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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH : NEW DELHI**

O.A. NO. 1927/2004

New Delhi, this the ^{1st} 25...day of October, 2005

**HON'BLE MR. M.P. SINGH, VICE CHAIRMAN (A)
HON'BLE MR. MUKESH KUMAR GUPTA, MEMBER (J)**

1. Shri Ajit Gidh,
S/o Shri Martin Gidh,
R/o 685, Sector VIII,
New Delhi
2. Shri Siya Ram Meena,
S/o Shri Jailal Meena,
R/o L-II/63B, DDA Flats,
Kalkaji, New Delhi-19

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Applicants

(By Advocate : Shri Gyanender Singh for Shri Arun Bhardwaj)

VERSUS

1. Union Govt. of India
Through the Secretary,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi-01
2. Chief Commissioner,
Customs & Central Excise,
Delhi zone,
C.R. Building, I.P. Estate,
New Delhi - 02

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Respondents

(By Advocate : Shri R.N. Singh)

ORDER

Two applicants in this OA working as Inspectors in the Central Excise & Customs Department, belonging to the Scheduled Tribe category, seek following reliefs:

- (i) declare that the applicants are entitled to be promoted to the post of Superintendents of Central Excise;
- (ii) direct the Department to consider the case of the applicants for promotion to the post of Superintendent by considering them against the DPC conducted in July,

2002 by taking their eligibility service of seven years from the date of DPC rather than 01.01.2002;

- (iii) or at least direct the Department to consider the case of the applicants against the DPC held in April, 2003 or thereafter specially when the re-structuring exercise has been extended upto 31st Oct. 2003;
- (iv) restrain the Respondents from assigning 26 vacant posts to any other category candidates other than those belonging to ST category who are eligible and available within the zone of consideration and fit for promotion;
- (v) direct the respondents to public the post based Roster Account before proceeding to promotion of any candidates to the cadre of the Superintendent of Grade-B;
- (vi) award the cost of the application in favour of the applicants; and
- (vii) pass such other further order or orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

2. The facts as stated are that : As per the Recruitment Rules in vogue dated 17.12.1986, a minimum of 8 years service is required for promotion to the grade of Superintendent Group 'B', which is a selection post. Vide Notification dated 30.09.1997, the Government of India had accepted the recommendations made by the 5th Central Pay Commission. Consequential changes in the Recruitment Rules were directed to be effected in full compliance of the acceptance and implementation of the recommendations. As per OM dated 25.05.1998 issued by the DOP&T, particularly Annexure-A prescribed 3 years qualifying service for promotion from the scale of Rs.5500-9500 to Rs.6500-10500/-. The post of Superintendent Grade 'B' at present carries the pay scale of Rs.6500-10,500/-. In the year 2001, the Customs & Central Excise Department had been restructured for enhanced revenue productivity and a revised sanctioned strength was notified in respect of different cadres under the restructuring vide communication dated 19.7.2001. As a result of the said cadre restructuring, 931 Group 'B' Gazetted posts of Superintendent of

Central Excise had been allocated/sanctioned by adding 531 more posts vide letter dated 05.06.2002. Out of these, 70 posts of Superintendent were reserved for ST category candidates. The applicants belong to ST category. A DPC was held for filling up the said vacancies in July, 2002 and the crucial date for determination of eligibility was taken as 01.01.2002. The applicants were not considered for promotion to the said post, as their seniors who were born in the Delhi Commissionerate in the year 1995 had not completed the requisite period of service.

3. Aggrieved by the above action, some ST Inspectors filed OA No.2475/2002 which was allowed on 11.11.2003 with the following directions:-

"We find, therefore, that merely because the applicants were juniors but were eligible, their claim for promotion could not be ignored for purposes of consideration. In fact our attention had been drawn towards the advice of the Ministry of Finance, department of Revenue on 30.5.2003 to the Additional Commissioner of Central Excise, Delhi whereby it was pointed that a senior eligible person cannot block consideration of a junior eligible person. Therefore, this particular plea of the respondents in the facts will not be of any avail."

