

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 1488/90

DATE OF DECISION 19.4.91

SHRI C.L.RAIZADA

APPLICANT

VS

UNION OF INDIA & 18 ORS. RESPONDENTS

C O R A M

SHRI I.K.RASGOTRA, HON'BLE MEMBER (A)

SHRI J.P. SHARMA, HON'BLE MEMBER (J)

SHRI G.R.MATTA

FOR THE APPLICANT

SHRI N.S.MEHTA

FOR RESPONDENT No.1

SHRI G.D.BHANDARI

FOR RESPONDENT No.6

1. Whether Reporters of local papers may ~~be~~ be allowed to see the Judgement?

2. To be referred to the Reporter or not? ~~Yes~~

J U D G E M E N T

(DELIVERED BY SHRI J.P.SHARMA, HON'BLE MEMBER (J))

The applicant, an officer of Delhi And Andaman and Nicobar Islands Civil Service (in short DANICS) has filed the application under Sec.19 of the Administrative Tribunal Act, 1985 aggrieved by the order

dated 17th July, 1990 (Annexure VIII) rejecting the applicants' representation for not including him in the list for appointment to Selection Grade of the Service. The grievance of the applicant is that, the officers junior to him (Respondents No.2 to 19) have been given Selection Grade while he was not given the same.

2. The applicant has sought the following reliefs:-

- (i) to direct the respondent No.1 to promote the applicant in the Selection Grade with effect from 18th August, 1987 with consequential benefits in the matter of pay and payment of arrears of pay and to modify the impugned notification dated 24th May, 1990 (Annexure VI);
- (ii) to quash and set aside guidelines contained in O.M. dated 10th March, 1989 (Annexure IX) as unconstitutional) being violative of Articles 14 and 16 of the Constitution of India to the extent that 'average report' should be taken into account while declaring officer as 'unfit'.

3. The relevant facts of the case are that the applicant was appointed to Grade-I of the Delhi Administration Subordinate Service (DASS) on regular basis with effect

from 1-7-1968 and was holding Group-B Gazetted post. The Central Government subsequently constituted DANICS and the rules were made under the proviso to Art.309 of the Constitution of India (herein after referred as the Rules of 1971). (The copy of the said rules is at Annexure I). These rules were subsequently amended by DANICS (Amendment) Rules, 1988 which were notified on 22nd November, 1988 (Annexure II). All appointments to DANICS are made to the Junior Administrative Grade, Grade-I or Grade-II of the service and not against any specific post included in the DANICS. The applicant was appointed in Grade-II of the DANICS. was assigned Sl.No.142 in the seniority list below Shri Alok Swarup and above Shri T.C.Nakh (Annexure III). The applicant has been posted to various posts like Sales Tax Officer, Administrative Officer, etc. and was later appointed to the post of Deputy Registrar Cooperative Societies vide order dated 2nd September, 1987 (Annexure IV). This post carries Special Pay of Rs.100/- P.M. (now Rs.200/-). By the order dated 21st February, 1990 (Annexure V) the applicant was posted as Under Secretary (LSG) Delhi Administration and allowed to draw pay in the post of Deputy Director (UTCS).

4. Rule 31 of the 1971 Rules provides the mode of appointment to Grade-I (Selection Grade) which is reproduced below:-

"31. Appointment to Selection Grade:

(1) Appointments of members of the service to the Selection Grade shall be made in consultation with the commission on the basis of seniority subject to

fitness. Persons appointed to the service under Rule 17 who were appointed to the Selection Grade of the Delhi, Himachal Pradesh and Andaman and Nicobar Islands Civil Service shall be deemed to have been appointed to the Selection Grade of the Delhi and Andaman and Nicobar Islands Civil Service.

(2) An officer with the minimum of 8 years service in Grade II shall be eligible for being considered for appointment to the Selection Grade:

Provided that service in a duty post or an equivalent post or in a State Civil Service or in Grade II of the Delhi and Himachal Pradesh Civil Service or Delhi Himachal Pradesh and Andaman & Nicobar Islands Civil Service shall count towards the eight years period:

Provided further that where a person is considered for such appointment all persons senior to him in Grade II shall also be considered irrespective of the fact whether or not they fulfil the requirement as to the minimum of 8 years service".

