

CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

O.A.NO. 940/2002

Thursday, this the 1st day of August, 2002

Hon'ble Shri Justice Ashok Agarwal, Chairman  
Hon'ble Shri S.A.T. Rizvi, Member (Admn)

Dr. Anup Kumar Srivastava,  
S/o Shri V.S. Srivastav,  
R/o Barood Khana,  
Gola Ganj  
Lucknow  
Presently at  
New Delhi

..Applicant

(By Advocate: Shri Devesh Singh)

Versus

1. Union of India Through  
Secretary,  
Ministry of Finance  
Department of Revenue  
North Block  
New Delhi - 110 001
2. Chairman,  
Central Board of Excise and Customs  
Department of Revenue,  
Ministry of Finance,  
Government of India  
North Block  
New Delhi
3. Member (Personnel)  
Central Board of Excise and Customs  
Department of Revenue  
Ministry of Finance,  
Government of India  
North Block  
New Delhi

..Respondents

(By Advocate : Shri R.R. Bharti)

O R D E R (ORAL)

Shri S.A.T. Rizvi:

Briefly stated the facts of this case relevant for  
a proper adjudication of the OA are as follows:

2. In respect of a certain offence committed in 1994,  
an FIR was lodged, inter alia, against the applicant by  
the CBI on 9.7.1996. An investigation report/charge sheet

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in respect of the aforesaid FIR was filed by the CBI belatedly on 14.12.1999 relating to offences under Section 120-B read with Section 109 of the IPC and Section 9 of the Prevention of Corruption Act, 1988. Aggrieved by the aforesaid charge sheet, the applicant filed a petition, being Criminal Misc. (Main) No. 3321 of 2000 under Section 482 of the Cr.P.C. seeking appropriate orders for quashing the investigation report, the FIR and all the other consequent proceedings in R.C. No. 56 (A)/96/DLI. Vide orders dated 26.9.2000 the Hon'ble High Court of Delhi stayed further proceedings in the aforesaid Criminal case insofar as the applicant is concerned. The aforesaid order of stay continues without interruption. The respondent-department has not initiated any departmental action against the applicant.

3. On 16.8.2000, a Departmental Promotion Committee (DPC) meeting was convened for considering the names of eligible officers for promotion to the post of Additional Commissioner (Non-Functional Selection Grade) (NFSG). The applicant's case was not considered in the aforesaid DPC. However, his case did come up for consideration before the supplementary DPC held in the first week of October 2000, but the recommendations of the Committee in respect of the applicant were kept in the sealed cover.

4. The matter was thereupon agitated by the applicant before this Tribunal in OA No.2598/2000 praying for directions to be issued to the respondents not to keep the findings/recommendations of the DPC in the sealed cover.

*d* That OA was decided by this Tribunal on 15.3.2000. The

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aforesaid OA was dismissed. The CWP No.2050/2001 filed by the applicant before the High Court of Delhi against the aforesaid judgement of this Tribunal was dismissed by that Court on 18.4.2001. Subsequently, a review petition, being Petition No.8477 of 2001, was filed before the High Court for a review of the aforesaid order dated 18.4.2001. Nothing has been stated about the fate of the said Review Petition. Later, however, the respondent-authority revoked the applicant's suspension on 2.1.2002.

5. Respondents not granting the NFSG to the applicant, though a number of officers including those junior to the applicant have been placed in the NFSG, led to representations being filed by the applicant on 18.1.2002, 28.1.2002 and 31.1.2002 praying therein, inter alia, that NFSG be granted to him.

