

**(2012) 04 DEL CK 0508**

**Delhi High Court**

**Case No:** Writ Petition (C) No. 7675 of 2007 and CM No's. 14636 of 2007, 10984 of 2010

Manohar Singh

APPELLANT

Vs

NTPC

RESPONDENT

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**Date of Decision:** April 10, 2012

**Acts Referred:**

- Constitution of India, 1950 - Article 16, 226
- Promotion Policy Rules - Rule 5.1, 6.4

**Hon'ble Judges:** Sudershan Kumar Misra, J

**Bench:** Single Bench

**Advocate:** V.K. Rao with Mr. Agastya Kumar and Mr. Vaibhav Kalra, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Sudershan Kumar Misra, J.

The petitioner appears in person. He retired from the respondent organization on 31st August, 2003. He has filed this petition seeking a direction to the respondent to promote him to the next higher post of Manager (Safety) at the E-5 level, with effect from 1st January, 2002 and to pay him all consequential benefits, including retiral benefits. The case of the petitioner is that he joined the National Thermal Power Corporation (NTPC) on 28th January, 1982 as Supervisor Grade- II. In 1986, on the request of the General Manager (Korba), the petitioner agreed to work in the Safety Department, where he received various honours and appreciations from the respondent for his performance. He was promoted as Deputy Manager (Safety) at the E-4 level in 1999, and was transferred from NTPC (Kawas) to BTPS/NTPC (Badarpur) in the same year.

2. By a memorandum, dated 23rd November, 2001, the General Manager Shri P.P. Singh, acting as the Disciplinary Authority, informed the petitioner that an inquiry has been initiated against him for misconduct under Rule 25 of the NTPC Conduct Discipline & Appeal Rules, and that a charge sheet has been framed on the

allegation that he had furnished false documents for claiming HRA from the respondent. By letter, dated 5th January, 2002, the petitioner informed the Disciplinary Authority that as per the "Modified Schedule of Delegation of Powers for Disciplinary Matters", he is not empowered to issue a charge sheet under Rule 25 (Major Penalty) of the NTPC Conduct Discipline & Appeal Rules and therefore, the petitioner was not bound to file any reply to the charge sheet. In his response of 12th January, 2002, the Disciplinary Authority rejected this plea of the petitioner and granted him 3 more days to file the reply. On 4th February, 2002, the respondent also appointed an enquiry officer. The petitioner took part in the inquiry proceedings under protest. He also requested the respondent to expedite the proceedings in view of his approaching retirement.

3. On 4th March, 2003, while the inquiry was in progress, the petitioner made a representation on Form- I, i.e., Stage-I Grievance, to the respondent for his promotion from E-4 to the next higher grade i.e. E-5. To this, the respondent replied vide a memo, dated 20th March, 2003, informing the petitioner that he was considered by the Regional Promotion Committee (RPC) but was not recommended by them. Being aggrieved from the reply of the respondent to Form-I, the petitioner resorted to Form- II i.e., Stage-II Grievance, on 29th March, 2003. This was rejected by the respondent on 30th May, 2003, and it was clarified that in fact, since the disciplinary proceedings were pending against the petitioner, the recommendations of the aforesaid Regional Promotion Committee have been kept in a sealed cover and will be governed by the relevant rules.

4. On 26th August, 2003, on the eve of the petitioner's retirement, which was coming up on 31st August, 2003, the Deputy Manager (HR-ER & W), initiated the following note proposing that the case against the petitioner be closed;

Sh. Manohar Singh, Emp. No. 21308, Dy. Manager (Safety), Safety Deptt. is due for superannuation from the services of the Corporation on 30.8.2003 (AN). In this context, it is submitted that there is a disciplinary case pending against Sh. Manohar Singh as per following details:

S. No.	Charge-sheet No.	Misconduct	Status
1.	BTPS/04/21308: 2001/2002 dt. 23.11.2001	Furnishing false documents for claiming of HRA from the company	Enquiry is continuing.