9. Resultantly, we allow the present application and direct: -

- (a) *that the claim of the applicants should be considered for promotion to Superintendent Group B irrespective of the fact that their seniors had not fulfilled minimum qualification of 8 years of service;*
- (b) *that the claim of the applicants can be considered only if they also fulfill the said qualifications as per the recruitment rules on a specific date for a particular year; and*
- (c) *necessarily their claim has to be considered in accordance with the rules and instructions regarding which no further opinion need be expressed. They should be within the zone of consideration besides being eligible."*

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4. In the meantime, respondents convened DPCs in April and June, 2003 but the applicants were not considered despite representations made on 18.07.2002, 14.02.2003, 10.02.2004, 12.07.2004 and 21st & 29th July, 2004. The Ministry of Finance, Deptt. Of Revenue, Central Board of Excise & Customs vide communication dated 18.06.2004 decided to accord one year relaxation in qualifying service as prescribed in the Recruitment Rules for filling up Group 'B' Ministerial and non-Ministerial posts, which were created as a result of cadre restructuring of Customs & Central Excise Department. It was accordingly directed that: "review DPC may be held exclusively for the vacancies that arise as a result of posts created due to cadre restructuring and the zone of consideration should not be extended by taking into account the normal vacancies available at that time and the zone of consideration should be prepared taking into account only the vacancies which had arisen as a result of cadre restructuring". Vide para 3 of the said communication, the said relaxation of one year in qualifying service is a one time measure for the posts exclusively created due to cadre restructuring and it shall not be treated as a general rule or cited as a precedent in future. Pursuant thereto, a review DPC was conducted on 19.07.2004 and the officers who had completed 7 years of service as on 01.01.2002 were considered. The contention raised is that those who were junior to the applicants in the seniority list were considered and promoted, but it ignored the applicants' claim, though they had completed 7 years of service as on the date of DPC. It is further contended that the respondents over-looked the mandate of instructions issued by the DOP&T dated 19.07.1989, which prescribed that when juniors who had completed the eligibility period are considered for promotion, their seniors would also be considered irrespective of whether they had completed the requisite

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service or not provided they have completed the probation period. Though DOP&T's OM dated 25.5.1998 also required the concerned Ministries/Departments to effect necessary amendments to the Recruitment Rules/Service Rules, no steps had been taken by the Department of Revenue, Central Excise & Customs though in the Income Tax Department the Rules have been amended and, therefore, it is contended that the respondents' action is arbitrary, discriminatory, illegal and unjust.

5. Applicants have contended that the date of DPC could be treated as the bench mark for calculating the eligibility service and 26 number of posts belonging to ST candidates are still lying vacant in the Superintendent cadre arising under cadre restructuring and non-filling up of the same would nullify the very object of cadre restructuring. It was incumbent upon the respondents to have amended the Recruitment Rules within two months from the directions passed on 25.5.1998 and within 6 months as per the recommendations of cadre restructuring. The respondents have also failed to publish the post-based roster till date even though the same is mandatory before taking any steps for promotion.

6. In the written arguments submitted on behalf of the applicants, it is contended that in July, 2004, the respondents promoted some officers of ST category, who are juniors to the applicants, without considering their claim; that they cannot be made to suffer because of respondents' inaction to amend the Recruitment Rules in terms of DOP&T's OM dated 19th July, 1989; the restructuring was approved by the Government only on the condition that the Department would amend the Recruitment Rules before filling up the vacancies and because of the inaction on their part, the

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applicants cannot be made to suffer. Moreover, there are still 26 posts of ST lying vacant in the said cadre.

7. The respondents contested the claim laid by the applicants stating that the OA is based on surmises and conjectures as well as applicants being guilty of suppressing material facts, deserves to be dismissed. On merits it was stated that till date no changes have been made in the Recruitment Rules, which is known as Superintendent of Central Excise Recruitment Rules, 1986, prescribing 8 years of minimum service in the grade of Inspector of Central Excise. There is no comparison with the Recruitment Rules for the post of Income Tax Officers. Due to non-availability of eligible candidates satisfying the prescribed qualifying service under the Recruitment Rules, the Central Board of Excise and Customs vide letter dated 18.6.2004 issued directions for filling up of Group 'B' posts, which were created as a result of cadre restructuring by relaxing the qualifying service by one year. The said relaxation of one year could not be taken into consideration in July, 2002, since the said instructions were issued only in the year 2004. However, in terms of the said relaxation dated 18.06.2004, the benefit of one year relaxation has been given to Officers who were within the zone of consideration to the post of Superintendent by reviewing the concerned DPC of July, 2002. The said relaxation was available exclusively for the vacancies arising out of the cadre restructuring and which remained unfilled due to non-availability of eligible candidates as on 1.1.2002, which was the crucial date for determining eligibility for such promotion for which the DPC was held in July, 2002, when the applicants were ineligible. There is no such provision available in the Recruitment Rules for Superintendent of Central Excise to consider senior ineligible candidate if juniors are considered for

