

Reserved

**CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD BENCH
ALLAHABAD**

(THIS THE 1 DAY OF 10 2009)

Hon'ble Mr. A.K. Gaur, Member (J)
Hon'ble Mr. D.C. Lakha, Member(A)

Original Application No.717 of 2006

(Under Section 19, Administrative Tribunal Act, 1985)

Abhilesh Kumar Singh Son of Sri Rajendra Pratap Singh Resident of Village Kachman, Post Office Keshavpur, District Chandauli (presently working as Administrative Assistant 'A' in the Regional Center for Military AIR worthiness), M/o Defence (R & D) C/o HAL (TAD), Kanpur.

..... *Applicant*

Versus

1. Union of India through the Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Distribution Krishi Bhawan, New Delhi through Under Secretary to the Government of India.
2. The Under Secretary to the Department of Personal and Training Ministry of personal, Grievances and Pensions, Lok Nayak Bhawan, New Delhi.
3. the Asst. Director (S&R) Save Grain Campaign Office, C-28 Bhuvneshwar Nagar Colony, Ardali Bazar, Varanasi.
4. The Regional Director, Save Grain Campaign Office Kendriay Bhawan (H Sector No.4) 5th Floor, Sector II, Aliganj, Lucknow.
5. The Regional Director, Regional Center for Military AIR worthiness (RCMA) Ministry of Defence (R&D) C/O HAL (TAD), Kanpur, 208008.

..... Respondents

Present for Applicants : Shri I.S. Tomar
Shri R.A. Singh

Present for Respondents : Shri S.C. Mihsra

ORDER

(Delivered by Hon'ble Mr. A.K. Gaur, J.M.)

Through this Original Application, the applicant has claimed following main relief/s:-

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- "(i) It is further prayed that the orders/letter dated 20.10.2004 (Annexure No.1), 25.10.2004 (Annexure No.2) and 02.12.2004 (Annexure No.3) may kindly be declared unconstitutional and ultra vires to rules and be quashed.*
- (ii) It is further prayed that an appropriate direction be given to the respondents to provide the benefit of financial up-gradation under the ACP Scheme in terms of the letter dated 11.10.2004 issued by Assistant Regional Director (S&R) Save Grain Campaign Office Varanasi and arrears of salary, if any.*
- (v) It is further prayed that the order/letter dated 07.11.2005 (Annexure-1 to the affidavit supporting amendment application may be declared unconstitutional and ultra vires to rules and be quashed.*

Relief No.5 has been incorporated by the applicants by filing amendment application on 13.09.2006. The applicant has claimed financial up-gradation in terms of letter dated 11.12.2004 issued by Assistant Regional Director (S&R), Save Grain Campaign, Office, Varanasi.

2. Letter dated 20.10.2004 issued by the respondent no.1, and the letter dated 25.10.2004, issued by the Assistant Regional Director (S&R) Varanasi, has been challenged by the applicant, whereby the financial up-gradation under ACP Scheme has been cancelled by the respondents. It is alleged that vide letter dated 02.12.2004 issued by the Regional Director (S&R) Varanasi, the applicant has been granted benefit of financial up-gradation of Scale (4000-100-6000) w.e.f. 26.06.2004 contrary to the violation of Rules. A copy of the letter dated 20.10.2004 issued by the respondent no.1 and letter dated 25.10.2005 issued by the Assistant Regional Director (S&R) Varanasi and letter dated 02.12.2004 issued by Regional Director (S&R) Varansi has been annexed as Annexure A-1, A-2 & A-3 respectively. The applicant was appointed on 26.06.1992 on the post of Lower Divisional Clerk (Group-C) in Save Grain Campaign Office, Varanasi on compassionate ground. He was

