

CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI

OA NO. 2130/2002

This the 15<sup>th</sup> day of April, 2005

HON'BLE MR. JUSTICE M.A.KHAN, VICE CHAIRMAN (J)  
HON'BLE MR. S.A.SINGH, MEMBER (A)

Shri S.K.Thakral,  
S/o Late Shri S.R.Thakral,  
R/o E-54, Saket,  
New Delhi-110017.

(By Advocate: Sh. G.D.Gupta, Senior counsel along with  
Sh. S.K.Sinha)

Versus

1. Union of India  
through the Secretary to the Government of India,  
Minsitry of Defence,  
South Block,  
New Delhi-110011.
2. The Engineer-in-Chief,  
Ministry of Defence,  
Army Headquarters,  
New Delhi-110011.

(By Advocate: Sh. R.P.Aggarwal)

ORDER

By Hon'ble Mr. Justice M.A.Khan, Vice Chairman (J)

The present application is filed for quashing of the letter dated 6.6.2000 and office memoranda of the DOP&T dated 11.4.1989 and 25.1.1990. Applicant also wants declaration that applicant was entitled to the post of Additional Director General of Works (Addl. DGW, for short) and his exclusion from the select panel relying upon office memorandum dated 25.1.1990 is illegal, arbitrary, malafide, discriminatory and violative of the principles of natural justice. Lastly, he also prays for issue of a direction to the respondents to promote him to the post of Additional DGW with all consequential pensionary and other retrial benefits.

*M.A.Khan*

2. Applicant was a member of Indian Defence Service of Engineers. He was working as Chief Engineer since September 1991. Two additional posts of Addl. DGW were sanctioned in the pay scale of Rs.22400-24500 on 31.3.2000. A Departmental Promotion Committee was constituted for considering the Chief Engineers for promotion to two newly sanctioned posts for the year 1999-2000 and for one vacancy for the year 2000-2001. The meeting of the DPC was held on 20.4.2000 as per the allegation of the applicant. It had prepared panel of 5 persons including the applicant for promotion to the post of Addl. DGW. The Defence Ministry approved the panel in May 2000 but in deviation from the past practice the case was referred to the Appointment Committee of the Cabinet (ACC) for consideration. The select panel, as approved by the ACC, was published on 25.8.2000. The name of the applicant did not figure in it. Oral enquiry made by the applicant revealed that his name was not considered as the applicant had retired on attaining the age of superannuation w.e.f. 30.6.2000 and as per ACCs policy decision the Chief Engineer having less than 3 months service were not considered for promotion to the post of Addl. DGW. It was in clear violation of the DOP&T's office memorandum dated 12.10.1998 which required the name of even those who had retired to be included in the panel for promotion and, if necessary, grant of notional promotion and consequential monetary benefit. Hence the OA.

3. Respondents in the counter reply have pleaded that on second cadre review of MES Group 'A' Civilian officers, the posts of Addl. DGW were increased from 1 to 3 vide Ministry of Defence letter dated 31.3.2000. A DPC was held on 20.4.2000 for two vacancies of 1999-2000 which were created vide letter dated 31.3.2000 and one anticipated vacancy of 2000-2001. The recommendation of the DPC was advisory in nature and it was to be duly approved by the appointing authority before promotions were to be effected. The power of appointment to Group 'A' officers is to be exercised by the authorities who are so authorized under Article 73 of the Constitution by the

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President of India. The post of Addl. DGW falls within the purview of the Appointment Committee so approval of the ACC was required after the Defence Minister had approved the recommendation of the DPC. The proposal was placed before the ACC. The ACC accorded its approval on 3.8.2000 in which the name of the applicant who had retired on 30.6.2000 did not figure. The panel of names of the officers approved by the ACC was notified vide letter dated 25.8.2000. As regards the OM dated 12.10.1998 it was stated that it was not applicable in the facts of the present case since it applied when DPC could not be held due to administrative lapses for years even though the vacancies arose during the years and the employees who had retired now would have been considered for promotion if the DPC was held for the relevant year in time. In the instant case, the DPC was held on 20.4.2000, so the OM is not applicable. Applicant was not approved for promotion by ACC as per the policy and instructions on the subject and the OA merits dismissal.

