

Central Administrative Tribunal, Principal Bench
New Delhi

(28)

O.A. No. 2039/2000

New Delhi this the 8th day of Sept., 2002

Hon'ble Mr. M. P. Singh, Member (A)
Hon'ble Mr. Shanker Raju, Member (J)

Mrs. Neeraj Sexena
W/o Shri B.B. Saxena
Aged about 35 years,
R/o 3-1611, Sector 23,
Raj Nagar,
Ghaziabad.

And employed as :

Senior Laboratory Assistant in the
office of the Food Research & Standardization
Labatory,
Ministry of Health & Family Welfare,
Ghaziabad.

...Applicant

(By Advocate : Shri G.D. Gupta with Shri S.D. Raturi)

Versus

1. Union of India
through the Secretary
Ministry of Health & Family Welfare
Nirman Bhawan,
New Delhi.
2. The Director General,
Directorate General of Health & Services,
Govt. of India,
Nirman Bhawan,
New Delhi.
3. The Director
Food Research & Standardization Laboratory,
Navyug Market,
Ghaziabad.

- Respondents

(By Advocate : Shri A.K. Bhardwaj)

O R D E R

Mr. M.P. Singh, Member (A) :

The applicant had filed OA 2039/2000 praying for direction to quash and set aside the impugned order dated 9/22.8.2000 (Annexure A) and order dated 7.9.2000 (Annexure B) being ultra vires and violative of the order dated 27.11.1997 and had also sought directions to the



respondents to hold the DPC as per rules for the post of Technical Assistant and consider him alongwith other eligible persons for the post of Technical Assistant. This OA was disposed of by a Single Bench of this Tribunal vide order dated 29.5.2001 and the following directions were given to the respondents:-

"14. In the background of the above discussion and after a careful consideration of the issues involved, I hold that there was no justification in issuing OMs dated 22.8.2000 (Annexure A) and 7.9.2000 (Annexure B) and accordingly, both these OMs deserve to be quashed and set aside. I decide accordingly. In the peculiar circumstances of this case, I also consider it proper to direct the respondents to hold a DPC for filling up the vacancies in the post of TA in accordance with the relevant rules and consider the claim of the applicant as also of the others, if any, by assuming that the applicant has completed three years of regular service as required under the relevant recruitment rules. The respondents are directed accordingly. They are also directed to hold the DPC as expeditiously as possible and in any event within a period of three months from the date of receipt of a copy of this order."

2. The respondents have filed CWP No.6679/2001 and CM 11460/2001 in the Hon'ble High Court of Delhi against the aforesaid order of the Single Bench of this Tribunal. The Hon'ble High Court vide its order dated 6.3.2002 has passed the following orders:-

"In Appendix VIII to the Rules the matter which can be dealt with by a Single Bench has been enumerated whereas Appendix VII enumerates the matters which are to be dealt by Division Bench. Item nos.20 and 21 deals with 'Selection/Promotion' and 'Seniority/Confirmation' respectively. There cannot be any doubt whatsoever that the matter ought to have been heard by a Division Bench. It is now well settled principal of law that even a right decision



by a wrong forum is 'coram non judice'. In this view of the matter, we are of the opinion that the impugned judgement cannot be sustained. We may state that we have not examined the correctness of the decision on merits.

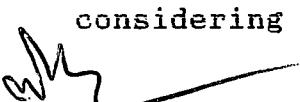
However, learned counsel for the respondents has rightly drawn our attention to the stand taken by the petitioner herein before the Tribunal to the effect that as the respondent had been promoted on 25th February, 1999, she should be deemed to have completed her service on 24th February, 2002 and thus has become eligible for consideration for promotion to the post of Technical Assistant only even as per the petitioner. In view of the categorical stand taken by the petitioner before the learned Tribunal we are of the opinion that in the interest of justice the petitioner may hold the Departmental Promotion Committee for consideration of the case of the respondents for promotion to the post of Technical Assistant together with all other eligible candidates as expeditiously as possible. This order is without prejudice to the rights and contentions of the parties before the learned Tribunal inasmuch as the matter is again directed to be dealt with by Division Bench of the Central Administrative Tribunal. For the reasons afore-mentioned we allow the Writ Petition and set aside the impugned judgement dated 29th May, 2001. We direct the controversy between the parties may now be adjudicated upon by a Division Bench of the Central Administrative Tribunal subject to the observations made above."

