

Central Administrative Tribunal, Principal Bench

O.A. No. 1678/2004

New Delhi this the 21 May, 2005

Hon'ble Mr. Justice M.A. Khan, Vice Chairman (J)
Hon'ble Mr. S.K. Malhotra, Member (A)

Surendra Kumar
S/o Bihari Lal
B-93 Sector 55,
Noida.

....Applicant

By Advocate: Shri Deepak Verma.

Versus

1. The Secretary,
Ministry of Statistics & Programme
Implementation,
Sardar Patel Bhawan,
Sansad Marg,
New Delhi.
2. The Secretary,
Department of Personnel & Training,
North Block,
New Delhi.
3. The Deputy Director General,
Central Statistical Organisation (CSO),
Sardar Patel Bhawan Sansad Marg,
New Delhi.Respondents

By Advocate: Shri Rajesh Katyal.

ORDER

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

The applicant has filed this OA for a direction to the respondents to grant first financial upgradation under ACP-Scheme on completion of 12 years service on

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22.11.2000 in the pay scale of Rs.8000-13500 with consequential benefits arising therefrom.

2. The applicant was working as Senior Investigator on 22.11.1988 in the pay scale of Rs.6500-10500. He completed 12 years of regular service on 22.11.2000. During this period, he was not granted any promotion. As per the ACP Scheme, he was entitled to the first financial upgradation with effect from 22.11.2000 in the existing hierarchy of the cadre/category of posts in accordance with the Recruitment Rules in the pay scale of Rs.8000-13500. Instead, he has been granted the ACP benefit in the pay scale of Rs.7450-11500 in accordance with the hierarchy of promotional post given in the new recruitment rules of Subordinate Statistical Service (Group 'B') (Gazetted) Rules which came into force with effect from 12.2.2002 (Annexure A-5). Hence this OA.

3. The respondents resisting the claim of the applicant pleaded that 5th Central Pay Commission in para 81.17 of its report had recommended for grant of pay scale to the Group 'B' and Group 'C' statistical function posts located in various Ministries/Departments and for constitution of a Subordinate Statistical Service (SSS) by grouping such posts. The Ministry of Statistics and Programme Implementation was entrusted with the responsibility of the cadre controlling of SSS. The Pay Commission had recommended Senior Statistical Investigators/Assistants who were in the pay scale of Rs.1640-2900 would be given the replacement scale of Rs.2000-3500 and would be called Statistical Investigator Grade-I in the restructured service. Since the constitution of SSS was a time consuming and complex exercise, all Ministries/Departments were advised vide Office Memorandum dated 30.6.1998 to grant upgraded pay scale as recommended by the 5th Central Pay Commission with effect from 1.1.1996 subject to

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certain conditions. Accordingly, Group 'B' and Group 'C' statistical function posts were granted with effect from 1.1.1996, the following pay scales:-

"Pre-revised pay scales Group B & C statistical function posts Normal replacement pay scale Upgraded replacement pay scale granted w.e.f. 1.1.1996 as per the recommendations of the fifth CPC

Rs.1400-2300	Rs.4500-7000	Rs.5000-8000
Rs.1600-2660	Rs.5000-8000	Rs.5500-9000
Rs.1640-2900	Rs.5500-9000	Rs.6500-10500".

4. Pursuance to the recommendation of the 5th Pay Commission the, government constituted Subordinate Statistical Service by including Group 'B' and Group 'C' statistical function posts located in 40 different Ministries/Departments/Organisations. The structure of SSS was as under:-

"Statistical Investigator Grade-I	Rs.7450-11500
Statistical Investigator Grade-II	Rs.6500-10500
Statistical Investigator Grade-III	Rs.5500-9000
Statistical Investigator Grade-IV	Rs.5000-8000".

