

Central Administrative Tribunal, Principal Bench

O.A. No.38 of 2002

New Delhi this the 30th day of June, 2006

Hon'ble Mr. Justice M.A. Khan, Vice Chairman (J)
Hon'ble Dr. V.K. Agnihotri, Member (A)

Malkit Singh
S/o Shri Bachan Singh
R/o LBSNAA Campus,
Musoorie.

...Applicant

By Advocate: Shri L.R. Khatana.

Versus

1. Union of India
Through Secretary,
Department of Personnel & Training,
North Block,
New Delhi-110 001.
2. Director,
Lal Bahadur Shastri National Academy of
Administration,
Mussoorie.
3. Secretary,
Department of Expenditure,
Ministry of Finance,
North Block,
New Delhi-110 001.
4. Shri R.K. Arora
Assistant Library & Information Officer,
Lal Bahadur Shastri National Academy of
Administration,
Mussoorie.

..Respondents

By Advocate: Shri A.C. Aggarwal.

ORDER

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

The applicant has filed the OA for the following relief:-

“(i) quash and set aside the impugned orders dated 26.2.2001 and 8.3.2001 issued by respondents No.1 and 2 respectively as being arbitrary, unreasonable, illegal, perverse and, therefore, bad in law and direct the respondents to consider the applicant for promotion against a supernumerary post, as proposed by the respondent No.1, in order to mitigate the hardship and injustice to the applicant, from the date he became eligible for the same with all consequential benefits.

(ii) in the alternative, declare that the action of respondent No.1 and 2 to de-reserve the post of ALIO as wholly illegal, arbitrary and discriminatory, as the said action was taken in violation of the clear and categorical directions given by the respondent No.1 itself and despite that the post was de-reserved with mala fide intention to

44

prejudice the right and interest of the applicant and quash and set aside the said decision to reserve the post as well as the consequent appointment of respondent No.4 against he said deserved post and direct the respondent No.2 to consider the applicant for appointment against the said posts.

2. The applicant was appointed in 1989 as Professional Assistant/Technical Assistant, which post has since been re-designated as Senior Library and Information Assistant (SLIA), in Lal Bahadur Shastri National Academy of Administration, Mussoorie in the pay scale of Rs.1640-2900. He belongs to SC category. At present the applicant is working as officiating Assistant Library and Information Officer (ALIO) on ad hoc basis. In the advertisement it was notified that the vacancies in the post of Professional Assistant/Technical Assistant were purely temporary but were likely to continue. But after the selection, the applicant was appointed on the post of Professional Assistant/Technical Assistant on ad hoc basis. The applicant was told that the Recruitment Rules for the post were not yet finalized so the ad hoc appointment was made. In December, 1990 the applicant was re-designated as Senior Library and Information Assistant (SLIA). In June, 1994, the Department of Personnel and Training, Government of India, wrote to the Academy that since Recruitment Rules for the post of ALIO were not finalized and the model Recruitment Rules provide the mode of promotion on transfer on deputation basis in case the Academy has eligible employee for regular promotion the process for promoting them should be undertaken, otherwise the post be filled up on deputation basis. On 17.6.1994, the applicant was promoted to the post of ALIO on ad hoc basis but on the objection of the DOP&T that being ad hoc SLIA he could not have been promoted to the next higher grade, the applicant was reverted to the post of SLIA on 8.8.1994. The Academy, though complied with the instructions of the DOP&T by reverting him from the post of ALIO, but did not comply with the other direction that the post of ALIO be filled in by regular promotion or if eligible candidate was not available, be filled up on deputation basis. It was arbitrary and mala fide and in derogation of the DOP&T's instructions for filling up the post of ALIO by transfer on deputation basis. The DPC in its meeting dated 20.2.1995 recommended for de-reservation of the post of ALIO. Prior to that the Academy, respondent No.2, sent proposal to the DOP&T on 19.1.1995 for de-reservation of the