Hence, the case has been remitted back by the Hon'ble High Court to this Tribunal for adjudication by the Division Bench. Accordingly we have heard learned counsel for the parties and perused the material placed on record.

3. The brief facts of the case as stated by the applicant are that she was appointed as Junior Laboratory Assistant (JLA) w.e.f. 26.2.1990. She became eligible for promotion to the post of Senior Laboratory Assistant (SLA) in the scale of Rs.1320-2040 on completion of five

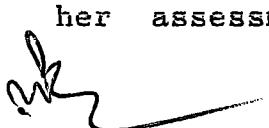


years regular service in the grade of JLA and she had completed the aforesaid period on 2.6.1995. The post of SLA which was occupied by a deputationist fell vacant on 1.11.1996. A Departmental Promotion Committee (DPC) meeting was held for considering promotion to the post of SLA among eligible JTA, including the applicant, but the DPC could not proceed further or make their recommendations regarding suitability of the applicant for promotion to the said post as her personal file and other relevant documents were not put up before the DPC and also due to non-availability of the Annual Confidential Reports (ACRs) of the applicant. Thereafter another DPC was held on 13.4.1998 for considering the case of the applicant and the same was again deferred for the next year. Thereafter a Review DPC was held on 24.2.1999. Respondent NO.3 had issued order dated 25.2.1999 on the basis of recommendation of the Review DPC and the applicant was promoted to the post of SLA in a temporary capacity in the pay scale of Rs.4000-6000 w.e.f. 1.11.1996. The next promotional post for the applicant is from SLA to Technical Assistant (TA). As per the Recruitment Rules the post of TA is a non-selection post and the same is required to be filled up 50% by promotion from amongst SLAs who have completed three years of regular service, failing which by direct recruitment and 50% by direct recruitment. According to the applicant, she had completed three years regular service as SLA on 1.11.1999 and thus became eligible to be considered for promotion to the post of TA. She, therefore, submitted a representation on 1.11.1999 for considering her candidature for the post of TA. Two

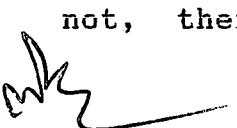


posts in that category were lying vacant in FRSL. The respondents vide their letter dated 29.11.1999 had informed the applicant that the actual date of her promotion to the post of SLA was under review by the competent authority. Thereafter the applicant was served with a Memorandum dated 9/22.8.2000 enclosing therewith a blank assessment form for the period from 25.2.1999 to 24.2.2000. In pursuance of the aforesaid Memorandum, applicant sent her reply stating that her promotion to the grade of SLA was to take effect from 1.11.1996. Therefore her probation period started from 1.11.1996 and ended on 31.10.1998, particularly because no communication was received by the applicant regarding extension of probation and, therefore, the same was deemed to have been completed successfully. The applicant has submitted another representation to the Director General of Health Services i.e. Respondent NO.2 through proper channel. Thereafter another Memorandum was received by the applicant on 7.9.2000 informing that her probation will be for a period of two years and probation assessment was required to be completed by the applicant. Aggrieved by this, she has filed the present OA claiming the aforesaid reliefs.

4. Respondents have contested the OA and have stated that the assessment report of probation is a routine matter as per instructions issued by the Govt. of India from time to time. As per notified recruitment rules for the post of SLA, the period of probation has been prescribed for two years. According to the respondents, her assessment as a probationer starts from the actual



date of joining in the said post. It is further stated by the respondents that in pursuance of the judgement of this Tribunal, the applicant was notionally promoted w.e.f. 1.1.1996 on which date the post of SLA had fallen vacant. Thus, the applicant is eligible from the date when she actually joined the post of SLA and not retrospectively. It cannot be said that the period of probation is deemed to be completed. It is further stated by the respondents ^{that} as per OM dated 9.10.1996 issued by the Ministry of Home Affairs wherein it has been stated that the appointment on probation should not be treated as a formality. These instructions require that assessment of the probationer should be done at the end of the prescribed period of probation. She was given the benefit of retrospective promotion by virtue of Tribunal's order. Her assessment as a probationer was undertaken from the date of her actual joining in the higher post. The applicant did not carry out the functions of the post of SLA w.e.f. 1.11.1996 to 24.2.1999 and thus the question of completion of probation period from 1.11.1996 to 31.10.1998 did not arise. It is further stated by the respondents that as per the Recruitment Rules, the post of TA is required to be filled up 50% by promotion from among SLAs who have put in three years of regular service, failing which by direct recruitment and 50% by direct recruitment. The respondents have further stated that the applicant was appointed to the post of SLA on 1.11.1996 and would have completed three years regular service as required for promotion to the posts of TA only on 1.11.1999 and was not, therefore, eligible to be considered for promotion