5. According to the applicant, as per the seniority list (Annexure III) President of India has been pleased to promote DANI Civil Service officers to the Selection Grade of the service with effect from the dates noted

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against each of them in the said order. The names of the applicant has however been ignored, even though he was entitled to the Selection Grade with effect from 18-6-1987 i.e. the date from which his immediate junior has been promoted. No vigilance or disciplinary case is pending against the applicant. The applicant made a representation but the same has been turned down summarily vide impugned order dated 17th July, 1990 stating therein that his name was duly considered by D.P.C. and U.P.S.C. but he was not recommended for appointment to Grade-I of the DANICS. The applicant contends that he was appointed to the higher post of Deputy Registrar Cooperative Societies carrying higher emoluments and Special Pay in September, 1987. On the basis of his record of service according to the applicant the notification dated 24th May, 1990 (Annexure 6) is therefore arbitrary against the provisions of the Rules, and the same be quashed.

6. The official respondents contest the application. The private respondents No.12,16 & 18 who have filed the reply to the application, have resisted the interim reliefs only.

7. The official respondent raised a preliminary objection that the application is bad in-as-much as it challenges the recommendations of D.P.C. which has objectively considered the case of the applicant alongwith other officers for promotion to Selection Grade of DANICS. He was however not found fit for promotion to

12

Selection Grade to the service, consequently he could not be appointed to Selection Grade alongwith other officers. It is also stated that since the post of Deputy Registrar, Cooperative Societies and Under Secretary, Land & Building are scheduled post of DANICS and carry a Special Pay of Rs.200/- P.M. only, Senior Grade-II DANI Civil Service Officers are posted against these posts generally in order of seniority from out of officers posted in Delhi Administration. The representation of the applicant was examined in the Ministry. As there was no merit in the representation of the applicant, it was rejected and he was informed in the matter accordingly. The applicant was also informed that he could not be appointed to Selection Grade of DANICS as his name was not recommended by D.P.C. which went through his A.C.R.Dossiers before making the recommendations. The D.P.C. is not required to give reasons with regard to its recommendations in respect of officers assessed by it. It is further stated that even before the issue of department of Personnel and Training U.M.dated 10th March, 1969 the D.P.C. was required to categories the officers in various gradings depending upon their level of performance as reflected in the A.C.R. The posting of the applicant against the post of Deputy Registrar Cooperative Societies, which is not a promotional post, would not entitle him for the grant of Selection Grade because the grant of Selection Grade is a promotion for Grade-II officer of the service and it involves assessment of cases of officers by the D.P.C. It is further stated by the respondent that the proceedings of the D.P.C. alongwith relevant records were forwarded to the U.P.S.C. who

after taking into consideration all the facts, approved the proceedings of the D.P.C. The applicant was found unfit by the D.P.C. and the recommendations of the D.P.C. were duly accepted by the U.P.S.C. According to the respondent the application is devoid of merit.

8. The applicant also filed the rejoinder denying various contentions raised by the respondent in the reply and further stated that the recommendations of D.P.C. cannot take away the right of the applicant to be appointed to the Selection Grade on the basis of his seniority.

9. The applicant has since retired from service on superannuation on 31.1.1991.

10. We have heard the learned counsel of the parties at length. During the course of the arguments the learned counsel for the applicant has filed a copy each of the A.C.R. for the period 18-1-1986 to 31-3-87 written by the Reporting Officer on 28-4-1987 in which the general assessment of the officer has been assessed as 'very good' and his integrity has been certified.

11. The learned counsel for the applicant has also relied on the judgement of the Principal Bench of Central Administrative Tribunal, New Delhi decided on 6-10-1989 P.C.Misra Vs.Lt.Governor, Delhi & Ors. However this judgement does not cover the points in issue in the present case. In this judgement the grievance of the applicant was regarding appointment

to a post in DANICS carrying Special Pay to which the applicant was not appointed and application was rejected holding the appointments to the posts were made with due consideration of suitability which is a reasonable criterion. It appears that the learned counsel for the applicant wants to draw an analogy or inference that since the applicant was posted as Deputy Registrar Coop. Societies in September, 1987 so he was adjudged suitable and, in view of this fact, the D.P.C. as well as the U.P.S.C. should have cleared him for the grant of the Selection Grade as has been done in the case of his juniors. However the judgement cited does not cover the issues whether the proceedings of the D.P.C. including the final recommendation made and the final concurrence of U.P.S.C. can be the subject of judicial review. The grant of the Selection Grade in the DANICS is governed by Rule 31 of the Recruitment Rules. The appointment to Selection Grade according to the rule shall be in consultation with the Commission on the basis of seniority subject to fitness. Rule 31 has since been amended by the Delhi & Andaman & Nicobar Islands Civil Service (Amendment) Rules, 1988. By this amendment Sub-Rule 1&2 have been retained and are renumbered as Sub-Rule 4&5 and new Sub Rule 1,2&3 have been added. New Sub-Rule 1 is reproduced below:-