Bose

post of ALIO. The respondent No.2 acted with pre-determined mind to cause prejudice to the right of the applicant disregarding the direction of the DOP&T, respondent No.1, that the post of ALIO be filled in by transfer on deputation basis which gave undue advantage to a candidate belonging to a general category, in the present case respondent No.4, over the candidate who belonged to SC community and who possessed all the requisite qualification for the promotional post. The service of the applicant was regularized with effect from 27.12.1995 by order dated 23.2.1996. It was regularized from the same date the Recruitment Rules for the post of ALIO were notified by the Government. When the applicant came to know that his chances for promotion had been blocked on long term basis as the post of ALIO had been filled up in an illegal and arbitrary manner, he made a representation to the respondent No.2, the Academy on 25.5.1998. He also met the concerned authorities. His case was referred to a Committee headed by Professor D. Banerjee for opinion. On receipt of the report, the respondent No.2, the Academy, realised the mistake and sent a proposal on 31.7.2000 to the DOP&T, the respondent No.1, to create a supernumerary post of ALIO to accommodate the applicant stating that on account of de-reservation of the post and its filling up by regular promotion and not by resorting to appointment on transfer on deputation basis the chances of the applicant for promotion had been marred for a long period. As per the post based roster, the reserved point for SC category fell at S.No.7 whereas the present strength of the cadre which in the present case was ALIO, was 2 and both were occupied, so the prospect of the applicant for promotion was lost on long term basis. As a result, the respondent approached the Government for creation of supernumerary post of ALIO for considering the applicant for promotion to the said post. They also sent a budget neutral proposal stating that two subordinate posts in the hierarchy may be kept in abeyance. But the respondent No.1 has turned down the proposal for creation of supernumerary post of ALIO by keeping 2 subordinate posts in abeyance by their letter dated 26.2.2001. The applicant being aggrieved has filed the present OA.

3. The respondent Nos.1 to 3 in their joint written statement have repudiated the claim of the applicant. According to them the applicant was appointed to the post of Professional Assistant/Technical Assistant, which was subsequently re-designated as

46

SLIA on 30.9.1989 on ad hoc basis since Recruitment Rules for the said post did not exist at that time. Shri Malkit Singh was promoted to the post of ALIO on 17.6.1994 erroneously since he was only an ad hoc employee and could not have been promoted to the higher post. Accordingly, as per the instructions of the DOP&T, he was reverted. The promotion of the applicant was subject matter of OA No.594/1995 which was dismissed by Allahabad Bench of the Tribunal by order dated 17.7.1995 so the present OA is not maintainable. Furthermore, the OA was barred by limitation as the applicant was challenging the order of the DOP&T, i.e., 9.3.1995 whereby the post of ALIO was deserved. It is also pleaded that the post of Professional Assistant/Technical Assistant was initially created under Plan scheme as per DOP&T's letter dated 16.6.1989. In the first instance, the post was created up to the period 28.2.1990. The appointment to these posts, therefore, was made on ad hoc basis. Subsequently, those posts were converted into Non-Plan vide DOP&T's letter dated 7.3.1990. The posts were initially created only for a short period although they were likely to continue but as the posts were temporary, the offer of appointment was issued on ad hoc basis. The applicant joined as SLIA on purely ad hoc basis and this fact was specifically made clear in the offer of appointment and the applicant had accepted the same unconditionally. In the letter dated 6.6.1994, the DOP&T clarified that in case there was any regular employee for promotion he should be promoted, otherwise the post may be filled by transfer on deputation. The DOP&T did not require the Academy to fill up the post straightaway only by transfer on deputation basis. There were employees who were eligible for promotion, therefore, the case for de-reservation was submitted to the Ministry and after obtaining the approval for de-reservation from the DOP&T the same was filled from amongst the eligible employees. As per the model Recruitment Rules, the applicant was involved in a disciplinary case and was charge-sheeted on 15.7.1991. He was placed at a lower stage of his pay scale for a period of 3 years without cumulative effect. His appeal against the penalty order was rejected on 9.3.1995. The applicant also filed OA No.595/1995 against the order of the penalty as well as his reversion from the post of ALIO but the OA was dismissed.

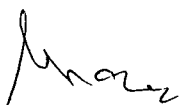
(47)

5. It is further submitted that the post of Assistant Library and Information Officer (ALIO) was lying vacant since 8.8.1994. After the reversion of the applicant, since as per reservation roster, no reserved candidate for the said post was eligible, therefore, proposal for de-reservation of one post of ALIO was sent to the DOP&T vide letter dated 19.1.1995. The promotion to the post of ALIO was made in accordance with the orders of the DOP&T dated 3.8.1994 in which it was stated that if there was any regular employee for promotion he should be promoted otherwise the post be filled up by transfer on deputation. At that time the applicant was not eligible for promotion as he was inflicted the penalty of reduction to the lower stage of the pay scale as such the question of depriving him of the promotion did not arise at all. Other allegations of the applicant were also traversed and it was prayed that the OA should be dismissed.