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confirmed on the post of Lower Divisional Clerk by the Competent Authority on 26.06.1994 (Annexure A-4). The applicant was declared surplus w.e.f. 20.11.2003 (Annexure A-5). The applicant thereafter has been redeployed in the office of the respondent no.5 but he was not relieved immediately and continued to work in his original office at Varanasi. As the applicant has already completed the tenure of 12 years of his service without any adverse remark and to the utmost satisfaction of his superiors, he claimed the benefit of financial up-gradation of pay scale under ACP Scheme. The applicant also brought to the notice of the respondents that one Smt. Nilima Pandey a similarly situated employee was granted the benefit of ACP Scheme w.e.f. 26.09.2002 after completion of 12 years service and she was also granted the pay scale Rs.4500-7000, but the applicant was not given this benefit without disclosing any reasons (Annexure A-7). The applicant being a surplus employee, his case for financial up-gradation under ACP Scheme was referred to respondent no.2 for advice. After receiving advice of respondent no.2, respondent no.1 vide letter dated 22.09.2004 allowed the financial up-gradation under ACP Scheme and provided financial up-gradation to the applicant in scale of Rs.4500-125-7000 w.e.f. 26.06.2004. A letter dated 08.10.2004 was issued by the respondent no.4 in this regard (Annexure A-9). In terms of letter dated 08.10.2004, vide order dated 11.10.2004 issued by the respondent no.3, the applicant was granted financial up-gradation from 3050-4590 to 4500-7000 w.e.f. 26.06.2004 (Annexure A-10). Though the applicant was redeployed vide letter dated 27.08.2004, he was not relieved by the Save Grain Campaign Office, Varanasi and continued to work in this office. To the utter surprise of the applicant while working at Varanasi, the applicant received a letter of respondent no.2 dated 20.10.2004, and

24.10.2004 informing the applicant that his first financial up-gradation in the scale of 4500-7000 has been cancelled. The benefit of financial up-gradation was cancelled solely on the ground that this benefit cannot be granted to the applicant being a surplus employee. Thereafter, the applicant was also relieved vide letter dated 29.10.2004 and directed to join the office of respondent no.1 before 01.11.2004 (Annexure A-1). Since 01.11.2004, the applicant started functioning in the office of the respondent no.5. Vide letter dated 02.12.2004 issued by Regional Director (S&R) Varanasi, the applicant came to know that the Departmental Screening Committee for financial up-gradation under ACP Scheme found him fit provided the first financial up-gradation scale of Rs.4000-100-6000 is accepted by him w.e.f. 26.06.2004. It is alleged that there is a great anomaly in the grant of financial up-gradation to the applicant vide letter dated 02.12.2004. The applicant represented his grievance through respondent no.5 and submitted for providing him financial up-gradation which has been given to him w.e.f. 26.06.2004 vide letter dated 08.10.2004. The applicant also made a representation dated 07.07.2005 which has been rejected in mechanical manner without assigning any reasons vide order dated 07.11.2005. By amending the OA, the validity of the said order has also been challenged by the applicant (SA-1).

3. In the counter reply filed by the respondents, it is, submitted that prior to completion of 12 years regular service that entitled the applicant to get the first financial up-gradation under the ACP Scheme, he was declared surplus on 09.12.2003. He continued to be borne on the Surplus Staff Establishment for some time after the date of completion of 12 years regular service till 31.10.2004. Instead of granting him financial

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up-gradation in the scale of Rs.4000-6000, the Save Grain Campaign, Varanasi issued Office Order dated 08.10.2004 granting financial up-gradation to the applicant in the pay scale of Rs.4500-125-7000. As the office order dated 08.10.2004 was contrary to the instructions issued by the Department of Food and Public Distribution on the basis of advice of the Department of Personnel & Training, the Save Grain Campaign Office, Varanasi was advised to cancel the said office order vide letter dated 20.10.2004. The office order dated 08.10.2004 was cancelled by Save Grain Campaign vide its Office Order dated 25.10.2004. The applicant made two representations dated 28.10.2004 and 07.07.2005, wherein he had claimed for grant of up-gradation to the post of Junior Accountant cum Store Keeper, which is the next post in the line of promotion to the post of LDC in the Save Grain Campaign. After the receipt of the representation of the applicant, the Competent Authority conveyed to him its inability to accede to his request after consulting the department of Personnel and Training. With a view to clarify the position and sustain the order of cancellation the respondents have redressed a copy of DOPT's OM dated 18.07.2001, and the relevant portions containing the clarification of points of doubt arising from their instructions on the ACP Scheme. It would be relevant to note Clarification No.56 of DOPT's OM dated 18.07.2001, which reads as follows:-

Sl. No.	Points of Doubt	Clarification
56	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	Financial up-gradations 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 Central Pay Commission. Further, as an example, in reply to point of doubt

<p>for adoption of uniform grade/cadre structure subject to functional needs of an individual organization. In a large organization, all the hierarchical levels as per uniform 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 promotion involved 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 up-gradations, it results in a situation where persons belonging to common category and recruited the same time in same entry grades are entitled to financial up-gradations in vastly different grades under ACPS is it not anomalous?</p>	<p>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 OM 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 up-gradations are allowed keeping purely such local 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 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.</p>
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4. According to the respondents as per the aforesaid Clarification No.56 financial up-gradations under the ACP Scheme are to be allowed in the 'existing hierarchy'. The term has been defined as 'the restructured grades' recommended by the Fifth Pay Commission. The applicant being an LDC, belongs to a common category of non-secretariat office staff and as per standard hierarchical structure viz.

