Chapter - IV
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INTRODUCTION:

Many PASs fail because they do not take the design of work into consideration. Perhaps it is more correct to say that we have frequently seen work disrupted as a result of the ineffective design of PASs. Appraisal systems are no longer a management prerogative; they are a part of the legal system. Designing PAS cannot be left to experts in the backroom as it used to be. It should involve all management levels of the organisation, from top to bottom (Allan Mohrman et al., 1990, pp.38-39).

The Government, as the guardian of its citizens, endeavours to safeguard the interests and rights of the labour class by formulating and adopting a labour policy and enacting suitable legislation (Varadan, 1987, p.5-8). This signifies that any practice or policy affecting employees made by the organisation should sustain its claim legally.

The researcher in this chapter has made an attempt to examine the issue of PA and the law. The major pieces of legislation that affect PA, enacted by both USA and India
Performance Appraisal and the Law in USA:

Employment law in the USA, UK and elsewhere is becoming more and more concerned with protection of employment, and with giving employees who feel they have been unfairly discriminated against an opportunity to seek redress. Legal bodies, concerned with administering the laws on unfair dismissal, unfair discrimination etc., act as a safety-net and provide some minimum standards. If an employee is to be dismissed for poor performance, one should be able to show the record of warnings given. Thus the appraisal system is used most carefully when poor performers are under scrutiny (Stewart and Stewart, 1980, p.161).

Because PA has been based largely on subjective ratings and personality traits, not job-related criteria, over the past ten years appraisals have increasingly become the target of federal regulation. Since appraisals are often used to make decisions about promotions and transfers, they are considered a test and are subject to the Equal Employment Opportunity Commission (EEOC) guidelines (King Patricia, 1989, pp.162-
The EEOC is responsible for administering the non-discrimination laws and set guidelines for employers. Many organisations have realised that accurate PA data are critical to their EEOC compliance efforts. They want to make sure that they are really promoting the best qualified candidates and that they will not wind up in court having to defend indefensible, subjective, or inaccurate appraisals. The courts expect appraisals used for decision-making to be fair. Managers who are going to protect themselves and their companies need to know the law and how to keep PA productive and legal.

Basically, the law requires that PA be:

* Job related and valid,
* Based on a thorough job analysis,
* Standardised for all employees,
* Not biased against any race, colour, sex, religion, or Nationality,
* Not based on subjective or vague criteria,
* Performed by people who have adequate knowledge of the person and the job.

The law requires that PASs be valid, i.e. the system should measure job-related performance criteria. We can prove
validity by testing a system using established statistical testing techniques or by establishing what is called 'content validity'. The employees should be judged on what the job requires, the whole job and nothing but the job. Traditional appraisal systems such as graphic rating scale are unlikely to be held up in court. BARS, on the other hand, are based on carefully established, statistically validated criteria and would very likely be legally defensible.

The following are EEOC laws that apply to PA.

1. The Equal Pay Act of 1963 - says equal pay for equal work, concerned with the planning aspects of the system.

2. Title VII of the Civil Rights Act of 1964 - prohibits employers from discriminating on the basis of sex, religion, race, colour, nationality and employer must prove that job-related criteria were used in making any judgements.

3. The Age Discrimination in Employment Act of 1967 - Protects job applicants and employees aged 40 to 70 from discrimination.

4. The Vietnam Era Veterans Readjustment Assistance Act of 1972 - requires companies to take affirmative action in employing and promoting disabled veterans and veterans.
of the Vietnam War. This law applies to companies with $10,000 or more in government contracts.

5. The Rehabilitation Act of 1973 - requires companies to take reasonable steps to accommodate the mental and physical needs of handicapped applicants and employees. The law applies only to the companies that have $2,500 or more in government contracts.

6. The Privacy Act of 1974 - gives past and present employees of the federal government the right of access to their employment records. This law protects the privacy of records that contain information about employees.

Legal decisions:

The following are a few famous cases of PA decided as precedents by US courts.


This case was concerned with performance ratings used in lay offs. The court found that the supervisor's ratings were vague and subjective, that the ratings were made by supervisors who did not have sufficient contact with the employee to be able to reasonably judge performance.
Objectivity: is defined as the ability of the format to bring out reliable and valid information about the individual.

2. Albemarle Paper Co., V. Moody:

This case involved discrimination in employment testing. The court found that the supervisor's appraisals were based on vague, subjective standards that were questionable in terms of job relatedness.


The court opined that "Practices, procedures or tests, neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices".