"Appointments of members of service to the Junior Administrative Grade shall be made by promotion on selection basis on the recommendation of the

Selection Committee. The composition of Selection Committee shall be as under:-

(i) the Chairman or a Member of the Commission -
Chairman;

Members

(ii) an officer in the Ministry of Home Affairs not below the rank of Joint Secretary to the Government; and

(iii) the Chief Secretary, Delhi Administration; and

(iv) the Chief Secretary of the Andaman & Nicobar Administration or any officer in the Ministry of Home Affairs not below the rank of Joint Secretary."

10. Thus it is evident that even for the grant of Selection Grade the consultation with the Commission is necessary. Regarding the constitution of the D.P.C. the administrative instructions on the point are also to be observed which had been regularly issued under Art.73/162 of the Constitution of India. These administrative instructions are supplemental to the Rule and are binding. In union of India & Ors. versus Somasundaram Viswanath & Ors. reported in 1989 SCC (L&S) P.150 it has been observed that:-

"6. It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law

made by the appropriate legislative or by rules made under the proviso to Art.309 of the Constitution of India or by means of executive instructions issued under Art.73 of the Constitution of India in the case of Civil Services under the Union of India & under Art.162 of the Constitution of India in the case of Civil Services under the State Governments. If there is a conflict between the executive instructions and the rules made under the proviso to Art.309 of the Constitution of India, the rules made under proviso to Art.309 of the Constitution of India prevail, and if there is a conflict between the rules made under the proviso to Art.309 of the Constitution of India and the law made by the appropriate legislative the law made by the appropriate legislature prevails."

13. In view of the above the applicant has to be declared fit by the D.P.C. on the basis of scrutiny of the A.C.Rs. & approval for the grant of such Selection Grade by the U.P.S.C. Merely because the applicant was working as Dy. Registrar Coop. Societies with effect from 3-9-1987 to 8-10-1989 will not make him eligible for the grant of Selection Grade as that will be against the rules. The post of Dy.Registrar Coop.Societies is not a Selection Grade post. The official respondent has clearly stated that seniormost persons have been appointed to man such posts, which carries Special Pay, so that there may be no discrimination and junior may not draw more pay than the senior. Further the applicant has been duly considered by the D.P.C. His grievance is that the D.P.C. has no power

or authority to evaluate the comparative merits of the eligible candidates when preparing list for promotion to the Selection Grade. However, this contention raised by the learned counsel is not correct. It is clear from the reply filed by the respondent No.12,16 & 18 that there were 49 vacancies in Selection Grade and only 30 officers have been recommended. It goes to show that adequate number of officers were not found fit for grant of Selection Grade even though the vacancies were available. Another grievance of the applicant is that he was never given adverse remarks & that the promotion was to non-functional Selection Grade which should be automatic in consultation with the U.P.S.C. However, it is conceded by the learned counsel for the applicant that the grant of Selection Grade shall be on the basis of seniority subject to fitness. The determination of fitness or otherwise of a person for the grant of Selection Grade is the sole jurisdiction of the D.P.C. and the U.P.S.C. The proceedings of the D.P.C. are fully gone through by the U.P.S.C. not as matter of formality but as a matter of procedure which has been clearly laid down under the administrative instructions. The Circular dated 10th March, 1989 though was made effective from 1-4-1989 yet more or less the procedure to be adopted by the D.P.C. remained the same as was earlier to the issue of this O.M. by Ministry of Personnel, Public Grievances & Pension. In any case the D.P.C. is competent to arrive at its own conclusion about the grading irrespective of the grading given in the A.C.Rs. This was the position which existed even before the issue of Department of Personnel & Training O.M. of 10th March, 1989. In the rejoinder to para 4.26 of the counter the applicant has not specifically rebutted the fact that before the O.M. dated 10th March, 1989 the

procedure to be adopted by D.P.C. was materially different. The grading given by Reporting Officer in the A.C.R. does not confer any right on any officer for being promoted to higher grade. All eligible officer are required to be considered by the D.P.C. and it is left to the D.P.C. to make its own assessment on the basis of overall performance of the officer.

