

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.No.2497/2000

Hon'ble Shri V.K.Majotra, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

New Delhi, this the 23rd day of March, 2001

R.B.Saxena
Dy. Director (Finance)
E.S.I. Corporation
5/1 Grant Lane
Calcutta - 700 012
r/o ESIC Qr. No.12, AFM Salt Lane
C A L C U T T A, .. Applicant

(Applicant in person)

Vs.

Director General
ESI Corporation
Panch Deep Bhawan
Kotla Road
New Delhi - 110 002. ... Respondent

(By Advocate: Shri G.R.Nayar)

O R D E R

Hon'ble Shri Shanker Raju, Member (J):

The applicant is working as Deputy Director in Employees' State Insurance Corporation (ESIC for short) has sought a relief of counting of his ad hoc service in the cadre of Deputy Director w.e.f. 28.1.1993 and to declare him as a regularly appointed to the post of Deputy Director w.e.f. the same date.

2. The applicant was appointed as Assistant Regional Director in the pay scale of Rs.2000-3500 on 30.1.1987 and thereafter he was promoted as Deputy Regional Director (now by Deputy Director) on ad hoc basis vide order dated 20.1.1993 with a stipulation that the period of service to be rendered as ad hoc will neither count towards seniority in the grade/cadre nor would be an eligibility for the

promotion to the next higher grade. It is further stipulated that the ad hoc promotion will not confer the applicant any right to count the service for regular promotion in the future. The applicant alleges that he continued on this post beyond the stipulated period of one year without consultation of the UPSC. It is further contended by the applicant that vide Office Order dated 13.10.1997, 25 officers had been promoted and have been regularised as Deputy Directors in consultation with the UPSC which include juniors of him, namely, S/Shri M.Karunanithi and K.Ramkrishnan as per the seniority list. But the name of the applicant had not figured and he had been superseded by his juniors. It is contended that there is nothing adverse in the record of the applicant and his ACRs have been down graded without bringing it to the notice of the applicant. According to the applicant, as per Section 17(3) of the Employees' State Insurance Corporation Act, 1948 (Act for short) in the event an officer continued on ad hoc basis beyond a period of one year his appointment should be treated as regular. The applicant further resorted to the contention that his uninterrupted ad hoc service was made without following the Rules and as such period should be reckoned for the purpose of grant of seniority to the applicant and he to be deemed as regularly appointed with effect from the date of his ad hoc officiation. The applicant later on vide an order dated 9.2.2001 has been regularly promoted as Deputy Director on the basis of the recommendations of the UPSC and had to be on probation for a period of two years.

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3. On the other hand, the respondents raised a preliminary objection by contending that the applicant had not exhausted the statutory remedy of filing an appeal to the Chairman, Standing Committee and the case of the applicant is barred by limitation. It is further objected that the OA is not maintainable as the affected persons have not been impleaded as necessary parties in this OA.

4. The respondents had also produced the record of the DPC. We have seen the record, wherein it had been mentioned that the recommendation of the DPC had been sent to the UPSC and according to the grading the applicant could not be included in the year wise panel prepared therein. The respondents further contended that the ad hoc promotion would not confer any right to claim any regular promotion and the period of ad hoc service would not be counted for as regular service. It is further stated that in other cases where the incumbents were to be on ad hoc as Deputy Director there had been accorded the seniority from the date of their case been recommended by the UPSC and not from the date of their continuous ad hoc officiation. According to the respondents as the applicant had failed to make the grade he was not regularised and continued to officiate on an ad hoc basis.