to the said post before that date. The respondents have also stated that two vacant posts of TA are direct recruitment quota posts as per notified Recruitment Rules. At the time, when the posts had fallen vacant on 15.3.1997 and 24.8.1998, the applicant was not eligible for promotion and, therefore, she was not considered. Respondents have further stated that when one post of TA had fallen vacant on 15.3.1997, as per prescribed procedure under Central Civil Services (Redeployment of Surplus (Civil) Rules, 1990, no objection was obtained from Ministry of Personnel, Public Grievances and Pension, DOP&T for filing up the said post of TA by direct recruitment vide their letter dated 4.6.1997.

5. We have heard learned counsel for the parties and perused the material placed on records.

6. During the course of argument, learned counsel for the applicant has stated that the applicant was promoted w.e.f. 1.11.1996 as SLA, she has been given seniority and pay fixation in that post from that date and, therefore, her probation period was deemed to have been completed on 31.10.1998. Since she has already completed three years service in the year 1999, she is due for promotion to the next higher post i.e. TA. If the contention of the respondents that her probation period will start from the date of actual promotion is accepted then the benefit of granting her the ante-dating promotion w.e.f. 1.11.1996 would be meaningless. In support of her claim, she is relying upon the Hon'ble ^{delhi} High Court's judgement in the case of O.N.Tandon and

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Others Vs. Food Corporation of India (CW No.36 of 1975 decided on 17.2.1983) wherein the Hon'ble High Court has held which as follows:-

"20. Why should I restrict the words of the circular and hold that only seniority and pay are covered and not promotion? Promotion is comprehended within the words 'seniority'. I not only see no good reason for restricting the words, but I see every reason to give them their full and proper significance. The corporate author of the circular cannot say "I give seniority but not promotion." It is always important to consider the purpose for which the fiction is introduced. Its primary function was to bring in something which would otherwise be excluded. The petitioners military service will have to be introduced which otherwise would have been excluded. Fiction here was introduced for the advancement of the ends of justice.

21. In East Dwellings v. Finsbury Borough Council (1951) (2) AIR E.R. 587 (599) Lord Asquith said:-

"If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences "incidents which, if the putative state or affairs had in fact existed, must inevitably have flowed from or accompanied it..... The Status says that one must imagine a certain state affairs. It does not say, that having done so, one must cause or permit one's imagination to boggle when it comes to the corollaries of that state of affairs."

22. Promotion is the 'consequence' of seniority. It is an inevitable corollary. The authorities fell into this error that they permitted their imagination to boggle when it came to the 'inevitable corollaries of that state of affairs' which the circular bids us imagine as real.

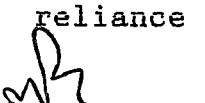
23. For these reasons the writ petition is allowed. The petitioners case will be considered as on 6.12.1974 and if selected, will be promoted to the post of DM (G) and their proper place of seniority will be assigned to them. They will also be entitled to all the consequential benefit as a result of this order on their promotion to the post of DM(G). IT is clarified that the two petitioners are working as DM (G)...."

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7. The post of TA is required to be filled up 50% by promotion failing which by direct recruitment and 50% by direct recruitment. The applicant, is therefore, eligible for promotion to the post of TA having completed three years of service on 31.10.1999. Learned counsel for the applicant has also submitted that instead of holding the DPC for consideration to promote her to the next higher grade, the respondents are considering to import person from Surplus Cell. He has also submitted that the applicant was promoted on regular basis w.e.f.1.11.1996 by duly constituted DPC in pursuance of the direction of the Tribunal. It is further submitted by the learned counsel for the applicant that she has also been paid arrears of salary and allowances of the higher post of SLA w.e.f.1.11.1996 and, therefore, her regular service is deemed to be counted from that date i.e. w.e.f.1.11.1996.