4. In the rejoinder, applicant has reiterated his own case. He further alleged that for the post of Addl. DGW, Defence Minister was competent to approve the appointments and the matter was not required to be placed before ACC and this was the practice in the past which has not been followed only in this case. Applicant's representation was rejected on the ground that he was not having three months service on the date of DPC before retirement but this is untenable since the recruitment rules do not provide for any such disability. Moreover, the perusal of the panel for the year 2002-2003 published on 28.8.2002 would show that Mr. S.K. Gupta was to retire on 30.4.2002 before the publication of the list although the list was published after retirement. Other allegations were also likewise refuted.

5. We have heard the learned counsel for the parties and gone through the relevant record.

6. Applicant has challenged the validity and legality of the OM dated 11.4.1989 and 25.1.1990. It will be apt to reproduce the relevant extract of

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these memoranda. The memorandum dated 11.4.1989 (Annexure A-12) reads as under:-

"The Appointments Committee of the Cabinet have directed that in respect of appointments which fall within its purview, no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of three months before retirement."

7. The memorandum dated 25.1.1990, Annexure A-9 on the other hand provided as under:-

"14. Promotion immediately before superannuation in case of ACC appointments – Attention is invited to O.M. No. 27 (4)-EO/89 (ACC) dated the 11<sup>th</sup> April, 1989, communicating the order of the Government to the effect that in respect of appointments which fall within the purview of the ACC, no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of three months before retirement. Where, however, a longer minimum service is already prescribed, the same will apply. These instructions are hereby reiterated for compliance by all Ministries/Departments. In order that officers approaching superannuation are not denied the promotion due to them subject to this limitation on account of the delay in processing of their cases for promotion, Ministries/Departments are requested to ensure that the meetings of DPC are held well in time and proposals for submission to the Establishment Officer in the Department of Personnel and Training well in advance before the date of occurrence of the vacancy."

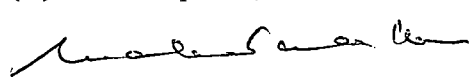
8. It seems both these OMs have since been rescinded by the Government vide OM dated 16.6.2003 issued by the DOP&T. OM stated as under:-

"The undersigned is directed to say that in this Department's O.M. No.27(4)/EO/89-ACC, dated 11.4.1989, as reiterated vide O.M.No.22011/11/89-Estt.(D) dated 25.1.1990 (Sl.No.248 of Swamy's Annual, 1990), it was prescribed that in respect of appointments which fall within the purview of ACC, no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of 3 months before retirement."

2. It has been decided to rescind the above decision with immediate effect. Secretary of the Department will be responsible for keeping the Cabinet Secretariate informed of any departure."

9. Applicant, on the other hand, attempted to draw support from the OM dated 12.10.1998 (Annexure A-6) which has provided:-

"Names of the retired officials may also be included in the panel(s). such retired officials would, however, have no right for actual promotion. The DPC(s) may, if need be, prepare extended panel(s) following the principles prescribed in the Department of Personnel and Training Office Memorandum No.22011/8/87-Estt (D) dated April 9, 1996."



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10. Applicant was due for retirement on 30.6.2000. Two new posts of Addl. SGW were created on 31.3.2000. Applicant was eligible for consideration for promotion to the said post. The vacancies in the newly created posts occurred in the year 1999-2000. A DPC was immediately constituted and it had considered the applicant along with other eligible officers on 20.4.2000. The DPC recommended the panel of five names for promotion which included the name of the applicant also. The recommendations were processed and the panel was approved by the Defence Minister. It was then placed before the ACC as per the existing Government instructions and policy. According to the applicant as per earlier practice the appointment used to be made after the approval of the Defence Minister and the panel was not considered and approved by the ACC. The respondents contested this contention for two reasons. Firstly, the Government instructions required appointment to the post of Addl. DGW and other posts carrying similar pay scale to be considered and approved by the ACC and secondly, in the past, if it was not done that would not give a right to the applicant to challenge the consideration of the panel by the ACC. The decision of the Government for considering the appointment on the post carrying certain pay scale would be made after the approval of the ACC to our view cannot be called in question before the Tribunal. Such a policy decision would not violate the statutory provision including the recruitment rules applicable to the post of Addl. DGW. The past practice would also not render the consideration of the panel by the ACC open to judicial scrutiny by the Tribunal in this proceeding. The argument of the learned counsel for the applicant, to the contrary, is not tenable and has to be repelled.

