexure J to the writ petition) reads as follows:

iv. While dealing with the representations/appeals against the adverse remarks in ACR it has been noticed that the Reporting Officer had been recording the adverse remarks in complete disregard of the instructions on the subject. It maybe reiterated that it is the duty of reporting officer not only to make an objective assessment of the work and qualities of his subordinates but also to give at all times the necessary guidance and assistance to correct their faults and deficiencies. Recording of adverse remarks should be resorted only when a officer fails to improve despite written warning advices. While recording adverse

remarks, the Reporting officer had to indicate the efforts made by him to get those defects remedied but the same is not being followed properly.

8. For the purpose of adjudicating the issues and the grievances of the Petitioner, it is necessary to analyse the decisions of the different Court given from time to time.

8.1. In the State Bank of India etc., Vs. Kashinath Kher and others, etc.,, para 15, the Supreme Court has observed that the object of writing confidential report is two fold, i.e. to give an opportunity to the officer to remove deficiencies and to inculcate, discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service.

In Kashinath Kher, (supra) the Supreme has observed that the ACRs should be written by a superior officer with objectivity, impartiality and fair assessment.

Writing of ACRs by officers of the same grade is violative of the principles of natural justice.

8.2. In Brij Mohan Singh Chopra Vs. State of Punjab, the Supreme Court has observed that making of a representation against an adverse entry is a valuable right-hence, it is imperative that an adverse entry is communicated and the representation against it is considered with full care.

8.3. In Union of India (UOI) Vs. M.E. Reddy and Another, the Supreme Court has held that it is not every adverse entry or remark that has to be communicated as the remark of general nature about work and reputation fall in this category.

8.4. In M.K. Dixit v. Union of India (1989) 11 ATC 654 , the Court has observed that an adverse entry made in the A.C.Rs. in contravention of the instructions relating to that entry is honest in the eye of law. If the entry itself is not in accordance with the rules or instructions on the subject binding in the case cannot be ignored and which are to be at least substantially complied with, otherwise, it has to be treated as honest.

8.5. In U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, the Supreme Court has observed that in the matter of down grading of assessment in respect of ACR of an employee even in a particular year, the reasons are to be recorded in the personal file and down grading is to be communicated in the form of an advice.

8.6. In R.L. Butah Vs. Union of India (UOI) and Others, the Supreme Court has observed that making of adverse entry in the confidential report is not equivalent to imposition of a penalty which would necessitate an inquiry or affording a reasonable opportunity before making it.

8.7. In Union of India v. E.G. Nambudiri 1991 AIR SCW 1190, the Supreme Court has observed that while rejecting the representation against the adverse entries the reasons may not be given.

8.8. In *Amar Kant Choudhary Vs. State of Bihar and Others*, the Supreme Court has indicated valuable suggestions in respect of recording of the entries and has further observed that the present system of awarding and communication of the adverse entries to the officer concerned and disposal of his representation against these was time consuming and causing not only inconvenience to the officer concerned but also avoidable difficulties to the authorities, as such the Supreme Court has observed as below:

In order to avoid such a contingency, the Government may consider the introduction of a system in which the officer who has to make entries in the confidential roll may be required to record his remarks in the presence of the officer against whom the remarks are proposed to be made after giving him an opportunity to explain any circumstance that may appear to be against him with the right to make representation to higher authorities against any adverse remarks. This course may obviate many times totally baseless remarks being made in the confidential roll and would minimize the unnecessary suffering to which the officer concerned will be exposed. Another system which may be introduced is to ask the officer who records the confidential remarks to serve a copy of such remarks on the officer concerned before the confidential roll is submitted to the higher authorities so that his representation against the remarks may also reach the higher authority shortly after the confidential roll is received. This would curtail the delay in taking action on the representation.

8.9. In *State of U.P. v. Kaushal Kishore Shukla* 1991 AIR SCW 793 the Supreme Court has held that A.C.Rs. are relevant document to decide the suitability for continuance of a temporary employee in service.

8.10. In Para 7 of *Biraj Mohan Singh (supra)* the Supreme Court has observed that it is now settled that adverse entries, if any awarded to an employee lose their significance on or after his promotion to a higher post.

8.11. The Apex Court has observed in *Lakhi Ram Vs. State of Haryana and Others*, that an officer whose chances of promotion are prejudiced by expunction of adverse remarks of Anr. employee can challenge it in a court of law.

8.12. In *Baidyanath Mahapatra Vs. State of Orissa and Another*, the Supreme Court has observed that 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.

8.13. In *State of U.P. Vs. Yamuna Shanker Misra and another*, the Supreme Court has observed that the object of writing the confidential reports and making entries in them is to give an opportunity to a public servant to improve excellence. Article 51A(j) enjoins upon every citizen the primary duty to

constantly endeavour to prove excellence, individually and collectively, as a member of the group-Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, faith and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of performance of the subordinate officer. It should be found upon facts and circumstances. Though, sometimes, it may not be part of the record but the conduct reputation and character public knowledge or notoriety and may be within the knowledge of such officer. Before forming an opinion to make adverse entries in confidential reports the reporting/reviewing officers should share the information which is not a part of the record, with the officer concerned. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct behaviour, integrity or corrupt proclivity. If, despite giving such an opportunity, the officer fails to perform the duty or correct his conduct or improve himself, necessarily the same is to be recorded in the confidential report and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal. Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standards of excellence in services constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion.