5. The Rules governing SSS were notified in Gazette of India on 12.2.2002. The improved pay structure were granted to the Group 'B' and Group 'C' functional posts only in the context of the recommendation towards constitution of SSS. Otherwise normal replacement scale would have been granted. Grant of upgraded pay scale with effect from 1.1.1996 and subsequent constitution of SSS and its operationisation with

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effect from 1.4.2004 has to be viewed together and not in isolation. On the recommendation of the 5th Central Pay Commission, the Government also introduced the Assured Career Progression (ACP) Scheme vide OM dated 9.8.1999. It was decided to grant two financial upgradations under the said scheme to Group 'B', 'C' and 'D' employees on completion of 12 years and 24 years of regular service respectively. It was emphasized that the financial upgradation under this scheme would be in accordance with the existing hierarchy in the cadre/category of posts. The existing hierarchy in relation to a cadre would mean the restructured grades. If a new hierarchy has come into being, financial upgradation would be allowed only in restructured hierarchy. Moreover, the applicant on opting for joining the SSS, had been appointed to the grade of Statistical Investigator Grade-I of the SSS with effect from 1.4.2004 which is a grade higher than the post of Senior Investigator Rs.6500-10500 held by him prior to his absorption in the SSS. His appointment to the Grade-I of SSS would be treated at par with promotion and would offset against his claim for first ACP.

6. We have heard the learned counsel for the parties and have carefully considered the relevant record and the case law cited.

7. The learned counsel for the applicant has vehemently argued that in accordance with the conditions for grant of benefit under the ACP Scheme (Annexure A-6) the financial upgradation has to be granted in the existing hierarchy of the cadre/category of posts. According to him, in accordance with the clarification of doubt on point No. 41 the benefit of ACP is to be allowed as per the hierarchy existing, as on the date when the employee become eligible for financial upgradation under the ACP. The applicant became entitled to the first financial upgradation on 22.11.2000. He has not been

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promoted during the preceding more than 12 years of service. In the existing hierarchy of the promotional posts, the next higher scale was Rs.8000-13500 which was attached to the post of Assistant Director. According to him, the subsequent restructuring of the service and promulgation of the recruitment rules on 12.2.2002 (Annexure A-5) would not deprive the applicant of the first financial upgradation in accordance with the existing hierarchy of the cadre/category of posts as existed on 22.11.2000. He has referred to the conditions for grant of benefit under the existing scheme which has been filed by him as per Annexure A-6, the copy of the Office Memorandum No. 35034/1/97.Estt.(D) (Vol.4) dated 18.7.2001 issued by the Ministry of Personnel, Public Grievances and Pensions, Order of the Hon'ble High Court dated 11.1.2005 passed in Writ Petition (Civil) 297/2004 in the case of Union of India Vs. Shri Bhagwati Prasad and Others, the Full Bench decision of this Tribunal dated 16.2.2005 in OA No.557/2004 in the case titled Shri Parkash Chand and 7 Others Vs. Union of India and 2 Others, the order of the Tribunal dated 30.11.2004 passed in OA 965/2004 in the case of Subhas and 3 Others Vs. U.O.I. & 3 Others and the order of this Tribunal dated 23.8.2002 in OA 1959/2002 in the case titled Arun Kumar Dubey and Others Vs. Union of India and Another, to seek support to his argument.

8. Conversely, the argument of the learned counsel for the respondents is that in accordance with the recommendations of the 5th Pay Commission, the Government constituted Subordinate Statistical Service by grouping Group 'B' and Group 'C' statistical function posts located in 40 different Ministries/Departments/Organisations with effect from 1.4.2004 vide Recruitment Rules notified in Gazette of India on 12.2.2002. It is argued that since the constitution of SSS was a time consuming and

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complex exercise, the Government also granted upgraded pay scale, as recommended by the Pay Commission, with effect from 1.1.1996 by this OM dated 30.6.1998 subject to certain conditions. It is submitted that as per the restructured grade in SSS, the next promotional post in the hierarchy was Statistical Investigator Grade-I in the scale of Rs.7450-11500 and the applicant has already been granted the benefit of ACP Scheme in that pay scale. He has also argued that the applicant had opted for joining the SSS and was appointed to the post of Statistical Investigator Grade-I in the pay scale of Rs.7450-11500 with effect from 1.4.2004 which is a grade higher than the grade of Senior Investigator Rs.6500-10500 held by him prior to his absorption in SSS as per the guidelines. The appointment of the applicant to Grade-I of SSS would thus be treated on par with promotion and offset his claim for promotion for his first ACP.