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LDC (Rs.3050-4590) UDC (Rs.4000-6000), Assistant (Rs.5500-9000) for non secretariat staff. It is urged that ACP benefits has been granted to the applicant on this basis which is in accordance with the instructions of the DOPT, which is the Nodal Ministry.

5. In the Rejoinder Reply filed by the applicant, it is submitted that the applicant has successfully completed the tenure of 12 years for up-gradation of pay scale Rs.4500-7000 under the ACP Scheme. In the Save Grain Campaign Department (the present Department of the applicant) for a promotion from LDC to Junior Accountant cum Store Keeper a continuous service of 8 years is required. Similarly, in a sister concern of Save Grain Campaign i.e. IGMRI, only 3 years service is required for consideration of promotion from LDC to UDC and 5 years service is required for promotion from UDC to Assistant Superintendent.

6. Applicant has also filed Supplementary Rejoinder Affidavit and in Paragraph No.4 of the same, it is stated that he obtained information under Right to Information Act, vide letter dated 20.02.2008 issued by the Deputy Secretary wherein it is mentioned that in Save Grain Campaign Department LDC is promoted to the post of Junior Accountant cum Store Keeper (Annexure SRA-3). It is well settled law that entitlement of an employee for being placed on a particular pay scale will depend upon the rules and terms and condition of the particular department of the employee and not to the desirous considerations of the controlling department based on erroneous clarifications. Thus the applicant is entitled to be given promotional benefit under the ACP Scheme for the post of Junior Accountant cum

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Store Keeper in the pay scale of Rs.4500 – 7000, from which he has been arbitrarily and illegally deprived of.

7. In the Supplementary Counter Affidavit filed by the respondents it is, submitted that the promotion of LDCs (Rs.3050-4590) is not automatic to the post of Junior Accountant Cum Storekeeper (Rs.4500-7000). It is subject to fulfillment of certain conditions like 8 years service with experience in maintaining cash, accounts and stores. Since normal channel of LDCs for promotion is UDC, the matter was referred to Government of India, Department of Personnel & Training to advice whether financial up-gradation of LDCs under ACPs should be granted in the pay scale of Rs.4000-6000/- or Rs.4500-7000/-. In terms of Clarification No.56 of Office Memorandum dated 18.07.2001, the benefit of ACPs has to be allowed as per standard hierarchical structure viz. LDC, UDC, Assistant and Office Superintendent for non secretariat office staff. By filing letter dated 05.01.2007, respondents have clarified that a general instructions have been issued and the question of grant of financial up-gradations under ACP Scheme to the LDCs in the Save Grain Campaign Office in the pay scale of Rs.3050-4050 has been considered by the Competent Authority and it has been decided that the LDCs in Save Grain Campaign office are to be allowed ACP benefits as per standard hierarchical structure.

8. We have heard Sri I.S. Tomar, learned counsel for the applicant and Sri S.C. Mishra, learned counsel for the respondents and also perused the written arguments filed by the learned counsel for the applicant.

9. It has been contended by the learned counsel for the applicant that financial up-gradation of the applicant was granted strictly in

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accordance with the Departmental Rule and also having regard to the decision rendered by a Full Bench of the Tribunal in **O.A. No.557 of 2004 decided on 16.02.2005 (Sri Prakash Chand and 7 ors. Vs. Union of India and Ors.)** It is urged that under the similar facts and circumstances of the instant case, the applicants of the Full Bench case were granted financial up-gradation in the pay scale of Rs.5500-9000 in accordance with the Para-7 of the ACP Scheme, which provided that financial up-gradation under the scheme shall be given to the next higher grade in accordance with the existing hierarchy in the cadre. The financial up-gradation granted to the applicant from Full Bench decision was also cancelled in terms of Clarification No.56 of DOP&T instruction. The Full Bench after considering the entire case held that when the language of Paragraph No.7 of the ACP Scheme is plain and clear that the financial up-gradation in the next higher grade is to be granted in accordance with the existing hierarchy, necessarily it has to go with each service. Learned counsel for the applicant would contend that the Clarification No.56 of the DOP&T is mere instruction or clarification, and can supplement statutory rule where there are ambiguities but cannot override the provisions of Rules or Statute. Ultimately the Full Bench of the Tribunal held that the Clarification No.56 issued by DOP&T, on 18.07.2001 will have the effect of rendering Paragraph No.7 of the ACP Scheme as redundant. It is urged by the learned counsel for the applicant that classification cannot takeaway the right that has accrued to the Government Servant in his existing hierarchy with respect to grant of the scale by way of financial up-gradation.