It may be pertinent to mention that on attaining the age of superannuation and thus retiring from service, the employee-employer relationship comes to an end and the employee does not remain within the disciplinary control of the Employer. Thus, all rules relating to the conditions of service become inapplicable and it is not

possible to impose any penalty on him even with retrospective effect (High Court of [High Court of Punjab and Haryana Vs. Amrik Singh](#)). Further, there is no clause in the NTPC Superannuation Benefit Scheme for conducting disciplinary proceedings after retirement. There is no rule for extended service just for continuance of departmental proceedings against the employee.

In this context, it may be mentioned that in a similar case comparable of Sh. M.P.Tiwari, Emp. No. 52691, Foreman, Gd. II, R&M Deptt., who superannuated from service on 30th June, 2003, the Competent Authority decided not to pursue the disciplinary matter. In view of the superannuation of Sh. Singh, we may close the case against him and release terminal benefits as per rules. A draft communication to be issued to Sh. Singh is also enclosed for kind perusal & approval.

Submitted please.

This was accepted; and ultimately, by a letter, dated 29th September, 2003, the respondent informed the petitioner that since he has now retired, the disciplinary proceedings against him have been decided to be closed by the respondent.

5. It was in these circumstances that the petitioner requested the respondent to consider the status of his promotion, but that was of no avail. Therefore, the petitioner moved this court in writ petition, WP (C) No. 2077/2007, alleging, inter alia, that he has not been informed about the recommendations made by the Promotion Committee for 2003 which were kept in a sealed cover by the respondent. On 19th March, 2007, this Court disposed off that petition with a direction to the respondent to open that sealed cover, and inform the petitioner about its contents. It also granted the petitioner liberty to move this Court again in case he felt aggrieved by the recommendations of the Promotion Committee for 2003. As a result, the respondent opened the sealed cover and informed the petitioner on 5th April, 2007 that he was not found suitable for promotion. This has prompted the petitioner to move the instant petition.

6. The petitioner who appears in person, has, inter alia, contended that there was no need for the respondent to resort to the sealed cover procedure because he was never placed under suspension at any time. He also contends that his case deserved due consideration under the promotion policy, and that such consideration was denied to him due to malicious reasons. In other words, he was not considered at all for promotion. These contentions are palpably misplaced. He has already moved this Court earlier in Writ Petition (C) No. 2077/2007, inter alia, with regard to the non-communication of the recommendations of the Promotion Committee to him. Those proceedings were concluded with a direction by this Court to the respondent to disclose the contents of the sealed cover to the petitioner. This has been done. He cannot re-agitate these aspects of the matter again keeping in view the principles of res judicata and constructive res judicata. Further, since he had, in fact, been duly considered by the Promotion Committee concerned, which had then placed its

recommendations in a sealed cover, it cannot be said that he was not considered at all in terms of the promotion policy. These contentions are therefore rejected.

7. In this context, the petitioner also contends that the respondent has not followed paragraph 7.3.2 of the Promotion Policy (Executive) which contemplates ad hoc promotion in cases of delay in concluding disciplinary proceedings. Paragraph 7.3.2 reads as under :

7.3.2. In the event of delay in the conclusion of the disciplinary proceedings/ criminal prosecution on serious allegations of corruption, bribery or similar grave misconduct including moral turpitude, fraud, etc. the delay not being attributable to the charged employee, and the disciplinary proceedings/criminal prosecution, against the employee concerned are not concluded even after the expiry of two annual CPCs from the date of the meeting of the first CPC which kept its finding in respect of the employee in the sealed cover, the Appointing Authority may review the case of the employee, provided he is not under suspension, and consider and order promotion of employee on ad hoc basis, provided his case was recommended by CPC keeping in view the totality of the case, the availability of vacancy etc. The order of promotion should make it clear that the promotion is purely on ad hoc basis, till further orders and confers no right on the employee for regular promotion and that the Competent Authority reserves the right to cancel/revoke the ad hoc promotion or to revert, at any time the employee to the post from which he was promoted on ad hoc basis without any formal proceedings.