9. The relevant conditions for grant of financial upgradation under ACP Scheme are reproduced below:-

“1. The ACP Scheme envisages merely placement in the higher pay-scale/grant of financial benefits (through financial upgradation) only to the Government servant concerned on personal basis and shall, therefore, neither amount to functional/regular promotion nor would require creation of new posts for the purpose;

3. The financial benefits under the ACP Scheme shall be granted from the date of completion of the eligibility period prescribed under the ACP Scheme or from the date of issue of these instructions whichever is later;

4. The first financial upgradation under the ACP Scheme shall be allowed after 12 years of regular service and the second upgradation after 12 years of regular service from the date of the first financial upgradation subject to fulfillment of prescribed conditions. In other words, if the first upgradation gets postponed on account of the employee not found fit or due to department proceedings, etc. this would have consequential effect on the second upgradation which would also get deferred accordingly.

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7. Financial upgradation under the Scheme shall be given to the next higher grade in accordance with the existing hierarchy in a cadre/category of posts without creating new posts for the purpose. However, in case of isolated posts, in the absence of defined hierarchical grades, financial upgradation shall be given by the Ministries/Departments concerned in the immediately next higher (standard/common) pay-scales as indicated in Anneuxre-II which is in keeping with Part-A of the First Scheme annexed to the Notification".

10. The Office Memorandum No.35034/1/97-Estt (D) dated 9.8.1999 issued by the Ministry of Personnel, Public Grievances and Pensions of the Government of India itself elaborated about the object of the ACP Scheme in the following words. "The ACP Scheme needs to be viewed as a 'Safety Net' to deal with the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues". The scheme as such is envisaged to elevate the hardship and acute stagnation faced by government servant for want of his promotion to the next grade for a period of 12 years for first financial upgradation and for 24 years for grant of second financial upgradation under the Scheme. The benefits under the ACP Scheme do not amount to functional or regular promotion. The beneficiary of the scheme would continue to hold the post and discharge the duties and functions assigned to him while working on that post. There is no change of designation. It will also not amount to promotion. It is only the financial benefit which would accrue to the government servant. He has no right to the change of the designation of the post to the higher promotional post nor would it affect his seniority or promotion in the hierarchy from the due date in accordance with the Recruitment Rules.

11. Condition 7 of the Scheme, reproduced above, unambiguously spelt out that the financial upgradation of the Scheme shall be given to the next higher grade in accordance

for record

with the existing hierarchy in a cadre/category of post. A Full Bench of this Tribunal in the case of Prakash Chand (Supra) considered the following question:-

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“Whether Clarification No.56 issued by the DOP&T on 18.7.2001 would have an effect of rendering condition No.7 of the ACP Scheme redundant and to take away the right accrued to a Government servant in his hierarchy to be granted financial upgradation under the ACP Scheme?”.

12. The Full Bench referred to an order of the Tribunal in the case of Bhagwati Prasad and Others Vs. Union of India and Others (OA 2380/2003) decided on 20.4.2004 wherein it was held that clarification No.56 was supplanting the ACP Scheme rather than supplementing the same by so called clarification. The Union of India filed a Writ Petition (Civil) No. 297/2005 in Delhi High Court. The Hon'ble High Court dismissed it observing as under:-

“ We have perused the order passed by the Central Administrative Tribunal. Learned counsel for the petitioner has contended that in view of the subsequent office order, the Assured Career Scheme could not have been implemented. We are in agreement with the findings of the CAT that when the Assured Career Scheme is clear and unambiguous, any clarification or office order cannot supplant the same. If the petitioner does not want to implement the Assured Career Scheme in letter and spirit, then remedy with them lies in amending the Scheme and not whittling down the Scheme on the ground of exigency of administrative difficulties. We find no merit in the petition. Dismissed”.

13. The Full Bench then considered clarification No.56 given by the Department of Personnel and Training which reads as under:-