the post based on their requisite qualifying service for consideration. The applicants have completed the requisite qualifying service for consideration for promotion to the post of Superintendent as on 1.1.2004 and since seniors to them are yet to be promoted, applicants would be considered for such promotion in due course. There is no violation of rules or instructions on the said subject and the applicants have no case, contended the respondents.

8. The applicants controverted the respondents' plea by filing detailed rejoinder and reiterating their contentions that in terms of DOP&T's letter dated 25.5.1998, the respondents were required to carry necessary amendment to the Recruitment Rules by lowering the qualifying service from 8 years to 3 years. The department has been making policies, which are prejudicial to certain cadres without there being any valid or reasonable cause or nexus to the object behind cadre restructuring. The DOP&T's instructions issued vide OM dated 19.7.1989 were common for all Departments and were implemented in Income Tax Department and there remains no reason and justification for not implementing the same in the Customs & Central Excise Department. The department having conducted DPCs on 21.4.2003 and 30.6.2004 with eligibility as on 1.1.2003, the applicants being eligible on the said date, ought to have been promoted.

9. We have heard learned counsel for both sides and perused the pleadings as well as written arguments submitted on their behalf.

10. OM dated 19.07.1989 of DOP&T was issued with the caption "Eligibility of officers to be considered for promotion by DPC – fixing of

crucial date of –". As per the said OM while holding the DPC the crucial date for determining a promotion is prescribed as –

- "(i) 1st July of the year in cases where ACRs are written calendar year wise; and
- (ii) 1st October of the year where ACRs are written financial year-wise."

11. The said crucial dates indicated above would be applicable to only such services and posts for which statutory service rules do not prescribe a crucial date. Para-4 of the said OM reiterated that DOP&T's OM dated 18.3.1988 which required all Ministries/Departments to insert a note in the Recruitment Rules to the effect that when juniors who have completed the eligibility period are considered for promotion, their seniors would also be considered irrespective of whether they have completed the requisite service provided they have completed the probation period.

12. We may note at this stage that the breach of aforesaid OM had been considered by the Division Bench of this Tribunal in OA No.2475/2002 in the case of *Ghasi Ram Meena & Others vs. UOI and others* decided on 11th November, 2003 and it was observed therein as under:

"7. xxxxxxxxxx. Admittedly, in the recruitment rules, there is no provision that if junior is eligible, senior may automatically be considered. The request for incorporating such a condition has since been rejected."

13. Similarly, the question about seniority and eligibility for promotion had been considered with reference to various judgements and it was held as follows:

"8. The question as to whether seniority and eligibility for promotion have to go arm in arm has been considered more often than once. In the case of State of Mysore & Another v. Syed Mahmood & Others, [1968] 3 S.C.R. 363]

the Supreme Court was concerned with a matter where promotion to the post of Senior Statistical Assistant was based on seniority-cum-merit. It was held that in spite of their seniority, officers junior to them could be promoted if they were unfit to discharge the duties of the post. It was held further that promotion could not be claimed as a matter of right by virtue of seniority alone. In the case of Scientific Advisor to Raksha Mantri & Another v. V.M. Joseph, (1998) 5 SCC 305, the Supreme Court again held that eligibility for promotion cannot be confused with seniority because they are two different and distinct factors. Service rendered by Shri V.M. Joseph before his unilateral transfer was held to be counted for determining his eligibility for promotion in the organization to which he was transferred. The decision in the case of R. Prabha Devi and Others v. Government of India, through secretary, Ministry of Personnel and Training, Administrative Reforms, JT 1988 (1) S.C. 488 in fact provides the answer to this question. It was held that when certain length of service in a particular cadre is prescribed then unless a person possesses that qualification, he cannot be considered eligible for promotion. If a junior is eligible then a senior automatically will not become eligible. Seniority cannot be substituted for eligibility xxxxxx."