6. The learned counsel appearing on behalf of the respondents has argued that the sealed cover procedure was correctly followed in the applicant's case in accordance with the DOP&T's Office Memorandum (OM) dated 14.9.1992 (R-I) which deals with promotion of Government servants against whom disciplinary/court proceedings are pending or whose conduct is under investigation, and that the Tribunal had upheld the same in its order passed on 15.3.2001 in OA No. 2598/2000. According to him, appropriate guide-lines have been evolved for considering cases for the grant of NFSG. These are contained in the DOP&T's OMs dated 9.10.1989 and 1.2.1990 which provide for the constitution of <sup>an</sup> internal Committee to review the cases of officers for NFSG and to make appropriate

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recommendations in relation to the same. The said guide-lines are, for the sake of convenience, reproduced in the following:-

"(c) Guidelines for the Selection Committee.  
- It has been decided, in supersession of the existing instructions, that for appointment to the Selection Grade in Group 'A' Services which is non-functional, the following procedure and criteria shall be followed:-

- (i) An internal Committee will be constituted to review the cases of officers for "Non-Functional Selection Grade" and to make suitable recommendations.
  - (ii) The Committee shall consider the last five ACRs of the officers.
  - (iii) Ordinarily, the Committee shall accept the final grading given by the Reporting/ Reviewing Authority in each ACR unless there are good reasons to depart from that grading.
  - (iv) The Committee should satisfy itself that the overall performance of the officer was good and that he has at least two "very good" gradings in the last five ACRs. Such an officer would be considered suitable for Non-Functional Selection Grade.
  - (v) There should be no adverse entries in any ACR. If there are any adverse entries, it should be clearly brought out in the minutes as to why the officer has been proposed for Non-Functional Selection Grade in spite of the adverse entry.
  - (vi) The minutes should also include a certificate that there is no other factor or aspect affecting an officer which will disqualify him for grant of Non-Functional Selection Grade.
  - (vii) The Screening Committee may, in exceptional cases, recommend candidates for appointment to Non-Functional Selection Grade who do not strictly satisfy the above criteria, provided they are considered deserving of grant of Non-Functional Selection Grade. In such cases, the Screening Committee should clearly record the reasons for such recommendations."
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The learned counsel has invoked the doctrine of resjudicata to contend that the issue regarding keeping of the Committee's recommendations in the sealed cover having been decided by the Tribunal on 15.3.2001, it is no longer opened to the applicant to question the validity of the sealed cover procedure followed by the respondents.

7. The learned counsel for the respondents had initially argued the matter in the light of the provisions made in rule 21 of the Indian Customs and Central Excise Service Group 'A' Rules, 1987 (hereinafter called 1987 Rules), to submit that placing of a Grade-IV Officer, which is the applicant's present status, to the higher grade, namely, Grade-III/NSFG of the service amounts to promotion and such promotions are required to be made on the basis of seniority subject to the rejection of the unfit. Thus, according to him, the DOP&T's OM dated 14.9.1992 which deals with promotion was correctly followed by the respondents and no fault could be found with the sealed cover procedure followed by the respondents. In the same context, the learned counsel has also relied on the following provisions made in the DOP&T's OM dated 22.11.1990 regarding keeping of cases of appointment to the NFSG in the sealed cover:-

"(d) Grant of benefit under Next Below Rule.  
- It has now been decided to follow the procedure indicated below in respect of extending the benefit of Next Below Rule for NFSG appointments and also the sealed cover cases -

(a) xxx      xxx      xxx      xxx      xxx      xxx

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- (b) As regards sealed cover cases, if the recommendations in respect of a person for appointment to NFSG are kept in the sealed cover, the NFSG vacancy should be kept unfilled till the disciplinary proceedings are completed. xxxxxxxx"

8. When the present case was called up for hearing <sup>on the next day,</sup> again, the learned counsel for the respondents has, after expressing his regrets, placed before us a copy of the Indian Customs and Central Excise Service Group 'A' (Amendment) Rules, 1998, notified on 23rd March, 1998, wherein rule 21 referred to above in paragraph 7 above has been substituted by a new rule as follows:-

"21. Appointment to Grade III of Service (Non-Functional Selection Grade of the Service) : 15 per cent of the senior duty posts shall be operated in the non-functional selection grade of Rs.14300-400-18300 and appointment to this grade shall be made according to seniority based on suitability taking into account the overall performance, experience and any other related matter."

The word 'promotion' used in the old rule 21 (1987 Rules) has been omitted in the new rule 21 reproduced above. Despite this, according to the learned counsel for the respondents, the sealed cover procedure would still have to be followed in accordance with the instructions contained in the DOP&T's OM dated 22.11.1990 already reproduced in paragraph 7 above, and the same can be opened only after the criminal proceedings pending against the applicant have ended.