56.	<p>The Fifth Central Pay Commission has identified a number of common category posts spread across various Ministries/ Departments as well as in Offices outside the secretariat as discussed in Chapter 55 of its report and also In other Chapters and has made Recommendations for adoption</p>	<p>Financial upgradations under ACPS are to be allowed in the existing hierarchy. However, in reply to point of doubt No.2, it has already been clarified that existing hierarchy in relation to a cadre would mean, the restructured grades recommended by the Fifth</p>
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	<p>of uniform grade/cadre structure subject to functional needs of an individual organization. In a large organization, all the hierarchical levels as per unified cadre/grade structure may be created while in a smaller office, a few levels of the uniform hierarchical structure may not be introduced keeping in view the functional needs of the organization. Consequently, while in a larger Organization/cadre, promotions are allowed in consecutive hierarchical grades, in a smaller cadre, promotions involve substantial jumps though in such cases, the requirement of period of regular service in the feeder grade as specified in the Recruitment Rules may be longer. Since under ACPS, the requirement of longer regular service in the feeder grade for promotion to such higher levels is not reckoned while considering financial upgradation. It results in a situation where persons belonging to common category and recruited at same time in same entry grades are entitled to financial upgradations in vastly different grades under ACPS. Is it not</p>	<p>Central Pay Commission: Further, as an example, in reply to point of doubt No.19, it has been stated that in order to secure upward mobility of library staff under the ACPS, it has been decided to adopt the pay structure as notified by the Ministry of Finance vide O.M. dated July 24, 1990 subject to the terms and conditions specified by them. Therefore, the ACPS already envisages that in respect of common category posts, if the Government has accepted a uniform standard hierarchical structure, then existing hierarchy in relation to such common categories shall be the standard hierarchy as approved by the Government and not the hierarchy in a particular office, which, for functional considerations may not have all the grades. If such financial upgradations are allowed keeping purely such, level Hierarchy in view, it will result in vast disparities in entitlements under ACPS for identical category of posts which cannot be justified. It has the potential of generating huge disquiet and unrest, which will not be in public interest.</p> <p>If, however, the Fifth Central Pay Commission has recommended a specific pay structure/ACP grades for a particular category in an organization which may seemingly belong to a common category, then the mobility under ACPS in respect of such specific posts</p>
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		in that organization shall be through the grade structure/ACPS grades recommended for that organization, if the same has been approved by the Government, and not the standard grade/hierarchical structure recommended for such common category.
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14. The Full Bench answered the reference as under:-

“Clarification No.56 issued by the Department of Personnel and Training on 18.7.2001 will have the effect of rendering condition No.7 of the ACP Scheme as redundant. It cannot take away the right that has accrued to the Government servant in his existing hierarchy with respect to the grant of the scale to be granted by way of financial upgradation”.

15. The above clarification No.56 being not consistent with para 7 of the ACP Scheme was held not to override para 7 of the Scheme. Consequently, the benefit under ACP Scheme was held to be granted in the existing hierarchy of the cadre/category of posts. In other words the proposed restructuring of the existing hierarchy of a cadre/category of post as per the recommendations of the Vth Pay Commission will not be the existing hierarchy in the cadre/category of post unless the ACP Scheme had provided for it or the Recruitment Rules have changed the hierarchy before the financial upgradation under ACP Scheme became due.

16. The contention of the respondents is that 5th Central Pay Commission in its report has recommended for constitution of SSS and has granted upgraded scale of pay of Rs.2000-3500 to the Senior Statistical Investigator. The restructuring of the cadre was brought about by the new recruitment rules, which came into force on 12.2.2002. According to the respondents, options were invited and the existing departmental

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the candidates were appointed in the appropriate grade of service w.e.f. 1.4.2004. The question that arises for consideration is whether the applicant would be entitled to financial upgradation in restructured service which came into being on 12.2.2002 or the hierarchical promotional post which was in existence on 22.11.2000 when the applicant became entitled to financial upgradation in accordance with the Scheme. We have already reproduced the conditions for grant of financial upgradation under the ACP Scheme. We have also considered the judgment of the Full Bench and the Hon'ble Delhi High Court. The benefit under the ACP Scheme is to be granted in the existing hierarchy as on the date on which the applicant became entitled, i.e., 22.11.2000. Concededly on 22.11.2000, the next higher grade to the Senior Investigator was attached to the promotional post of Assistant Director, which was Rs.8000-13500. The learned counsel has not been able to point out anything in the Scheme which may justify the grant of financial upgradation to the applicant in the restructured grade which came into existence on 12.2.2002. The Scheme did not provide that where the restructuring of a service was under process as per the recommendation of the 5th Pay Commission, the financial upgradation will be admissible only after the restructuring process was completed. Any administrative instructions that the financial upgradation would be granted to the applicant only in the restructured grade is clearly in contravention of the provisions of the Scheme and, therefore, is not valid as held by the Hon'ble High Court and the Full Bench of this Tribunal. The government could have amended the Scheme instead of issuing administrative instructions contrary to the provisions of the Scheme.