11. Counsel for applicant fervently argued that two OMs dated 11.4.1989 and 25.1.1990 are in derogation of the recruitment rules which did not prescribe any condition that the officers who had less than 3 years of residual service before retirement would not be considered for promotion to the post of Addl.

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DGW. It is argued that imposing such a restriction it is arbitrary, malafide and discriminatory so deserves to be quashed.

12. A reference to the judgment of Calcutta Bench of the Tribunal in Sunil Bhattacharya vs. Union of India VII-2002 (2) AI SLJ 294 was made wherein the Tribunal after examining these two OMs held them illegal, arbitrary, unjust and unfair. He also drew our attention to another judgment of the Principal Bench dated 3.12.2002 in OA-759/2002 where again the legality of these two OMs was considered and the bench was in agreement with the judgment of the Calcutta Bench. This case was also related to the same service where a Chief Engineer was not promoted since he had left less than three months service prior to his superannuation.

13. Admittedly, the recruitment rules do not lay down any restriction on the promotion of Chief Engineer to the post of Addl. DGW on the ground that he had less than three month's service left before his retirement. We are in respectful agreement with a view taken by the Calcutta Bench and this Principal Bench on this question in the above cited two cases.

14. Learned counsel for applicant had cited Chief Settlement Commissioner, Punjab vs. Om Prakash AIR 1969 SC 33 which laid down that the statutory provision must prevail over the executive instructions. He also referred to Controller and Auditor General of India and others vs. Mohan Lal Mehrotra and others 1992 (1) SCC 20 wherein it was held that the administrative order cannot be issued in contravention of statutory rules but could be issued to supplement them.

15. Applicant next relied on another judgment of the Hon'ble Supreme court in S.L.Sachdeva and others vs. Union of India AIR 1981 SC 411 where prescribing of eligibility for promotion to the post of UDC drawn from Audit Offices on the basis of 5 years service was held unreasonable and arbitrary.

16. There is little difficulty in holding that exclusion of the name of an otherwise eligible Chief Engineer from the panel on promotion solely on the

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ground that he had less than three years of service left is inequitable, unfair, unjust and arbitrary. Good sense has now prevailed on the government and it has of its own rescinded the OM dated 11.4.1989 and 25.1.1990. Now legitimate aspiration of a senior government officer will not be scuttled on the pretext that he was left with less than 3 months residual service before his retirement when ACC came to decide on his promotion.

17. It has been argued on behalf of counsel for applicant that if at all OM dated 11.4.1989 and 25.1.1990 were to be given effect, three months residual service ought to have been counted from the date these vacancies became available and if it was done and 3 months were to be counted from 31.3.2000, applicant had minimum prescribed service of over 3 months on the due date of his retirement, i.e. 30.6.2000. So even applying the Government decision concerning matters, which are placed before the ACC, applicant could not have been excluded from consideration. Counsel for applicant placed strong reliance on Union of India vs. B.S. Aggarwal and another JT 1997 (8) SC 290 where the Hon'ble Court was examining para 7.3. of the scheme devised by the Railway Board for regulating the promotion to the post of GM. It provided as under:

"Only such of the empanelled officer would normally to be appointed to the post of General Manager and equivalent who will be able to serve for at least 2 years on such higher post(s). The Hon'ble Supreme Court held that the two years period prescribed by this para of the scheme should be constituted to be counted from the date a vacancy has occurred."

18. The Hon'ble Supreme Court has held as under:-

"22. ....It appears to us that the learned counsel for the respondents have rightly contended that in the matter of appointment and also in giving promotion, the guarantee enshrined under Articles 14 and 16 of the Constitution cannot be violated. If a panel of eligible officers for the purpose of appointment to the posts of General Manager or equivalent is prepared, then each of such empanelled officers must be held to have been found suitable for appointment to such post. Therefore, if the said empanelled officer conform to the requirement of para 7.3 of the Scheme, his inter se seniority cannot be ignored in giving appointment to the post of General Manager and equivalent."

