
(2011) 03 GAU CK 0082
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 72 of 2010

Sh.Lalropaia Hmar

APPELLANT

Vs

State of Mizoram & Ors.

RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Citation : (2012) 5 GLR 269 : (2012) 3 GLT 530

Hon'ble Judges : Madan B.Lokur, C.J.

Bench : Single Bench

Advocate : Advocates appeared for the Petitioner: Mr. C. Lalramzauva, Sr. Advocate, Mr. A.R. Malhotra, Mr. J. Lalkafawma , Mr. T.J. Lalnun-tluanga??
Advocates appeared for the Respondents: Addl.AG, Mr. M. Zothankhuma, Sr. Advocate, Ms. D. Lalrinchhani, Mr. Lalfakawma, Ms. Zonuni Hrahse, Mr. Vanlalnghaka, Advocates appearing for Parties

Judgement

Madan B. Lokur, CJ.

1. The grievance of the petitioner is with regard to the failure of the Mizoram Public Service Commission (MPSC) to recommend him for promotion to the grade of Executive Engineer in the Public Health Engineering Department. The petitioner is also aggrieved by the failure of respondent Nos. 1 to 3 to objectively consider the case of the petitioner for promotion to the grade of Executive Engineer in the Public Health Engineering Department. In this regard, the prayer made by the petitioner is for setting aside the notification dated 10.12.2009 issued by the MPSC recommending the promotion of respondent Nos. 5 and 6 to the grade of Executive Engineer and for setting aside the letter dated 11.5.2010 issued by the Department of Personnel & Administrative Reforms (DP & AR) of the State of Mizoram refusing to accept the upgradation of the ACRs of the petitioner for the year 20062007.

2. In terms of the relevant Recruitment Rules called the Mizoram Engineering Service Rules, 2001 an Assistant Engineer is eligible for promotion to the grade of Executive Engineer if he has put in 8 years regular service as an Assistant

Engineer and on passing the requisite departmental examinations.

3. For the purposes of promotion, the ACRs for the last 5 years of candidate are required to be considered and in terms of the procedure adopted by the Departmental Promotions Committee (DPC), a candidate should be recommended as fit for promotion in 4 out of 5 years including in the last year.

4. In so far as the petitioner is concerned, his ACRs for the first 4 years show that he was graded as "Very Good" but for the 5th year he was graded as "Good" and, therefore, not fit for promotion. On the other hand, respondent Nos. 5 and 6 were found fit for promotion in all the relevant 5 years. On this basis, respondent Nos. 5 and 6 superseded the petitioner for promotion to the post of Executive Engineer.

The gradings given to the petitioner and respondent Nos. 5 and 6 is as follows:

SI. , Name of Officer , 0203 , 0304 , 0405 , 0506 , 0607 , Overall

1. Lalropuia Hmar , VG , VG , VG, VG , VG , Unfit

2. H. Lallianmawia , VG, VG, VG, VG, VG , Fit

3. Lalsanga , VG, VG, VG, VG, VG, Fit

4. Helen Rodingliani , VG, VG, VG, VG, VG, Fit

5. Netralai Jaisi , VG, VG, VG, VG, VG, Fit

5. When the petitioner learnt that he had been superseded for promotion to the post of Executive Engineer, he made a representation dated 28.12.2009 to the Principal Secretary to the Govt. of Mizoram, Public Health Engineering Department, Aizawl in which he stated that the grading "Good" given to him in the ACR for the year 20062007 was not justified and that his ACR deserved to be upgraded. The petitioner gave supporting materials along with his representation.

6. It seems that on processing the representation, the Public Health Engineering Department informed the DP & AR by a letter dated 23.3.2010 that it was not aware of any adverse remark given to the petitioner for the year 20062007 and hence the adverse remarks were not communicated to him. It was also pointed out that the representation was then referred to Reporting Authority and Reviewing Authority of the petitioner and the ACR for 20062007 was upgraded from "Good" to "Very Good".

7. In response to the above letter dated 23.3.2010 the DP & AR wrote back on 6.4.2010 to say that the upgradation of the ACR of the petitioner from "Good" to "Very Good" for the year 20062007 was without proper justification and rules. Moreover, the upgradation was not accepted by iii Accepting Authority and that the representation was not made within the stipulated time. It was also stated that the change in grading was made after the recommendation of the DPC and such an upgradation (or down upgradation in a particular case) would not be desirable. It was pointed out that the DP & AR was of the view that under these

circumstances, a review DPC was not possible. The comments/clarifications from the Public Health Engineering Department were sought by the DP & AR.

8. In response to the letter dated 6.4.2010 sent by the DP & AR, the Joint Secretary to the Public Health Engineering Department wrote back on 30.4.2010 stating that the upgradation in the ACR of the petitioner was effected because of the decision of the Supreme Court rendered in *Dev Dutt Vs. Union of India & Ors.*, (2008) 8 SCC 725 and therefore a review DPC may be held.

9. In response to the aforesaid letter dated 30.4.2010 the DP & AR reiterated its view by a letter dated 11.5.2010 that there was no sufficient ground to hold a review DPC.

10. Under these circumstances, the petitioner preferred the present writ petition for setting aside the views expressed by the DP & AR and for accepting the upgradation of his ACR for the year 20062007.

11. Upon notice having been issued to the respondents, an affidavit in opposition has been filed, inter alia, by respondent Nos. 5 and 6, both of whom had superseded the petitioner in the matter of promotion to the grade of Executive Engineer. These respondents have annexed a letter dated 18.2.2010 issued by the present Superintending Engineer of the Public Health Engineering Department (who was at the relevant time an Executive Engineer and the Reporting Officer of the petitioner). In this letter it is stated that the grading of the petitioner for the year 20062007 was upgraded from "Good" to "Very Good" so as "to avoid supersession of his promotion by his junior which may adversely effect and spoil his future service." These respondents have also annexed a photocopy of the ACR form of the petitioner which shows that the opinion of the Reporting Authority upgrading the ACR of the petitioner from "Good" to "Very Good" was accepted by the Reviewing Authority. According to learned counsel for respondent Nos. 5 and 6, the upgradation of the ACR of the petitioner is whimsical and arbitrary.