14. According to Rule 5(4) of DANI Civil Service Rules, 1971, as amended up to date, an officer with 8 years minimum service in Gr.II is eligible for being considered for appointment to Selection Grade of the service provided that where a person is considered for such appointment, all persons senior to him in Grade II are also required to be considered irrespective of the fact whether or not they fulfil the requirement as to the minimum of 8 years service. It is evident from this provision in the Rules that promotion to Selection Grade of the service is not automatic in order of seniority. The case of the applicant was considered by the D.P.C. in its meeting held on 7-9-1989 under the Chairmanship of the then Joint Secretary (UT) in the Ministry of Home Affairs. The official respondent in its counter in para 5 A&B have clearly given the procedure adopted by the D.P.C. In reply in the rejoinder at page 93 the applicant stated "since suitability is an elusive term the D.P.C. is duty bound to record reasons when a senior is superseded but in the present case that is not done". The position of law however is different. The Hon'ble Supreme Court in R.S.Das versus Union of India, AIR 1987 SC P.593 held that no reasons need be given by D.P.C. and the dictum laid down by their Lordships of the Supreme Court in the case of R.D.Das vs. Union of India,

A.I.R. 1987 Supreme Court page 593 applies mutatis mutandis to the facts of the present case. So this contention of the learned counsel that reasons should have been given by D.P.C. for declaring him unfit cannot be accepted. Moreover in the present case the U.P.S.C. also after taking into consideration all the factors, approved the proceedings of the D.P.C.

15. The applicant has also urged that there is a violation of Art.14/16 of the Constitution of India. However, in the present case the officer has only the right to be considered for promotion alongwith others and no right is conferred by any law for promotion to the next higher grade. Promotion to the next higher grade has to be on the basis of the service record of the officer and other factors like availability of vacancies. The respondents have clearly stated in para 5(e) regarding the consideration of the officers by the D.P.C. and in the rejoinder the applicant only stated in reply to para 5(e) of the counter that the finding of the D.P.C. is arbitrary and malafide. This Tribunal cannot sit in judgement as an Appellate Court over the findings of the D.P.C. The learned counsel for the applicant has not pointed out any specific Rule which was glossed over either in the constitution of the D.P.C. or in the procedure adopted by it. The respondents' counsel on the other hand argued that the findings of the D.P.C. are not open to judicial review unless malafide is alleged and established. The applicant was duly considered and was not found fit to Selection Grade of the service on the basis of his service record. An officer with colourless performance can also be assessed unfit by D.P.C. and

it is not necessary that an official may be declared unfit by D.P.C. when he is having an adverse A.C.Rs. It is for the D.P.C. to devise its own procedure for assessing fitness or otherwise of an officer for promotion to next higher grade. Non-promotion of an officer because of his not attaining the required standard has no penal consequences which may attract the principle of natural justice. So long as the officials are considered by a duly constituted D.P.C. no prejudice is caused to any one.

16. The learned counsel has also argued that the applicant in rejoinder in para 5(d) of the counter has referred to certain prejudices harboured by the then Chief Secretary, Delhi Administration Shri V.K.Kapoor. Shri V.K.Kapoor has not been made a party in this application and so he cannot be condemned unheard.

17. The learned counsel for the applicant also challenged the constitution of the D.P.C. that it was not a validly constituted body under the Rules. As stated in the earlier part of the judgement the ratio of Union of India -vs- Somsundaram Vishwanath (supra) is clear on the point that administrative instructions may be issued for the constitution of the D.P.C.

18. The learned counsel for the applicant has also filed the extract of an A.C.R. of the year 1986-1987 showing that the applicant was assessed 'very good'. As is evident from the reply filed by the respondents, the D.P.C. in the case was held on 7-9-89 and, therefore, the annual remarks of earlier and subsequent years must have also been before the D.P.C. The D.P.C. has to make overall assessment

of the officer for the grant of Selection Grade. So the filing of an extract of a particular year relating to the period much before the meeting of the D.P.C. will not help the applicant.

19. Having given a careful consideration to all the aspects of the case we are of the opinion that the application is devoid of merits and is disposed of accordingly leaving the parties to bear their own costs.

J.P. Sharma
(J.P. SHARMA) 19.4.91

MEMBER (J)

I.K. Rasgotra
(I.K. RASGOTRA)
MEMBER (A) 19/4/1991