In addition, through an application moved under the Right to Information Act, the petitioner also claims to have discovered that in another, unrelated case, the respondent had indeed promoted some other employee on an ad hoc basis during the pendency of a departmental inquiry against that employee.

8. Admittedly, the petitioner was duly considered for promotion to the E5 level for the first time in the year 2002 and the result was kept in a sealed cover. He was again considered in the year 2003 and the result was once again kept in a sealed cover. He retired before he could be considered yet again. For the petitioner to become eligible for consideration for ad hoc appointment under paragraph 7.3.2, which is reproduced above, it was necessary that after the decision of the first Promotion Committee to place its finding in a sealed cover in the year 2002, two further annual Promotion Committees should have also been held before the enquiry was concluded. In other words, the condition precedent upon which the consideration of ad hoc promotion, as postulated under the aforesaid paragraph 7.3.2, to the effect that the ongoing disciplinary proceedings should not have been concluded even after the expiry of two annual Promotion Committees, "from", the date of the meeting of the first Promotion Committee, which kept its finding in a sealed cover, is not satisfied. Consequently, the question of considering the petitioner for ad hoc promotion in terms of clause 7.3.2 did not arise, and the petitioner's reliance on that provision for this purpose is misplaced. Even if it is

assumed that any orders have been issued by the respondent contrary to its own regulations in any other, unrelated, matter that would not vest any right on the petitioner for similar treatment.

9. The main argument of the petitioner that merits examination by this court is that he has, in fact, not been properly considered by the Promotion Committee; he contends that the assessment sheets of the Promotion Committees of 2002 and 2003 show an incorrect assignment of marks to his performance ratings as reflected in the relevant ACR in violation of the respondent's own Promotion Policy. According to him, the Promotion Committees have, in effect, reduced or downgraded the performance appraisal ratings actually awarded to him in his ACRs for the years under consideration. He further contends that one of the members of both the Promotion Committees, namely, Mr. P.P. Singh, General Manager, not only influenced the Committees to downgrade or lower his ACR ratings because he was biased against him; he was also ineligible to sit on the committees; And therefore, the decisions of those committees deserve to be set aside.

10. Paragraph 4.5 of the respondent's promotion policy dealing with the basis for assessment of merit and suitability" of candidate is as follows:-

"The Appraisal System will be on a 5 point scale, i.e. "Outstanding", "Good", "Average", "Below Average" and "Unsatisfactory", as defined in the Appraisal formats. The Final overall evaluation by the "Moderation Committee" will be taken into consideration for the purpose of aggregation, and marks will be allotted to various ratings for promotion at all levels as follows:

Rating	For promotion up to E4 level	For promotion from E4 to E5 & above
Outstanding	8	10
Good	6	8
Average	4	6
Below Average	2	4
Unsatisfactory	0	0

Para 5.1 dealing with the "Eligibility Period" is as follows:

5.1 - The eligibility period for consideration of executives in the grade as mentioned below for promotion to the next higher grade shall be as under:-

Executives in the grade of	Eligibility period
E2	1 year
E1,E2A, E3 and E4	3 years
E5 and E6	4 years

In this context, para 6.4 which prescribes the number of years that have to be considered by the Promotion Committee is also relevant. It states as follows:-

6.4 -The CPC shall take into consideration the Performance Appraisal Reports including Special Performance Report, if any, for the last One/Three/Four years, as the case may be, depending upon the eligibility period prescribed at Para 5.1 above.