5. We have given careful thought to the rival contentions of the parties and also perused the available pleadings with departmental file produced by the respondents. The first contention of the

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applicant is with reference to the Section 17 (3) of the Act *ibid* and it is stated that as per the provisions if the applicant had been put on an *ad hoc* basis, according to the applicant, as it is a Group 'A' post, it is to be filled in consultation with the UPSC and according to the provisions of Rule 17(3) *ibid*, this Sub-Section shall not apply to an officiating or temporary appointment for a period not exceeding one year. In this back-ground, relying upon the ratio of Judgment of the Hon'ble High Court, in CWP No.5/81 dated 13.8.1982 in G.P.Sarabhai Vs. Union of India and Others where the issue was regarding the direct appointment of qualified Doctors and while interpreting the provisions of Rule 17(3) the Hon'ble Court was of the view that consultation of the UPSC for Group 'A' post on expiry of one year ceases to have any operation and if so the consultation with the UPSC is made and the incumbent continues beyond the period of one year the appointment should be treated as permanent. On the other hand, the respondents took exception to the contentions of the applicants and stated that this Judgment is applicable in the case of direct recruitment and not in the case of promotees. Apart from we also have noticed that the aforementioned ratio was laid down on 13.8.1982 and thereafter the respondents had brought in an amendment by inserting proviso in Section 17(3) which provided as under:

"Every appointment to [posts (other than medical posts)] corresponding to [Group A and Group B] posts under the Central Government], shall be made in consultation with the [Union] Public Service Commission:

Provided that this sub-section shall not apply to an officiating or temporary appointment for [a period] not exceeding one year.

[Provided further that any such officiating or temporary appointments shall not confer any claim for regular appointment and the services rendered in that capacity shall not count towards seniority or minimum qualifying service specified in the regulations for promotion to next higher grade]."

6. In view of this proviso we feel that despite continuing beyond the period of one year no right can be conferred on the applicant to claim any regular appointment and this would not count for seniority or minimum qualifying service to the next higher grade. The aforesaid Judgment delivered by the Hon'ble High Court at a time, when amendment to Rule 17(3) had not been effected. Apart from it, the case of G.P. Sarabhai supra would be applicable in a case of a direct recruitment at the initial appointment and not to the applicant, who was initially appointed in the department as Assistant Regional Director and later on promoted as Deputy Director on ad hoc basis. Hence, we are of the confirmed view that the ratio would not apply to the case of the applicant and in view of the proviso added to Rule 17(3) and the fact that in the order of ad hoc appointment of the applicant there is a specific clause debaring the applicant to have any claim for regularisation on the basis of ad hoc officiation, the contention of the applicant is not legally acceptable and is rejected.

7. It is next contended that the respondents while holding the DPC in the year 1997, have arbitrarily rejected the case of the applicant and had not followed the ratio laid down by Hon'ble Apex Court

in U.P.Jal Nigam and Others Vs. Prabhat Chandra Jain and Others, 1996(2) SCC 363 wherein it has been held that if there is a down grading in the Confidential Reports, the same is to be treated as an adverse and the concerned person should have been communicated the remarks. It is in this back ground, DPC had down graded him wherein his Confidential Reports were having the superior grading. In the present case the grading given to the applicant during his assessment is good for all the years whereas in the selection the Bench Mark was Verygood being a selection post. As such the applicant was not found upto to the mark, hence not empanelled for being regularised as Deputy Director for the years 1994-1997. The applicant has failed to show that previously his grading was higher and then the same was down graded subsequently. In absence of any material to prove the above contention, it is very difficult for us to adjudicate and to observe that the applicant's grading in the Confidential Reports had been down graded without being communicated to him. As such the UP Jal Nigam's case supra would have no application to case and this contention of the applicant is rejected.

8. As regards the exhaustion of the remedies of the applicant by not filing a statutory remedy to the Chairman, Standing Committee the applicant in his rejoinder contended that in view of the decision of the Tribunal of Calcutta Bench in OA No.448/98 it has already been held that appeal to the Chairman is not mandatory. Although the Judgment is not produced but as the contention is not refuted by

A the respondents we hold that the objection of the respondents regarding exhaustion of remedies is not legally tenable.