4. Rowe V. General Motors:

In this race discrimination case, the court ruled that an all white management may not be able to fairly evaluate the work of black and minority work forces unless they have a valid appraisal system and adequate training.

5. Mistretta V. Sandia Corporation (1980):

In this case performance appraisals were used as the main basis for lay off decisions affecting a disproportionate
number of older employees (Winstanley, 1980). The judge awarded the plaintiffs double damages plus court costs (Murthy..)

6. Pugh v See's Candies (1981):

In this case the court held that a jury could find an implied-in-fact contract where "the employer's conduct gave rise to an implied promise that it would not act arbitrarily in dealing with its employees based on facts including the duration of the plaintiff's employment, the commendations and promotions he received" (Allan Mohrman et al., 1990, pp. 161-171).

A growing number of court decisions concerning personnel related situations have focused on appraisals, particularly in relation to equal employment opportunity concerns (Schuster and Miller, 1984). Further, a review of court cases cited in age discrimination litigation charges found that employers who ignore only "informal" methods of PA lost those cases more than half the time. Title VII of the 1964 Civil Rights Act permits the use of a bonafide PAS. A review of court decisions by Holley and Field (1975) relating to PASs concluded that the use of such systems may be deemed illegal if the method of appraisal is not job related; performance standards are not
derived through careful job analysis, etc. Field and Holley (1982) further emphasised that employers must design their appraisal systems to the satisfaction of the courts, enforcement agencies and their employees (Murthy).

To understand what the courts consider an adequate performance appraisal system, Holley and Field (1982) analysed sixty-six legal cases that involved charges of discrimination resulting from PA. The majority of these cases involved racial discrimination and were decided after 1976. Of the sixty-six cases, thirty one were won by the plaintiffs (Allan Mohrman et al., 1990, pp.164-165).

Implications of the legal decisions in USA:

An analysis of the legal decisions and review of studies indicates that in USA a major development has been the use of PA for legal purposes. After the passage of Civil Rights Act, 1964 and formulation in 1966 and 1970 of EEOC guidelines, legal considerations created strong pressures on organisations to formalise and review their appraisal practices.

The following are a few implications:

i) The criteria of performance should be fair and relevant to real effectiveness in the job, fairness and relevance should be easy to explain.
ii) The possibility that legal scrutiny may be brought to bear on the appraisal system has implications for the way equity between appraisers is maintained especially if salary matters are in question.

iii) Another implication is concerned with the way in which appraisal system is applied against employees.

Performance Appraisal and the law in India:

Legal concern in PA stems from two basic sources: the first is article 14 dealing with Fundamental Rights which guarantees equality before law; and the second being article 16 of Fundamental Rights, which provides equality of opportunity in matters of public appointments. It also prohibits discrimination on grounds of religion, race, caste and sex as done by Civil Rights Act and EEOC in USA.

An analysis of the court rulings relating to PA for the last four decades reveal that the problems are related to infirmity of PAS retirement/termination, illegal promotions, with holding selection grade, increments and subjective appraisal ratings (Usha Krishna, 1988, p.114).

Of late, the Jaipur Bench of the Central Administrative Tribunal (CAT) (1995) has struck a blow to efficient
government service by holding that Annual confidential reports (ACRs) are not secret (Krishna Mahajan, 1995, p.7). Krishna Mahajan under legal perspectives has analysed the various legal decisions pointed out by the Tribunal relating to PA which are as under:

i) Darbari Vs Union of India (1995) - (Incorrect Assesment)

In this case the Tribunal upheld the claim of the applicant for the production of the ACRS of his juniors who had been selected for promotion. He wanted that he should be given the right of inspection of his junior's ACR to find out if the assessment made by the committee was incorrect.

Justice Mehta upheld the claim of the applicant and pointed out that ACRS from its very inception are not confidential in nature. He pronounced in his judgement that even Government instructions categorically state that PA through ACRS should be used as a tool for HRD. The report is not meant to be a fault-finding process.

ii) It was decided by the Supreme Court in the case of Amar Kant Choudary Vs State of Bihar (1984) that the role of the present system of ACRS is pernicious. An officer makes an assignment behind the back of the employee and
then only the adverse remarks are communicated. (Role of the appraiser).

iii) Gupta Vs Union of India (1982) : (Right to Know-openness)

The Supreme Court upheld in the case the employee's fundamental right to know the ACRS. It laid down a test for determining the claim for immunity against disclosure raised by a government under section 123 of the Evidence Act. The Court further concluded that the claim of immunity could be justifiably made only when it is felt that the disclosure of the document would be injurious to public interest.