"27. Para 7.3 of the scheme in express term refers to the residual service of at least two years on higher post of General Manager and equivalent. But the question that requires to be addressed is from

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which point of time, the said residual tenure is to be reckoned. In our view, para 7.3 of the Scheme must be given such fair and reasonable interpretation with reference to a fixed point of time so that there is no scope of introducing any uncertainty and variable factors thereby bringing unmerited hardship and injustices by eliminating some of the eligible senior officers either on account of normal procedural delay or delay caused in a designed manner. An empanelled officer having higher inter se seniority over others has a reasonable expectation to get appointment on the accrual of vacancy but if the actual appointment is not made promptly either on account of inherent time lag, associated with procedural formalities or on account of bureaucratic lethargy or by delaying the process of appointment in a calculated and designed manner, and eligible and senior officer in the panel cannot but suffer unmerited hardship if para 7.3 is interpreted in the manner advocated by the learned counsel for the respondents. In that event, such officer in the last leg of brilliant service career will be deprived of the fruits of toil and sincere efforts put in over the years. It is true that in para 7.3 the residual service for at least two years has been indicated in contradistinction to the language appearing in the matter of appointment as Member, Railway Board, but in our view, such expression of residual service for at least two years as contained in para 7.3 does not stand in the way of giving a fair and reasonable interpretation. In our view, para 7.3 must be held to be referable to the date of accrual of vacancy in order to ensure fairness and transparency in the matter of appointment as General Manager or equivalent. The date of accrual of vacancy is a fixed one and even if any manipulation is made about the date of accrual of vacancy, the actual date of accrual of vacancy can always be ascertained by a closer scrutiny. We, therefore, do not find any merit in the contention that accrual of vacancy is not a certain event and be easily subjected to manipulation. In our considered view, determination of residuary length of service with reference to accrual of vacancy will not be consistent with the language of para 7.3 but such interpretation will also not frustrate the purpose for which residuary length of service is intended in para 7.3 of the Scheme. The court should lean in favour of such interpretation of a statute which conforms to justice and fair play and prevents potentiality to injustice by liberally construing the provision without intrinsically violating the language of the statute and the purpose intended to be achieved. We may indicate here that although the residual tenure is referable to the date of accrual of vacancy, the intended purpose of reasonable length of service in the post of General Manager and equivalent should not be permitted to be defeated by delaying the actual appointment from the date of accrual of vacancy for long. It will only be proper if the concerned authorities remain alive to the urgency in taking prompt action in making actual appointment, so that such appointment is made at least within three months from the date of accrual of vacancy."

19. The judgment of Union of India vs. B.S. Aggarwal (supra) of the Hon'ble Supreme Court is on the peculiar provision of the Scheme framed by the Railway Board which has become part of the terms and conditions of the Railway employee. The Office memorandum of the DOPT dated 11.4.1989 and 25.1.1990 on the other hand are not part of the service conditions of the

*No objection*

applicant. They are the policy decision which being in conflict with the provisions of recruitment rules could not be held to be legal and valid. The administrative instructions supplement and not supplant the statutory rules, wherever the rules are wanting, the administrative instructions may fill up the gap. But the fact remains that the Hon'ble Supreme Court in the case of Union of India vs. B.S. Aggarwal (supra) although did not hold the para 7.3 of the Scheme illegal, invalid and violative of Articles 14 and 16 of the Constitution of India but held that the stipulation of 2 years residual service should be reckoned from the date on which the vacancy has occurred. The Hon'ble Court has also emphasized holding of the DPC and completion of the process of promotion expeditiously so that the legitimate expectation for promotion to the deserving government employee are not frustrated on account of administrative lapses and delay. Applying the principle of law laid down on the facts of the present case, we may hold that even if the decision of the Government as contained in OM dated 11.4.1989 and 25.1.1990 are upheld the period of 3 months ought to have been counted from the date on which the vacancy became available and not from the date on which the ACC <sup>approved</sup> ~~circulated~~ the recommendations of the DPC.