In our considered view, the aforesaid findings are squarely applicable to the facts of the present case too.

14. Admittedly, the applicants were appointed as Inspectors in June, 1995 and had not rendered even 7 years of service as on 1.1.2002, even if they were granted one year relaxation, as prescribed vide communication dated 18.6.2004. It is an admitted fact that the said relaxation of one year in qualifying service was applicable to only those vacancies which were created as a result of cadre restructuring. It is also an admitted fact that the applicants are claiming the benefit of promotion due to increase in the sanctioned strength arising out of cadre restructuring. In other words, the benefit of one year relaxation in qualifying service as a one time measure would have a limited application. The relevant portion of the communication reads as under -

"3. The above relaxation of one year in qualifying service is a one time measure for the posts exclusively created due to cadre restructuring and, therefore, this shall not be treated as a general Rule or cited as a

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precedent in future. The Action Taken Report, in this regard, may also be furnished to the Board."

15. In our considered view, the applicants have no case as far as this aspect is concerned because as on 1.1.2002, they had rendered only six years and six months service. The applicants have not provided the details of juniors who were considered, over-looking their claim, by the Review DPC held on 19.06.2004. Averment made to this effect under para 4.12 of the OA as well as written arguments, in our considered view, are vague and remain unsubstantiated. What has been emphasized by the applicants is that they had completed the requisite period of 7 years in July 2002, i.e. when the DPC was held and not on the date of eligibility as prescribed i.e. 1.1.2002. The applicants have admitted this aspect that they had not completed 7 years of service as on 1.1.2002 in their representation dated 29th July, 2004. The emphasis made therein was that they were not considered for promotion to the Grade of Superintendent in the DPCs held on 21.4.2003 and 30.06.2003 though by that time they had completed the eligibility prescribed for the purpose.

16. Shri R.N. Singh, learned counsel for the respondents pointed out that the applicants' name figure at serial No.368 and 369 in the seniority list. For the DPC held in June 2004, the last candidate considered with the extended zone of consideration was at serial No. 227. Further for filling up 49 vacancies in June 2005, the last candidate within the zone of consideration was at serial No.259. Therefore, the applicants being much junior were not within the zone of consideration too.

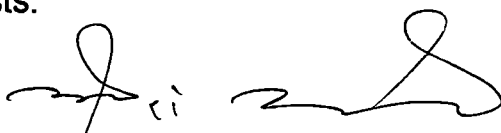
17. On bestowing our careful consideration to the entire aspect, we find that the respondents have not clarified as to how the DPC were conducted on 21.4.2003 and 30.6.2003 and February, 2004. If the DPCs held in April, 2003, June, 2003 and February, 2004 were to consider the

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candidates not for the cadre restructuring vacancies, but for general vacancies, the applicants by that time at last for DPC held in February 2004, had rendered 8 years of qualifying service as prescribed vide Notification dated 17.12.1986. Applicants' averment in para 4.10 that a review DPC was conducted in February, 2004 and subsequent to the orders passed by this Tribunal on 11.11.2003, 29 Officers of SC/ST categories having 8 years of service were promoted has not been denied by the respondents in the reply. The only answer offered to the said para of the OA is "that the averment in the corresponding para being matter of record, need not reply". But the matter did not rest here.

18. Taking cumulative view of the entire matter, we are of the considered view that the applicants were not eligible as on 1.1.2002 as the one year relaxation available in terms of OM dated 18.6.2004 was a one time measure and was to apply to vacancies due to care restructuring only. Even if it is presumed that certain vacancies of ST category remained unfilled after according such ^{relaxation} relation of one year by the Review DPC held in June, 2004, the applicants would have no claim for consideration by the said review DPC. In normal course, the applicants fulfilled 8 years of service only in July 2003 onward and became eligible for the vacancies arising thereafter. It is not the case of the applicants that the vacancies, which had arisen after July 2003 onward, have been filled up ignoring their claims.

19. In view of the discussions made hereinabove, we find no justification in the present Original Application, which is accordingly dismissed. No costs.


(Mukesh Kumar Gupta)
Member (J)

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(M.P. Singh)
Vice Chairman(A)