Para 7 of the Promotion Policy lays down the Criteria and Conditions for Promotion and Disqualification from Promotion. Para 7.1(c) which is relevant here, is as follows:-

7.1(c) - Promotion of executives from the grade of E4 to E5

Factors	Maximum Marks
(i) Performance Appraisal Ratings (for last three years)	30
(ii) Grade Service	15
(iii) CPC	15
TOTAL	60

The marks for Performance Appraisal Ratings will be as given in Para 4.5.

The marks for Grade Service will be as under:

Grade Service	Marks
3 years	08
4 years	10
5 years	12
6 years	15

The "Qualifying Marks" for promotability will be 45 (Forty Five).

11. An examination of paragraph 4.5 of the promotion policy, extracted above, shows that for promotion to the next level, the marks that are to be allotted by the Promotion Committee for previous performance recorded in the candidate's ACR will depend, not only upon the rating awarded to that candidate in the ACR of each relevant year, but also on the level for which he is being considered. For convenience, paragraph 4.5 of the policy sets down the marks to be accorded in two tables next to a column denoting the various ratings or grades. The first table at the left under the heading, "For promotion up to E4 level", denotes the marks to be allotted by the Promotion Committee for promotions up to the E4 level, and the second one on the right under the heading, "For promotion from E4 to E5 and

above," denotes the marks to be allotted for promotions from the E4 to E5 level and above. Excepting for the marks to be allotted for an unsatisfactory rating, which is zero in both cases, for all other ratings from, "outstanding", "good", "average" to "below average"; 8, 6, 4 and 2 marks are to be allotted for all promotions up to the E4 level; and 10, 8, 6 and 4 marks respectively are to be allotted for the same ratings for promotion from E4 to E5 and above. In other words, the same rating may attract different marks depending upon the level for which the candidate is being considered.

12. The petitioner has approached the matter rather differently. He has taken the extracts of the petitioner's assessment by the relevant Promotion Committee for the years 2002 and 2003; as furnished by the respondent's additional affidavit; disclosing the marks allotted by it for the ratings in his ACRs for each of the three previous years, as his starting point. He submits that, since marks are given by the Committee for the performance rating mentioned in his ACR for a relevant year; therefore, from the marks actually given, one can correctly work out the ACR rating in question. Unfortunately, he is logical only up to this point. Thereafter, out of the two columns mentioned in para 4.5, which is reproduced above, he uses the first column of marks on the left in preference to the second column, for determining the grading mentioned against the marks disclosed by the respondent; And the rating found against the marks actually awarded by the Promotion Committee by referring to the first column on the left, is presumed by him to be his rating for that year. After doing that, he then looks to the marks mentioned against that rating in the second, right hand column, and contends that those are the marks that should have been allotted to him by the Committee instead of the marks actually allotted. He justifies this approach on the specious reasoning that in all the relevant years, he was working in the E4 level, and therefore, to work out the ratings awarded in those years, the first column on the left must be used. For instance, for the year 2000, the Promotion Committee has allotted the petitioner 6 marks, therefore in terms of the first column, he must have been given a rating of, "Good" in his ACR of that year. After thus arriving at the rating of, "Good" for that year; he then determines the corresponding marks for that rating in the second column which happen to be 8 and contends that these are the marks that should have been allotted to him by the Promotion Committee for that year instead of the 6 marks actually shown to have been allotted by the Committee in the extract furnished by the respondent to this court. According to him, the method adopted by the Promotion Committee has resulted in a downgrading of the ACR ratings actually awarded to him. To my mind, the petitioner is completely misdirected. His approach is based on a complete misunderstanding of the purpose of clause 4.5. In fact, clause 4.5 postulates the allotment of different marks for the same rating depending upon the level for which the candidate is being considered. The level at which the ACR rating in question was earned is immaterial; And simply because the Committee has allotted the marks prescribed for a particular ACR rating in terms of para 4.5 for considering him for

promotion to the E5 level, cannot therefore lead to an automatic presumption that the petitioner's ratings have been reduced by it.