8. On the other hand, learned counsel for the respondents has stated that as per general principle laid down by the Govt. of India, the assessment of probationer's probation period should not be treated as formality. This classification requires ^{formal} ~~formal~~ assessment of the probationer should be done at the end of the prescribed probation period. It is stated that the applicant was given the benefit of retrospective promotion, her assessment as a probationer was undertaken from the date of actually assigning the position in the higher post. Learned counsel for the respondents places reliance of chapter 19 of Swamy's Establishment &



Administration (Probation on Appointment) by drawing the attention to the following transcendencies:-

"(1)(i) Instead of treating probation as a formality, the existing powers to discharge probationers should be systematically and vigourously used so that the necessity of dispensing with the services of employees at with the services of employees at later stages may arise only rarely.

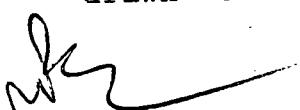
(3) 2. On expiry of the period of probation, steps should be taken to obtain the assessment reports on the probationer and to -

(i) Confirm the probationer/issue orders regarding satisfactory termination of probation, as the case may be, if the probation has been completed to the satisfaction of the competent authority; or

(ii) Extend the period of probation...

(4) Probation commences from date of formal selection when already officiating in the post. - A question recently arose as to the date from which the prescribed period of probation should commence in the case of a Government servant who is later selected by the Union Public Service Commission for permanent appointment thereto. During the period of officiation prior to formal selection for permanent appointment to a post the officer concerned merely carries on the duties of the post and his work and conduct is not particularly watched with a view to eventual confirmation. It is reasonable, therefore, that after formal selection for a post and before confirmation therein there should be a specific period of probation during which the work of the officer could be carefully watched, and his suitability for confirmation decided on the basis thereof. It has accordingly been decided, after careful consideration that the period of probation in such cases should commence from the date of formal selection by the Union Public Service Commission of an officer for a post and not from the date from which he began to officiate in that post prior to such selection."

9. Learned counsel for the respondents has also drawn our attention to Ministry of Finance, Dept. of



Expenditure's OM dated 23.10.2000 whereby certain guide-lines on austerity/economy in expenditure were communicated and proceeds to clarify that only those posts should be filled up which have remained vacant for less than one year and are to be filled up by promotion. Since both these vacancies have been existing for more than one year, these cannot be filled up at that point of time. On the other hand, learned counsel for the applicant argues that the aforesaid OM was not in existence on the date when the applicant became eligible for promotion to the post of TA i.e. 1.11.1999 and, therefore, the same will not be applicable.

10. Having regard to the aforesaid submissions, we are of the considered view that the contention of learned counsel for the respondents that the actual promotion of the applicant to the post of SLA will be counted from the date when she actually joined, is not sustainable, as the very purpose of promoting the applicant from 1.11.1996 and granting all the benefits including pay fixation and seniority will be defeated. As regards the reliance placed in paragraph 8 above, we find that these provisions are not applicable in the present case as the same deal with the situation in which a Govt. servant, who is holding a post in temporary or officiating capacity and who is later selected by the UPSC for permanent appointment. It has been mentioned therein that the period of probation in such a case commence from the date of formal selection by the UPSC. In the present case, the applicant was not holding the post in temporary/officiating capacity before she was selected



for regular promotion nor she was selected by UPSC. As regards the contentions of the respondents that these posts are lying vacant for more than one year and, therefore, are liable to be abolished, the same is not correct. These instructions issued by the Ministry of Finance provide that a post which has not been filled up for one year can be revived in consultation with them. Moreover these instructions shall not be applicable in the present case, as the same were not existing on 1.11.1999 when the applicant became eligible for promotion to the post of TA. We are also of the considered view that since the applicant has been promoted w.e.f. 1.11.1996, the probation should be deemed to have been completed on 31.10.1999. In this proposition, we are supported by the judgement of the Hon'ble High Court in the case of O.N. Tandon, referred to Para 6 above.

11. In the light of the above discussion and after carefully considering all the issues involved herein, we hold that the respondents are not justified in issuing Memorandums dated 9/22.8.2000 and 7.9.2000 and accordingly both these OMs deserve to be quashed and set aside. We do so accordingly. In the peculiar facts and circumstances of the case, we also consider it appropriate to direct the respondents to hold the DPC for filing up vacancies in the post of TA in accordance with relevant rules and consider the claim of the applicant by assessing the applicant that she had completed three years of regular service under the relevant rules on 1.11.1999. Therefore, respondents are directed to hold

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DPC for considering the case of the applicant as expeditiously as possible and, in any event, within a period of three months from the date of receipt of a copy of this order.

12. The present OA is disposed of in the aforestated terms.

S. Raju
(Shanker Raju)
Member (J)

M.P. Singh
(M.P. Singh)
Member (A)

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