6. In the rejoinder the applicant reiterated his own case pleaded in the OA.

7. We have heard the learned counsel for the parties and perused the relevant record.

8. The grievances of the applicant are twofold. Firstly, the DOP&T was not justified in rejecting the proposal of the respondent No.2, the Academy, for creating a supernumerary post of ALIO since the proposal was budget neutral by keeping two subordinate posts of Senior Library and Information Assistant and Library and Information Assistant vacant and it was meant to undo justice meted out to the applicant because of jeopardising his chances of promotion to the post of ALIO for a long time. It is stated that the order dated 26.2.200⁰ Annexure A-1 by which the proposal of the Academy was rejected and the Memorandum dated 8.3.2001 whereby the representation of the applicant for his promotion to the post of ALIO by creating supernumerary post of ALIO was rejected were arbitrary, unreasonable, illegal and perverse so deserves to be set aside. The second contention is that the order of the respondent by which the post of ALIO reserved for SC category was de-reserved and resultant promotion of a general candidate, the respondent No.4's promotion/appointment to the said post, was illegal, arbitrary, discriminatory and mala fide since it was in contravention of the directions of the DOP&T and that the





applicant should be directed to consider the applicant for promotion against the said post.

9. As regards to the first contention it has been fairly and candidly admitted by the learned counsel for the applicant that DOP&T is the competent authority to decide about the creation of supernumerary post of ALIO. However, his argument is that the proposal of the respondent No.2, the Academy, was budget neutral since two lower posts of SLIA and LIA were to be put in abeyance. The creation of supernumerary post of ALIO fell in the domain of State Policy and the State Policy cannot be challenged unless it is in contravention of the statutory provisions or the provision of the Constitution or was mala fide or whimsical. In the present case the competent authority, the DOP&T of the Government of India had considered the proposal of the Academy but has not agreed to the creation of the supernumerary post simply in order to give promotion to the applicant. The Tribunal has limited jurisdiction to review the order of the administrative authority. It judicially reviews the decision making process and not the decision itself. The Tribunal, as such, cannot sit over the order of the DOP&T dated 26.2.2001 or dated 8.3.2001 (collectively was marked as Annexure A-1) as an appellate body and examine its legality when it does not contravene any statutory or Constitution provision. It cannot be called mala fide capricious, arbitrary and whimsical simply because it has turned down the request of the Academy for creation of a supernumerary higher post for giving promotion to the applicant. We, therefore, find ourselves unable to interfere with the orders of the DOP&T dated 26.2.2001 and 8.3.2001 impugned in the present OA.

10. Now we come to the second contention of the applicant, i.e., de-reservation of the post of ALIO by the DOP&T. Deservation is not under challenge on the ground that some rules or instructions applicable to the dereservation [✓] have been violated. Even otherwise, the learned counsel for the applicant during the course of argument has not been able to bring any rules or government instructions to our notice which may justify a conclusion that the post of ALIO of reserved category, was illegally de-reserved. The de-reservation will not become mala fide, arbitrary and illegal simply because it has allowed the post of ALIO to be filled on

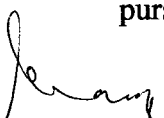


(48)

long term basis by promotion of a general candidate and thereby indirectly depriving the applicant of the chance of promotion to the post of ALIO when he became eligible for consideration for such promotion. The learned counsel for the applicant has strenuously argued that the DOP&T in its letter dated 3.8.1994, Annexure A-6 had told the respondent Academy that by letter dated 6.6.1994 it was clarified that in case there was any regular employee for promotion, he should be promoted otherwise the post be filled up by transfer on deputation. But the department instead of filling up the post by transfer on deputation, got the vacancy de-reserved and filled it up by regular promotion which resulted in occupancy of vacancy on long term basis and prejudicially effected the chanced of the applicant for consideration for promotion against reserved vacancy, being a candidate belonging to the SC category. The respondent conversely stated that there were eligible persons for promotion so the vacancy was got de-reserved and eligible person was promoted so there is no violation of this advice:

11. The DOP&T by its letters dated 6.6.1994 and 3.8.1994 had simply required the Academy to fill up the post of ALIO by promotion from the regular eligible employee and if no such candidate was available, it may be filled up by transfer on deputation. It was open for the Academy to resort to either of these two modes in filling up of the vacancies. The Academy, however, finding that no candidate of reserved category was available against reserved vacancy, thought it proper to get the post de-reserved and fill it up on regular basis. This indeed has caused some set back to the right of the applicant for consideration for promotion to the post against reserved vacancy on his becoming eligible for it, but the proposal for de-reservation of the post has been duly approved by the competent authority, the DOP&T in this case and the de-reservation of the vacancy has not been done in violation of de-reservation policy.