20. In the present case, the vacancies were created on 31.3.2000. The DPC for filling these vacancies had taken place on 20.4.2000 with all promptitude. The panel of selected candidates recommended by the DPC was also approved by the Defence Minister in the second week of May 2000 as per the allegation of the applicant which has not been controverted in the counter reply. As per the policy decision of the Government, which cannot be faulted, the recommendation of the DPC were to be considered and approved by the ACC. The ACC approved the panel minus the name of the applicant on 3.8.2000. As such the delay in considering the panel prepared and recommended by the DPC had occurred on the part of the ACC that deprived the applicant who was the senior most candidate eligible to be promoted to the next higher grade of Addl. DGW before his retirement on 30.6.2000. We are conscious that some delay is

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bound to occur in processing of the case for placing it before the ACC but the authorities ought to have realized that one of the recommended candidate was attaining the age of superannuation. The policy of the ACC for excluding the officers who had less 3 months of residual service before the date of retirement from consideration was not legal and valid. In fact the Government itself has rescinded and recalled it. It is true that the two posts against which the applicant was considered for promotion were created only on 31.3.2003 and before that applicant could not have any legitimate expectation of his promotion. It is also true that the department has taken prompt action in convening the DPC meeting within 20 days of the creation of these vacancies. Furthermore, there is no indefeasible right of a Government servant to be promoted from the date on which the vacancy has become available. But in the present case after the recommendation of the DPC were approved by the Defence Minister and they were decided to be placed before the ACC the delay of about 3 months cannot be justified though indeed some <sup>delay</sup> ~~amount~~ in preparation of the case and convening the meeting of the ACC was justified.

21. Any how we are told that the applicant was the senior most candidate recommended for appointment for promotion to the post of Addl. DGW and the ACC has excluded his name from the finally approved list only for the reason that he did not have 3 months residual service left before his retirement. In fact, the applicant had 91 days when the vacancies occurred on creation of the post of Addl. DGW on 31.3.93. For this reason, the applicant at the fag end of his career should not have been deprived of his legitimate due, promotion to the higher post and as a consequence payment of all other retirement dues.

22. Though the learned counsel for applicant has heavily relied upon on the Office Memorandum dated 12.10.1998 which provided that the name of the retired officials may be included in the panel but a careful reading of this OM shows that it would not advance the case of the applicant much. If applied to a case where the DPC could not be held within the year in which a vacancy

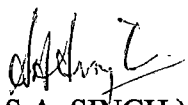
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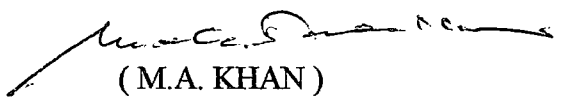
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became available as a result while preparing year wise zone of consideration/panel, juniors were considered in place of seniors, who had since retired, who otherwise would not have been within the zone of consideration, if the DPC was held in time. It is not a case of the applicant that his right to be considered for promotion was defeated as there was delay in convening of the DPC in time rather it was convened promptly within 20 days of the occurring of the vacancies. But the fact remains that the ACC failed to consider the recommendations of the DPC and approve select panel within three months of the vacancy becoming available (see Union of India vs. B.S. Aggarwal (supra) ). As a result, the applicant was deprived the fruit of his service at the fag end of his career.

23. In the totality of the facts and circumstances of the case and considering the time which the entire procedure for promotion has to take, we are of the considered view that the applicant should be considered by the ACC afresh for grant of notional promotion at least from 30.6.2000. In case the applicant is promoted to the post of Addl. DGW from the date of 30.6.2000 his pay and allowances shall be refixed as on 30.6.2000 notionally and he would be granted pension and other pensionary benefits on the basis of this revised pay. This process shall be completed within 4 months from the date on which the copy of this order is received by them.

24. The OA stands disposed off in terms of the above order.

  
( S.A. SINGH )  
Member (A)

  
( M.A. KHAN )  
Vice Chairman (J)

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