9. In view of the forgoing analysis it becomes apparent that report which is annually recorded in confidential record have some purpose. In fact the performance of an employee, the opinion about his individuality, personality, status and role played, work, action, performance, activities, attitude, devotion, diligence, honesty, integrity faithfulness of an employee has to be assessed confidentially. Three aspects arise while are relatable while recording a confidential report. Firstly, the person or an employee in whose matter the confidential report is being made, the same has to be and fairly assessed. Secondly, the person and his qualities making assessment or a report and thirdly, the criteria or parameter of evaluation.

10. Confidential and character reports should be written by superior officers objectively, impartially without any prejudices. Such Annual confidential report has to be recorded with confidentiality and with two fold objectives i.e. firstly to give an opportunity to the officer concerned to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality excellence and efficiency of officer or public service. Sometimes the "ACR" is called or acknowledged as character roll entry where the characteristics of an individual values as a human being relatable to "morality" preserve in him and one's personality is also assessed relatable to the work assigned and post held by him. "Moral" and "Morality" connote the entire virtues of human being, in short

justice, discipline, self-control, tolerance, benevolence, generosity, honesty, compassion, devotion to duty and willingness to self-sacrifice one's own interest and benefit for the welfare of people or society. All these virtues cumulatively may be taken as covered in "morality". It may also be said that these virtues are essential components of "good conduct" and collectively known as "morality", the basic foundation of good personality of an individual human being or person may also be kept in mind while making "ACR" of an employee.

11. Therefore general conditions could be enumerated while making confidential report as follows:

(i) The maintenance of character rolls is not enjoined by any statute or rules framed under Article 309 of the Constitution. Principles regarding record of confidential reports and communication of adverse remarks have been laid down in administrative instructions issued from time to time. The circular if any applicable at a particular point of time is to be followed in its entirety.

(ii) The character rolls are maintained primarily for the benefit of the State Government. Where the Government is the master has to make its own estimate or the assessment about the caliber of its servants or employees so as to derive their talents for the purpose.

(iii) The instructions prescribe guidelines for the officer for making assessment of the worth and caliber of their subordinates.

(iv) The circulars of State bind the department under the administrative control of the State Government and not binding on the members of the subordinate Judicial Service under the administrative control of the High Court under Article 235 of the constitution.

(v) Since the action is taken on the basis of remarks in the character roll in the matter of allowing crossing of efficiency bar, promotion, suppression or reversion etc. therefore the adverse entries affect the service prospects of an employee and have civil consequences.

(vi) At the time of record confidential report the employee is not entitled to any hearing.

(vii) It is only after the record of confidential reports and the communication thereof, an employee is to be given an opportunity to make a representation against the adverse entry.

(viii) The time prescribed in any circular for communication of adverse entry is not mandatory but directory. If the adverse entry is not communicated in time, it is not wiped out.

(ix) If the employee does not make a representation against the adverse entry after communication, it becomes final.

(x) The character roll can be acted upon before final disposal of the

representation. There is no provision in the administrative instructions that action would await the final disposal of the representation. Such a view would militate against exigencies of public service.

(xi) If representation is ultimately rejected, the action taken on the basis of the confidential report would stand.

(xii) If on representation, the adverse entry is set aside or substantially modified the case is to be reconsidered and earlier action taken on such adverse entry is to be quashed if a different view is taken on reconsideration and retrospective benefits are to be conferred.

(xiii) If the adverse entry is not communicated at all for an unusually action is taken on the basis of the adverse entry, a Government servant can ask for an appropriate writ directing the Government to communicate the adverse entry and to dispose of the representation, if any. In appropriate cases depending on facts and circumstances, adverse action taken against the Government servant may liable to be quashed.

(xiv) An adverse entry made in the A.C.Rs. in contravention of the instructions relating to that entry is honest in the eye of law.

(xv) While making confidential reports-mentioning of specific instances are not necessary however, if such remarks contain a slur on the character and conduct of the officer, the concrete instances should be given.

(xvi) While recording the down grading of assessment the reasons are to be recorded in personal file and down grading is to be communicated in the form of an advice to an employee.

(xvii) Making of adverse entry in the confidential report is not equivalent to imposition of a penalty which would necessitate an inquiry or affording a reasonable opportunity before making it.

(xviii) While making communication of adverse entry the basis on which the adverse entry was founded must also be communicated.

(xix) While rejecting the representation against the adverse entries even if reasons not communicated but must be there on the file.

(xx) The adverse entries can be acted upon even if not communicated unless malafide on the part of the authority can be shown.

(xxi) The guidelines and observations of the Supreme Court in Amar Kant Choudhury (supra) have to be kept in consideration by the State Government or by the instrumentalities of the State or authorities of State or Corporation to avoid delay and consequent inconveniences arising from the present system relating to representations against adverse entries.

12. In view of the above analysis, it appears that the representation/appeal of the Petitioner was not considered carefully by the authority concerned the same

was rejected all together on different grounds and reasons. The rejection of the representation/appeal was in derogation to the norms and provisions or instructions issued for the purpose under memo No. R-9/I-CRC dated 24.12.91. The rejection of representation/appeals on irrelevant, different points and on different reasons are violative of principles of natural justice and lacks objectivity. In these circumstances, the order dated 9.8.2000 as well as order dated 26.5.2002 are not legally sustainable therefore, these are set aside and the adverse entries communicated to the Petitioner vide order dated 9.8.2000 are directed not to be read by the Respondents as a part of annual character roll of the Petitioner and same has to be deleted so that it may not be part of service book of the Petitioner even.

13. In view of the above observations, writ petition is allowed. No order as to cost.