12. The learned counsel for the applicant has stated that Professor D. Banerjee Committee had found force in the submission of the applicant that injustice has been done to him by filling up the post of ALIO on regular basis by de-reserving the reserved vacancy so it had suggested that a supernumerary post may be got created pursuant to which the Academy had approached the DOP&T but the DOP&T has



unjustly rejected that proposal. In fact, the counsel, who is representing all the three respondents including the Academy, has argued that the Academy had approached the DOP&T for creation of supernumerary post of ALIO but the DOP&T had not agreed with the proposal, therefore, the Academy though sympathetic to the cause of the applicant yet could do nothing in the matter. However, as a counsel of the Union of India, the DOP&T justified the action of the DOP&T in refusing to create supernumerary post of ALIO to give to the applicant even if two lower subordinate posts were to be kept in abeyance for this purpose. It is submitted that the policy decision taken by the DOP&T on this question cannot be interfered with by this Tribunal. Indeed, the policy decision of the respondent No.1 cannot be interfered with unless it contravenes a statutory provisions or rules or constitutional provision or is otherwise mala fide, capricious, arbitrary or whimsical (See *State of Rajasthan vs. Sevamivatra Karmachari Hitkari Samiti* JT 1995 (1) SC 315).

13. The learned counsel for the applicant has cited the case of **Harish Chandra Ram Vs. Mukh Ram Dubey and Othrs, 1994 Supp. (2) SCC 490** in which the question was whether the reserved vacancy, having not been filled for three successive years, shall be deemed to be unreserved and open for general candidate the Supreme Court has held that the vacancy had occurred in 1980 but recruitment was made in the year 1987 by which time the applicant had already qualified the eligibility qualification and had become eligible for consideration to vacancy No.2 in the roster which was admittedly reserved for SC candidate. The Hon'ble Court held that the Promotion Committee was right in considering the case of the applicant for promotion as Senior Selection Grade Head Typist since that post was kept reserved for the Scheduled Caste candidate. It is not the case of the applicant that the reserved vacancy was de-reserved violating the rules for de-reservation. The de-reservation was challenged on the ground that it was in contravention of the letter of the DOP&T that the post should be filled up by promotion and if no eligible candidate was eligible, then by transfer on deputation. Therefore, the law laid down in the case cited was not applicable to the applicant's case.

14. The learned counsel for the applicant has next cited the case of **State of Maharashtra Vs. Jagannath Achyut Karandikar, 1989 Supp (1) SCC 393** where

Handwritten signature

57


it was observed that it would be unjust, unreasonable and arbitrary to penalize a person for the default of the Government to hold the examination every year and if the examination is not held in any year, the person who has not exhausted all the permissible chances has a right to have his case considered for promotion even if he has completed 9 years of service under the relevant rules. It was further observed that the Government instead of promoting such persons in their turn made them to wait till they passed the examination. They are the persons falling into the category of 'Late Passing'. To remove the hardship caused to them the Government wisely restored their legitimate seniority in the promotional cadre. There was nothing improper or illegal in this action and it is in harmony with the object of the rules. In the present case it is argued by the learned counsel for the applicant as a consequence of the de-reservation of the post of ALIO was filled up on regular basis which has caused blockage of the promotion of the applicant on long term basis so the respondent No.1 has arbitrarily and unjustly refused creation of a supernumerary post of ALIO when the respondent Academy had found that injustice has been done to the applicant. The facts of the cited cases were peculiarly distinguishable and not similar to the present case. Indeed, the applicant may suffer hardship on account of de-reservation of the reserved vacancy of ALIO as it was filled up regularly by general candidate. The DOP&T has not agreed to the proposal of creation of supernumory post of ALIO and the Tribunal is unable to interfere with this order simply because the interest of the applicant to some extent has been adversely affected.

15. The ~~respondent~~^{applicant} in the counter reply have also stated that the applicant had challenged the penalty imposed on him in a disciplinary proceedings and his reversion from the post of ALIO to the post of SLIA in OA No.594/1995 in Allahabad Bench of this Tribunal and the Tribunal had dismissed the OA and in the present OA the applicant has raised the same question which is impermissible. The relief claim in the previous OA has also been reproduced in the counter reply. A bare look on it is sufficient to hold that cause of action for filing the previous OA and the relief claimed were totally different. The applicant is neither challenging the penalty in departmental proceedings nor is he question^{ing} validity of his reversion in


for

pursuance to the instructions of DOP&T. Therefore, the questions for consideration in the present OA are totally different. The dismissal of the previous OA does not debar the applicant from filing present OA challenging dereservation of reserved post and refusal of DOP&T to create supernumery post of ALIO to facilitate his own promotion.

16. The result of the above discussion is that the OA fails and it is dismissed but without any order as to costs.


(V.K. Agnihotri)
Member (A)

Rakesh


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