13. The examination of the ACR folder of the petitioner which was produced by the respondent shows that as prescribed by Rules 5.1 and 6.4 of the Promotion Policy, which is also reproduced above; the Promotion Committee for the year 2002 examined the ACRs of the petitioner for the years 1999, 2000 and 2001; whereas the Promotion Committee for the year 2003 examined the ACRs of the petitioner for the years 2000, 2001 and 2002. For the year 1999, there appear to have been two ACRs filled in. The first one is from 1st January, 1999 to 24th September, 1999. In this ACR, the reporting officer has evaluated his performance as, "average" and no final assessment has been mentioned by the Moderation Committee. Thereafter, the second ACR has been filled in for the period 25th September, 1999 to 31st December, 1999. In this ACR, the petitioner's performance has been rated as, "good". For the year 2000, the petitioner's performance has been rated as, "average". Thereafter, for the year 2001, his performance is rated as, "average". For the year 2002, his performance has once again been rated as, "average". The marks allotted by the Promotion Committee for the year 2002, which was looking at the ACRs of the years 1999, 2000 and 2001, are 6 for each year. In other words, the Committee was under the impression that he had been rated as, "average" for all the three years. Here, there appears to be an error inasmuch as for the year 1999, his performance has in fact, been rated as, "good" and, therefore, the Committee should have allotted him 8 marks for that year. Even then, an increase of 2 marks would only take his total from 33 to 35 which would still be far below the qualifying mark which has been set at 45 in paragraph 7.1(c) of the Policy. For the year 2003, the Performance Committee took into consideration the ACR rating of the petitioner for the years 2000, 2001 and 2002. In all these years, the petitioner was rated as, "average" and consequently, the Committee has correctly allotted 6 marks for each year in this case. It appears that before the sealed cover was opened, the petitioner was under the impression that the overall ratings in his ACR for the relevant years is in fact, "good". This is not the case. Furthermore, even if the petitioner's case in this respect is taken at the highest and the ACRs in question are presumed to be, "good", even then, while considering the petitioner for promotion to the E5 level, it would make no material difference to the outcome as his total would only increase to 39 instead of 33 for the year 2002; and for the year 2003, it would become 37 instead of 31. However, in terms of the aforesaid paragraph 7.1(c), the minimum benchmark prescribed is 45 marks. It follows, therefore, that even if his performance ratings are allotted marks in the manner claimed by the petitioner, he would still not be eligible to be promoted to the E-5 level due to his failure to meet the aforesaid minimum criteria of 45 marks. He was therefore not recommended. The petitioner in this case only had a right to be considered for promotion but did not have any vested right to be recommended for promotion. A similar view has been taken by the Hon'ble Supreme Court in [Coal India Ltd. and Others Vs. Saroj Kumar Mishra](#), in paragraph



11 which reads as under:

11. Although an employee of a State is not entitled to promotion to a higher post as matter of right, he is entitled to be considered therefore in terms of Article 16 of the Constitution of India.

Also, it is well settled that the question of a candidate's fitness for a particular post is required to be decided by a duly constituted Selection Committee; and the decision of such committee can only be interfered with on the grounds of illegality or patent material irregularity, mala fides or absurdity, and not otherwise.

14. The petitioner also seems to be under an impression that if he was found unsuitable for promotion to the next, higher post, it means he was also found unsuitable for the subordinate post he was then holding, or conversely, because he was found suitable for the subordinate, i.e., E4 post, he should have been found suitable for the next E5 post as well. This is a rather simplistic view of the matter, to say the least. An employee may be good performer up to a certain level, but for the next level, he may not be suitable. Furthermore, as the organizational pyramid narrows towards the top, comparative evaluation becomes the norm. Rules and guidelines are also put in place that often specify minimum qualifying standards. This obviously results in the elimination of many while ensuring uniformity of assessment by a broad based Committee. There is nothing wrong with that. In any case, there is no challenge to the Promotion Policy itself framed by the respondent which prescribes all this.