9. It is next contended that the applicant was appointed as Deputy Director on an ad hoc basis on 28.1.1993 and as this appointment exceeded one year the requirement of consultation with UPSC was not necessary and as he continued uninterruptedly for more than 7 years, the period rendered as ad hoc should be counted towards seniority and he should be deemed to be regularly appointed to the post of Deputy Director from 28.1.1993 instead of 9.2.2001. The applicant has drawn our attention to the ratio of Constitutional Bench Judgment of the Hon'ble Supreme Court in Direct Recruitment Class-II Engineering Association Vs. State of Maharashtra & Others, 1990 SCC (L&S) 339 and contended that Clause 'B' in para 47 of the judgement observed which is applicable to his case, which provides as under:

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

10. It is contended that if the initial appointment is not made by following the rules but the applicant continues in the post uninterruptedly till regularisation of the service then the period of officiation would be counted towards seniority. On the other hand, the respondents contended that Clause 'A' of Para 47 of the aforesaid Judgment would be applicable in his case which provides as under:

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"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."

11. It is further contended that as the initial appointment was ad hoc and the fact that the applicant despite being considered could not make a grade for regularisation in the DPC held in the year 1997 because of his Confidential Reports and grading and the fact that Rule 17(3) proviso does not confer the ad hoc appointee right to claim seniority and regularisation the applicant cannot claim regularisation from the date of his ad hoc appointment and this period shall not be counted towards the seniority in the regular cadre of Deputy Director. We have given careful thought to this contention of the applicant and we are of the considered opinion that the case of the applicant falls in Clause 'A' of Para 47 of the Direct Recruit Class II Engineering Officers' Association's case supra and as his promotion was ad hoc, the same would not be counted towards the seniority for the purpose of regularising his services as Deputy Director w.e.f. 28.1.1993. We are also fortified by a ratio laid down by the Hon'ble Apex Court in State of West Bengal & Ors. Vs. Aghore Nath Dey & Ors., JT 1993(2) SC 598, wherein the following observation has been made:

"There can be no doubt that these two conclusions have to be read harmoniously and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore,

first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc a stop gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority.' Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

The conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the 'rules' and the latter expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rule has to be cured at the first available opportunity, without any default of the employee and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural

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requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest."

12. What we feel is that the applicant's initial appointment though was not following the rules, as he continued beyond the period of one year without any consultation with the UPSC, he continued on the post uninterruptedly. But at the same time, he was not found eligible and qualified it for being declared regular from the initial appointment as the DPC in the year 1997 considered the case of the applicant by making year-wise panel and therein he could not secure the Bench Mark of 'Verygood'. As the post of Deputy Director was a selection post, having been declared unqualified for being regularised for the appointment, the applicant cannot claim this period to be counted towards seniority more particularly when the initial appointment was purely ad hoc with a stipulation that he cannot claim regularisation of seniority on the basis of ad hoc service. It has been stated by the respondents that the persons who had been promoted in the year 1997, have also not been accorded the benefit of regularisation by counting their ad hoc service and their appointments have been made from the respective date, i.e., 6.10.1997. The applicant who was found fit to be regularised later on was accordingly regularised on 9.2.2001. As such we are of the considered view that the service rendered by the applicant as ad hoc shall not be counted towards the seniority of Deputy Director and

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the applicant cannot be declared as regularly appointed Deputy Director w.e.f 28.1.1993 as such this contention is also rejected.

13. The respondents had also taken an objection that the affected parties from the relief claimed by the applicant, have not been made as a necessary parties. In our view, in case the applicant is to be given regular promotion w.e.f. 28.1.1993, ie., the date of his junior, he will be ranked senior to all the Deputy Directors at present working in the cadre as such being a necessary parties their non-impleadment in the OA suffers from the vice of non-joinder of necessary parties as they would have been adversely affected if the order passed by this Tribunal in favour of the applicant. In this view of ours, we are fortified by the Hon'ble Apex Court in *Gopabandhu Biswal Vs. Krishna Chandra Mohanty & Others*, 1998(4) SCC 447.

14. Having regard to the discussion made above, we find no merit in the present application. As such the OA is accordingly dismissed but without any orders as to cost.

S. Raju
(SHANKER RAJU)
MEMBER(J)

/RAO/

V.K. Majotra
(V.K. MAJOTRA)
MEMBER(A)