9. The learned counsel appearing on behalf of the applicant has vehemently argued that the NFSG is a segment of the JAG and is also non-functional in character.

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Appointment to the NFSG is, therefore, not a promotion but merely placement in a higher pay scale. In support of this contention, he has placed reliance on DOP&T's OM dated 6th June, 2000, the relevant portion of which runs as under:

"2. As NFSG is a segment of JAG and is also 'non-functional' in character, appointment to NFSG is not promotion but merely placement in the higher pay scale."

According to him, as per the same OM, the existing ceiling of 15% in the case of NFSG has been increased to 30% with prospective effect. The DOP&T's OM dated 22.11.1990 has been, according to the learned counsel, wrongly relied upon by the learned counsel for the respondents in support of his contention that the sealed cover procedure can be followed in NFSG cases also. The aforesaid instructions deal with the grant of benefit under the Next Below Rules and in that context it has been stated therein that if the recommendations in respect of an officer for appointment to the NFSG have been kept in the sealed cover, one NFSG vacancy should be kept unfilled until the disciplinary proceedings are completed. The aforesaid instructions clearly do not deal with the question of placement of recommendations of the Committee in sealed covers whether in respect of NFSG or otherwise. Placement of Committee's recommendations in respect of NSFG cases in sealed covers has not been sanctified by the aforesaid instructions. Having regard to the provisions made in the DOP&T's OM dated 14.9.1992 which are confined to cases of promotion alone, and keeping the above mentioned provision made in the DOP&T's OM dated 6th June, 2000 in mind, we find considerable force in

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the plea advanced by the learned counsel for the applicant.

10. That placement of Grade-IV officers (Joint Commissioner) (like the applicant) in Grade-III (Additional Commissioner) cannot amount to promotion is further sought to be proved by the learned counsel appearing on behalf of the applicant by relying on the table reproduced in the respondent-department's Notification No.15/2002-Customs (N.T) dated 7th March, 2002, a copy of which was supplied to us by the learned counsel during the course of hearing. On a perusal of the aforesaid Notification, we find that the designations of Additional Commissioner and Joint Commissioner of Customs have been alternately used by treating them as equivalent posts. That being so, the post/rank of Additional Commissioner cannot be said to be a promotional post/rank for a Joint Commissioner. The learned counsel also relies on the new rule 22 incorporated in the Indian Customs and Central Excise Service Group 'A' (Amendment) Rules, 1998 to contend that the Grade-III post of Additional Commissioner is by no means a promotional post for an officer working in Grade-IV. The aforesaid new rule 22 provides as under:

"22. Appointment to Grade II of the Service :  
Appointment to Grade II of the Service, to the post of Commissioner of Customs and Central Excise shall be made by promotion by selection from amongst:

- (a) Officers of Grade IV of the Service, holding the post of Deputy Commissioner of Customs and Central Excise with eight years' regular service in the grade (including service, if any, rendered in non-functional selection grade of Rs.14300-400-18300/- ; or xxx"
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A careful reading of the aforesaid rule would show that for the purpose of promotion to Grade-II of the Service 8 years' of regular service is required whether in Grade-IV of the Service or in the NFSG. Clearly, the NFSG and Grade-IV of the Service have been treated on par for the purpose of promotion of Grade-IV officers to Grade-II.

11. ~~However~~, Our attention has also drawn by the learned counsel for the applicant to the provisions relating to the internal Committee constituted for considering cases for the grant of NFSG already reproduced by us in paragraph 6 above. According to the learned counsel, a cursory perusal of the aforesaid guide-lines reveals that the matter for the grant of NFSG is required to be considered very liberally. For instance, the Committee is required under these guide-lines not to make its own assessment about the work and conduct of an officer on the basis of the ACR entries but to accept the final gradings given in the ACRs. Only two 'Very Good' ACR gradings out of five are considered enough for the purpose. In exceptional cases, NFSG can be granted even where the aforementioned liberal criteria are not met. We have carefully perused the aforesaid guide-lines and can readily see that the intention is merely to ensure that the officer concerned is fit for the purpose. Such criteria are, in our judgement, laid down only in cases which are not to be treated as promotional cases, strictly speaking. For these reasons, we are unable to accept the various ~~pleas~~ <sup>pleas</sup> advanced by the learned counsel for the respondents and find merit in the applicant's claim that placement of internal Committee's recommendations made by.