15. The petitioner further contends that the participation of the General Manager and Head of Department of the petitioner, Mr. P.P. Singh, in the deliberations of the Promotion Committees was contrary to the rules and that Mr. Singh's bias towards him is the reason for the lowering of his ratings, and the rejection of his candidature, by the Promotion Committee.

16. As already concluded in the preceding paragraphs, in fact, there has been no lowering or reduction of the petitioner's ratings awarded to him for his performance in the years in question, by the Promotion Committees. Furthermore, admittedly, the Performance Committee for the year 2002 comprised of as many as 11 officers, all of whom were party to the decision. In addition, as pointed out by counsel for the respondent at the bar, the aforesaid Mr. P.P. Singh was not the senior most officer sitting on that Committee, and, in fact, there were as many as 4 officers with the rank of General Manager, all of whom, were senior to Mr. P.P. Singh, sitting on the Committee. He has also pointed out that out of the 11 officers on the Committee, as many as 6 officers were either of the same rank as that of Mr. P.P. Singh or senior to him. Similarly, in the Promotion Committee of 2003, there were as many as 7 officers who participated. In that view of the matter, more so, when no specific mala fides have been spelt out against the said Mr. P.P. Singh in the writ petition moved by the petitioner, it cannot be said that mere participation of

Mr. P.P. Singh could have influenced even his superiors in such a manner as to result in any appreciable difference to the outcome. Consequently, the allegations of bias against the committee on the ground of participation of Mr. P.P. Singh, who was a General Manager and Head of the Department of the petitioner, fail to impress this Court.

17. With his rejoinder, the petitioner has annexed a copy of a, "rating sheet for regional promotional committee 1999," which he states was filed by the respondent itself, "in court below". Presumably, he means that this was filed either in the earlier writ petition filed by him in this court, or in some proceedings instituted by him before the CIC. From this, he points out that two other employees, i.e., Mr. Reddy and Mr. Pareek, were allotted the same marks i.e. 28, the only difference was that Mr. Reddy's qualification is B.Tech(Mech.) and his date of birth is 5th January, 1968, while Mr. Pareek is a B.E. (Telecommunications and Electronics) and his date of birth is 28th June, 1969, all other factors are identical and the marks secured by them are also identical, but even then, only Mr. Reddy was promoted, which clearly demonstrates the arbitrary functioning of the respondent. A perusal of this document shows that this concerns promotion from grade E 3 to grade E 4. The effective date of promotion for candidates considered therein is also mentioned as 1.1.2009. Furthermore, the very next document annexed by him is another extract of the rating sheet of the Promotion Committee which was constituted in 1999 showing the consideration according to the petitioner's case for promotion from grade E 3 to grade E 4 with effect from 1.1.1999 whereby he was recommended for promotion to the E4 grade, and also duly promoted in that grade. The controversy at hand pertains to the consideration accorded to the petitioner for promotion to the next, i.e., A5 grade, which is another matter altogether. What has been done in any other case; and that too for promotion to a completely different grade, by some other Promotion Committee, is, to my mind, quite irrelevant to the case at hand. His next contention, which is noted only to be rejected, is that in their reply to this petition, the respondent have only extracted the petitioner's result from the over-all result prepared by the Promotion Committee for 2002 for promotion to the E5 level and, therefore, the petitioner is not in a position to see the comparative merit assessment of all other candidates. It is obvious that even if the case of the petitioner is taken at the highest, he does not fulfill the required minimum criteria for promotion to the E-5 level. Since the petitioner himself did not even achieve the minimum marks stipulated for being considered for promotion to the E5 level, the question of disclosing comparative merit of all other candidates does not arise.

18. Under the circumstances, I find no ground to interfere with the impugned decisions taken by the respondent in the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition is therefore dismissed.

CM Nos.14636/2007 & 10984/2010 20.

Since the main petition has been dismissed, these applications do not survive and the same are dismissed as such.