10. Learned counsel for the respondents vehemently argued that Financial up-gradations under ACPS are to be allowed in the 'existing

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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 Central Pay Commission. He also submitted that 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 up-gradations are allowed keeping purely such local 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. Learned counsel for the respondents has also placed reliance on the letter dated 05.01.2007 issued by the Ministry of Consumer Affairs, Food and Public Distribution Department of Food and Public Distribution. In order to show that the question of grant of financial up-gradation under the Assured Career Progression Scheme to the LDCs in the Save Grain Campaign Offices in the pay scale of Rs.3050-4050/-, has been considered in the Department in consultation with the Department of Personnel and Training and it has been advised that in terms of Clarification No.56, of Office Memorandum dated 18.07.2001, the LDCs in the Save Grain Campaign Offices are to be allowed ACP benefit as per standard hierarchical structure.

11. We have given our thoughtful consideration to the pleas advanced by the parties counsel and we have also carefully perused the decision rendered by Full Bench of the Principal of New Delhi, reported in

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2005(2) ATJ-617 Shri Prakash Chand and 7 Ors. Vs. Union of India & Ors. It has been contended by the learned counsel for the applicant that the ACP Scheme had been drawn after taking due care and caution. The parties are bound by the same. The instructions/clarifications cannot modify the Scheme and in that process it cannot take away the vested right that was available to the applicants. On the contrary, as per the respondents, by virtue of the clarification, it is only the ambiguity, which has been clarified. According to the respondents the administrative instructions, particularly clarification no.56 is in order. In the case of **Guman Singh Vs. State of Rajasthan & Ors. reported in 1971 (2) SCC 452.** The Hon'ble Supreme Court precisely and succinctly has described the position as to whether administrative instructions can modify the rules or not. In the paragraph no.39 it was held that:-

"39. Then the question is whether Government is competent to issue the said Circular and whether the Circular in any manner affects the discretion and powers of the Committee functioning under the statutory rules. The position is clear, as laid down by this Court in Sant Ram Sharma Vs. State of Rajasthan and another (Surpra).

"It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

12. Several decisions of Hon'ble Supreme Court reported in **1982 (2) SCC 7 VT Khanzode and Others Vs. Reserve Bank of India & Another and AIR 1973 (SC) 303 Union of India Vs. K.P. Joseph & Ors.** who had considered by the Full Bench and in Para-11 & 19 of the judgment the Full Bench is observed as follows:-

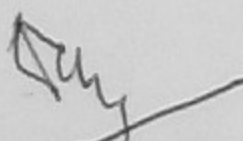
"11, From the aforesaid, the principle, which can conveniently be drawn is that the administrative instructions or clarifications can supplement the statutory rules, where there are ambiguities. They can fill up the gaps but administrative instructions or clarifications cannot override the provisions of the rules or statute."

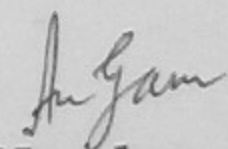
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19. *In the first instance, it must be stated that the clarification, in this process. Supplants the ACP Scheme. We have already referred to above that the State is at liberty to amend the same in accordance with law, but by clarification, the amendment cannot be effected. The clarification, by no stretch of imagination, is clarifying any ambiguity because we have already referred to above that the language is plain and clear of the Scheme and the clarification are modifying the Scheme and supplanting something new, that is not permissible in law."*

13. Resultantly the position is clear and beyond any pale of controversy that clarification that has been issued, must be held to be one which is modifying the Scheme and by virtue of a clarification it could not have been so done. The Full Bench of the Tribunal accordingly held that "Clarification No.56 issued by the Department of Personnel & Training on 18.07.2001 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 up-gradation."

14. Having given our thoughtful consideration to the ratio of Law propounded by Full Bench of the Tribunal rendered in Sri Prakash Chand's Case (supra), we allow the OA and quash and set aside the order dated 20.11.2004 issued by the respondent no.1, and order dated 25.10.2004 passed by the respondent no.3, and consequential letter dated 02.12.2004 granting financial up-gradation in the scale of UDC Rs.4000-6000 with all consequential benefits. No costs.


Member-A


Member-J

/Sushil/