In this case the High Court had stated that the embarrassment by disclosure would result only if the report did not reflect the recording officer's honest and independent assessment of the work and conduct of his subordinates. The court rejected the argument that a recording officer was likely to feel embarrassed by the disclosure of the ACR recorded by him.

v) Butail Vs Union of India (1969) (unfavourable CR)

The Supreme Court pronounced its judgement in this case that adverse remarks in ACRs were not equivalent to the
imposition of a penalty. The court must see the substance of an order and not its form, it was pointed out.

vi) Ram Saran Dass Vs. State of Punjab (1967) (Nomenclature)

It was held by the Supreme Court in this case that the nomenclature of an annual report of an employee being called 'confidential' is not very relevant. The Court further pointed out that the substance of such reports was nothing more than an evaluation of the work of a government employee.

The CAT cited similar supporting decisions given by Orissa High Court and Ernakulam Bench of the Tribunal. The judge has thrown a flood of light on the previous decisions and given a new perception to the role of ACRs.

vii) Sarat Chandra Misra Vs. the State of Orissa and others (1976), (infirmity of appraisal system):

There was a recording of adverse entry in the applicant's ACR and was subsequently promoted. It was held in this case that the rules of natural justice were violated.

viii) Keshrwani Vs. State of Madhya Pradesh, 1978(1) (Communication)

It was decided in this case that the failure to communicate adverse remarks amounted to violation of rules of natural justice.
ix) Lakhi Ram Vs. State of Haryana and others 1981(3)

In this case it was held that the remarks "Not yet fit for confirmation" - can not be said to be adverse remarks and communication of such remarks was not necessary.

x) Union of India Ranjith Singh Grewal and others 1980(3)

It was pointed out that the ratings used for retirement after taking into consideration adverse reports recorded in violation of rules was bad. Disposal of adverse reports and representation should be timely and within reasonable time. Similar judgements were given in case of Bahadur Singh Vs. the State of Rajasthan and others (1981), Lingegowda Vs. State of Karnataka and others (1981).

xi) Kishan Chand Mathur Vs. the State of Rajasthan (1977-retirement)

It was decided by the court in this case that entire service record could be looked into for the purpose of compulsory retirement. Similar rulings were made by the courts in the case of Gurmohan Singh, Deputy Superintendent of Police Vs. Union of India and others, (1976), Mahmood Hussain Vs. Osmania University and another (1978), and Lakshminarayanan Vs. The Secretary to Government of Tamil Nadu, Department of Commercial Taxes, and Religious Endowments, Madras (1978).
xii) Gurdial Singh Fijji Vs. The State of Punjab and others (1979), (Promotion)

The court issued directions to the state that the representations on adverse entries should be disposed of before consideration for promotion by selection committee.

xiii) Sharma Vs. Union of India and others (1984)

It was ruled by the court in this case that withholding selection grade on uncommunicated adverse reports was not just.

xiv) Arbindo Kumar Kawatra Vs. The State of Punjab and Others (1978)

It was decided in this case that the subjective remarks in appraisal reports, should be squashed.

Implications and Guidelines (Indian Cases):

The foregone discussion reveals that PA ratings when used for administrative purposes may lead to litigations between the employers and employees, if not handled with skill and ability. PA ratings generated from conventional approach bring bias into ratings. The employees as well as employers lose faith in the system when biased ratings are used for taking administrative decisions (Usha Krishna, 1988, p.121). It is also clear from the above cases that PA is used for
punitive actions, which is contrary to the development of employees.

The following are a few guidelines offered to the designers of appraisal system in meeting legal requirements (Holley and Field, 1975):

i) providing written instructions to raters for the completion of evaluations;

ii) deriving the content of the appraisal system from job analysis;

iii) ensuring that the results of the appraisals are reviewed by employees;

iv) performance standards should be made explicit and based on the actual work performed by the ratee;

v) users of appraisal system should be given orientation and training in PA;

vi) document the reasons for all employment decisions positive or negative;

vii) allow the employee to see the appraisal and to appeal if he thinks it is unfair;

viii) avoid making subjective appraisals of an employee's personal characteristics;

ix) base your appraisal on a number of observations and

x) increase manager's awareness of legal issues.
It can thus be concluded that today PA and legal considerations are so intertwined we can no longer consider the design of appraisal systems without paying attention to legal issues. In most companies the personnel officer is responsible for seeing that the company's practices are legal. Open communication will foster understanding between the employer and employee and help the employer to keep out of court.

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Krishna Mahajan, ACRs are not confidential, says tribunal, Indian Express, 23rd Jan. 1995, p.7 (1-6).


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