17. Learned counsel for the respondents has submitted that if the financial upgradation is granted to the applicant in the hierarchy of the posts which existed prior to

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restricting of the cadre, i.e., in the pay scale of Rs.8000-13500 it would create an anomalous situation since one of the Senior Investigator Grade-II, i.e., the applicant would be getting much higher pay than admissible even to Senior Investigator Grade-I which was the maximum a member of SSS would be getting in the service. The learned counsel for the respondents has also submitted that the applicant had given option to join the SSS and accordingly the applicant and others who have exercised their option in favour of joining the SSS, were appointed in the restructured Grade-I SSS, i.e., Rs.7450-11500 w.e.f. 1.4.2004 and this will amount to promotion which will offset the applicant's claim for first financial upgradation in the ACP Scheme. The argument is not tenable. It is the case of the respondents pleaded in the counter-affidavit that the 5th Central Pay Commission has recommended higher replacement scale of pay to the Statistical Investigator Grade-I and Statistical Investigator Grade-II. The recommendation was not for promoting the existing incumbents of the post of Senior Investigator Grade-I nor has any order of the Government been reproduced to show that it was not grant of higher pay scale in accordance with the recommendation of the 5th Pay Commission but was promotion from the post of Senior Investigator to the post of Statistical Investigator Grade-I. The appointment of the applicant to the post of Statistical Investigator Grade-I in SSS in exercise of the option exercised by him does not amount to his promotion within the meaning of the Scheme. The applicant, therefore, cannot be held to be not entitled to the grant of benefit of the Scheme. In fact, the respondents themselves have granted benefit of the ACP Scheme to the applicant in the scale of Rs.7450-11500.

18. Having regard to the above facts it is stated that the applicant is entitled to the financial upgradation in the existing hierarchy in the cadre/category of posts as existed on

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22.11.2000 when he became entitled to financial upgradation under the Scheme. On that day, the next promotional post in the existing hierarchy was the Assistant Director which had the pay scale of Rs.8000-13500 attached to it. The applicant would be entitled to the first financial upgradation under the Scheme in the scale of Rs.8000-13500.

19. The applicant has filed a copy of an order dated 28.11.2001, Annexure A-3 which shows that the Ministry of Road Transport and Highways has granted financial upgradation to one Rakesh Agarwal, Senior Investigator in the said department in the pay scale of Rs.8000-13500 w.e.f. 30.10.2001. According to the applicant, Shri Aggarwal was junior to him in service and for this he has referred to order dated 1.4.2004 which is Annexure A-4. Annexure A-4 is a list of persons who were selected by the Selection Committee for being absorbed in SSS. It is not the seniority list. In fact, para 6 of Annexure A-4 related to seniority made it clear that the posting, fixation of pay and inter-se-seniority of the members of the service whose list has been attached will be issued separately. Therefore, it is not a seniority list. Furthermore, Shri Aggarwal belonged to Ministry of Road Transport Highways which is totally a different department than the department in which the applicant was working. The counsel for the respondents, however, submitted that the steps would be taken for the recovery of the overpayment made to Shri Aggarwal also. Anyhow, we are of the view that the applicant cannot take any advantage of the order dated 28.11.2001, Annexure A-3. Moreover, the seniority has no relevance to the grant of financial upgradation under ACP Scheme. The first and/or second financial upgradation has to be granted strictly in accordance with the terms and conditions of the Scheme. Senior cannot claim parity/equality in the pay with junior if otherwise he has not become entitled to financial upgradation under the Scheme. Article

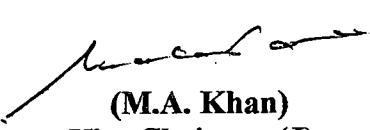
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14 and 16 of the Constitution of India will not apply if the disparity in pay of senior and junior is on account of financial upgradation granted under the Scheme.

20. The result of the discussion is that the OA succeeds. The respondents are directed to consider the applicant for grant of first financial upgradation w.e.f. 22.11.2000 in the pay scale of Rs.8000-13500. The applicant shall also be entitled to consequential benefits. The order shall be implemented within 2 months from the date on which the certified copy of the order is received. However, the parties are left to bear their own costs.



(S.K. Malhotra)
Member (A)



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

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Fresh OA-1544/05 (for Extn. of time)