12. The primary contention of learned counsel for the petitioner is that the benchmark for promotion to the post of Executive Engineer was "Very Good" which automatically made a person fit for promotion. Since the petitioner was given only "Good" in his last ACR for the year 20062007, he was found not fit for promotion. The "Good" grading, therefore, had an adverse impact on the promotion prospects of the petitioner. In support of his contention that even a "Good" grading may be adverse in certain circumstances and should be communicated to the concerned officer, reliance is placed by learned counsel on paragraphs 9 and 10 of *Dev Dutt*. These read as follows:

9. In the present case the bench mark (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 199394 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 noncommunication of the "good" entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondent are distinguishable.

13. A perusal of the aforesaid passages makes it clear that the nomenclature of the grading is not relevant. In a given case, even a "Good" grading may have an adverse impact. Therefore, what is relevant is the effect or impact that a grading has on the career prospects of a Government servant.

14. On the facts of this case it is quite clear that the effect of the grading given to the petitioner for the year 20062007 was to deny him promotion to the post of Executive Engineer. Therefore, even though the grading given to him was "Good", the impact thereon was adverse to his interests and, therefore, that grading should have been communicated to him. The failure of the official respondents to communicate the adverse entry to the petitioner prevented him from making a representation against it at the appropriate time.

15. Consequently, the plea taken by the respondents that the representation made by the petitioner was highly belated has no significance. The petitioner could not make a representation without being communicated the adverse entry made in his ACR. He came to know of the adverse entry only when he learnt that he was superseded to the post of Superintending Engineer by respondent Nos. 5 and 6. Immediately on coming to know of the adverse entry, the petitioner made a representation and it cannot be said, under these circumstances that the petitioner did not take remedial steps at the earliest possible point of time. In my opinion, the reason given by the DP & AR for rejecting the representation of the petitioner on the ground of delay cannot be accepted.

16. The further reason given by the DP & AR for rejecting the petitioner's representation is that upgradation of his ACR for the year 20062007 was not endorsed by the Accepting Authority, who had since retired and therefore there was no one to "accept" the upgradation. The fortuitous circumstance of the

retirement of the Accepting Authority cannot disentitle the petitioner to get what is legitimately due to him. It is not as if the petitioner waited for the Accepting authority to retire before making the representation. On the contrary, the petitioner made the representation at the earliest possible time. Therefore, this reason given by the DP&AR for rejecting the upgradation of the ACRs is liable to be rejected.

17. What is really a more formidable objection raised by the DP &AR is that the upgradation of the petitioner's ACR for the year 20062007 was done without proper justification. It is on record that the representation of the petitioner was accepted by his Reporting Authority only to avoid his supersession by his junior which may adversely effect and spoil his future service. Surely, such a reason cannot hold good, otherwise every representation against an adverse ACR would have to be accepted. Clearly, the Reporting Authority did not apply his mind to the service profile of the petitioner for the year under consideration. The decision of the Reporting Authority to upgrade the ACR of the petitioner is not at all justified.

18. Under the circumstances, two options are available to me. The first option is to direct that the case of the petitioner for promotion to the post of Superintending Engineer should be considered on the basis of the four available and valid ACRs. The second option is to direct that the representation made by the petitioner on 28.12.2009 should be considered afresh.

19. Learned counsel for the petitioner suggested acceptance of the first option. But this would mean that only the first four ACRs of the petitioner would be taken into consideration while assessing his chances for promotion. The result of this would most certainly mean the promotion of the petitioner to the rank of Executive Engineer without any proper assessment having been made for the year 20062007.

20. Learned counsel for the official respondents canvassed acceptance of the second option and placed reliance on paragraph 37 of the decision rendered in Dev Dutt. In this paragraph, the Supreme Court makes it clear that a representation against an adverse ACR should be made to a higher authority, otherwise it would be an appeal from Caesar to Caesar.

21. This was opposed by learned counsel for the petitioner since it appears that the Reporting Authority of the petitioner (who was earlier an Executive Engineer) has now been promoted as a Superintending Engineer and the Reviewing Authority (who was earlier a Superintending Engineer) has now been promoted as Chief Engineer, holding the charge of EngineerinChief. Consequently, the representation of the petitioner cannot be considered by anybody in the hierarchy.

22. However, I am told that the head of the department is really the Commissioner and Secretary in the Public Health Engineering Department who is superior to the Engineerinchief. Surely, he can impartially consider the representation of the petitioner submitted on 28.12.2009. Accordingly, a

direction is given to respondent No. 3 who is the Commissioner and Secretary in the Public Health Engineering Department to objectively consider the representation submitted by the petitioner for upgrading his ACR for the year 20062007. The Commissioner and Secretary should take a decision thereon within a period of two months from today.

23. In case the Commissioner and Secretary comes to the conclusion that the representation of the petitioner should be accepted on merits, a Review DPC would have to be constituted by the DP & AR to consider the case of the petitioner for promotion to the grade of Executive Engineer. It is made clear that the representation of the petitioner dated 28.12.2009 ought not to be rejected on any technicality but should be considered on merits.

24. Until a decision is taken by the Commissioner and Secretary in the Public Health Engineering Department and it is acted upon (if it is in favour of the petitioner) the parties will maintain the status quo.

25. The writ petition is disposed of on the above terms. No costs.