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that Committee in October 2000 in relation to him in the sealed cover was not the right thing done and that is because it was not a case of promotion. In arriving at the aforesaid conclusion, we have also taken note of the fact that in the various Notifications issued by the respondents granting NFSG to various officers, the word 'promotion' has not been used and on the other hand, the aforesaid Notifications merely convey the Presidential pleasure granting the NFSG to the officers concerned. We have also not failed to notice that in their own reply the respondents have gone on to say that appointment to NFSG is not a promotion and involves placement from a lower pay scale to a higher pay scale.

12. The learned counsel appearing on behalf of the applicant has further relied on the judgement of the Bombay Bench of this Tribunal dated 4.5.2000 in OA No. 680/1999 to submit that the present case is eminently fit for a direction to the respondents to place the applicant in the NFSG at any rate on ad hoc basis even while the criminal proceedings against him, though stayed, are still pending. The conduct of the applicant in that OA was also investigated by the CBI and based on the recommendations of the CBI, departmental proceedings were initiated against that applicant. The departmental charge sheet against the said applicant was still pending when the Tribunal in its aforesaid order dated 4.5.2000 directed the respondents as follows:

"(iii) Pendency of the charge-sheet dated 14.10.1997 should not come in the way of the applicant being considered for promotion, if his turn has come and if he is otherwise fit and suitable for being

promoted and in which case he should be given adhoc promotion during the pendency of the disciplinary enquiry, which can be reviewed subject to the result of the departmental enquiry."

13. The ground of applicability of the doctrine of resjudicata advanced by the learned counsel for the respondents is found by us, after consideration of the foregoing details, to be untenable. In the order dated 15.3.2001 passed by this Tribunal in OA No. 2598/2000, the issue of the sealed cover procedure followed in the case of the applicant has been discussed and the matter concluded by treating the placement of the applicant in the NFSG as amounting to promotion and by relying consequently on the DOP&T's OM dated 14.9.1992 which, as stated, deals with cases of promotion only. The learned counsel for the applicant has, in the above, undoubtedly succeeded in establishing, in our view, to the hilt that placement in the NFSG is by no means a matter of promotion.

14. For all the reasons brought out in the preceding paragraphs, the present OA succeeds and is allowed in the following terms:

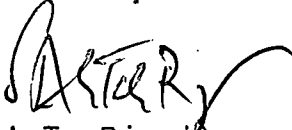
15. The applicant has completed 14 years of service required for placement in the NFSG by 6th June, 2000, with effect from which date several officers including his juniors have already been placed in the NFSG by Notifications issued from time to time (Annexure-1 colly.) The sealed cover in which the recommendations made by the internal Committee in respect of the applicant have been kept will be opened by the respondents and, if it is

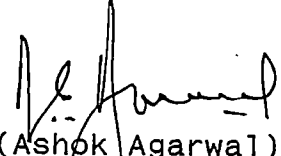
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discovered that the Committee had found him fit for placement in the NFSG, will proceed to issue a notification placing him in the NFSG w.e.f. 6th June, 2000 but this will be done on adhoc basis in view of the fact that the criminal proceedings against the applicant, though stayed by the High Court, are still pending and the applicant himself has sought the relief of being placed in the NFSG on adhoc basis only. However, on being placed in the NFSG as above, the applicant will be entitled to all the consequential benefits arising therefrom including the ~~payment~~ <sup>of</sup> arrears of pay and allowances. The respondents are directed to open the sealed cover and proceed further as above expeditiously and complete all actions required as above within a maximum period of two months from the date of receipt of a copy of this order. The respondents are directed accordingly.

16. The OA is allowed in the aforesaid terms. There shall be no order as to costs.

  
(S.A.T. Rizvi)  
Member (A)

  
(Ashok Agarwal)  
Chairman

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