

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No. 501/89 199-
T. A. No.

DATE OF DECISION 31.8.90

K.K.Sasidharan Nair Applicant (s)

M/s M.R.Rajendran Nair &
P.V.Asha Advocate for the Applicant (s)

Versus

Union of India represented by Respondent (s)
Secretary, Ministry of Communications,
New Delhi. & another.

Mr. P.Santhosh Kumar, ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. **S.P.Mukerji, Vice Chairman**

The Hon'ble Mr. **A.V.Haridasan, Judicial Member**

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *M*
4. To be circulated to all Benches of the Tribunal? *M*

JUDGEMENT

(Shri S.P.Mukerji, Vice Chairman)

In this application dated 9.8.89, the applicant who has been working as a Lineman under the Telecom District Engineer, Kottayam has prayed that the impugned order dated 26.12.88 rejecting his representation of 6.10.88 for promotion to the next higher grade with effect from 30.11.83 should be set aside. He has also prayed that respondent-2 be directed to consider him for promotion to the next higher scale with effect from 30.11.83 with all consequential benefits including arrears with interest. The brief facts of the case are as follows:

2. The applicant commenced his service as Lineman on 8.8.65 and completed 16 years of service on 8.8.81. On 17.12.83 the Director General, P&T issued a scheme known as "One Time Bound Promotion Scheme" (TBPS) providing inter alia for promotion to the next higher scale of Group C and Group D officials who have completed 16 years of service before 30.11.83. The applicant's

grievance is that while his juniors in the category of Lineman were promoted to higher grade by the order dated 22.2.84 he was not so promoted and was told that he could not be promoted as investigation was pending against him regarding an incident which occurred on 28.12.83. A criminal case was pending against him under section 353 of I.P.C. on the charge that on 28.12.83 he had assaulted a Junior Engineer. On 16.9.85 the Judicial First Class Magistrate acquitted him. Thereafter, departmental proceedings were initiated for the same incident and he was chargesheeted on 16.5.84. Order of penalty of reduction of pay was passed which was confirmed by the Appellate authority on 3.6.88. The applicant moved the Tribunal against the penalty in OAK-420/88 and the order of penalty has been set aside on 28.2.90. The applicant in the mean time represented on 6.10.88 that since the incident which happened on 28.12.83 took place after the crucial date of 30.11.83 when he was eligible to be promoted to the next higher grade ^{under} (1) the aforesaid One Time Bound Promotion Scheme, his case for promotion under as on 30.11.83 that Scheme /should not be prejudiced by the subsequent ^{of 28.12.83} incident. He was ^{also} informed by the impugned communication at Annexure-II that he was "not eligible for promotion w.e.f. 30.11.83, since the punishment was current at that time." The applicant's contention is that no punishment was current at that time and the impugned order is based on an obvious mistake. His further contention is that under the TBPS, since he had completed 16 years of service as Lineman on 8.8.81, he should have been considered for promotion to the next higher grade either from 8.8.81 or in any case, from 30.11.83 and denial of this promotion while his juniors had been promoted is violative of Articles 14 and 16 of the Constitution. Since there was no punishment current on 30.11.83, the impugned order at Annexure-II was passed on erroneous and non-existing grounds. He has further argued that even assuming that there was some

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punishment current on 30.11.83, that by itself does not preclude his being considered for such promotion.

3. The respondents in their counter affidavit have stated that the Departmental Promotion Committee which met on 18.2.84 to consider the cases of all those officials who had completed 16 years of service in Group C & D, assessed the fitness of the applicant along with other identified officials and did not find him fit for promotion to the next higher grade as on 30.11.83. They have specifically averred that vide Memo No.C-1/82-82 dated 15.4.82 the increment of the applicant which was due on 1.1.83 had been withheld for a period of one year without cumulative effect. Thus the punishment was current upto 1.1.84. The DPC on the basis of the general service records also, found him to be unsuitable. They have also referred to the acknowledged copy of the punishment order dated 15.4.82. They have further indicated that the applicant was awarded with 'dies non' on 8 days between 19.9.68 and 4.8.83. It has also been stated that the fitness of the applicant for promotion was considered by as many as 7 DPCs between 18.2.84 and 20.6.89. Since punishments had been current till the 5th DPC met on 20.8.87, he was not considered for promotion. They have also referred to the criminal case pending against him for assaulting a Junior Engineer on 28.12.83. He was acquitted by the Magistrate. Since the DPC consistently found him unfit for promotion, the applicant could not be promoted to the next higher scale.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The impugned order dated 26.12.88 at Annexure-II rejecting the representation of the applicant for promotion with effect from 30.11.83 reads as follows:

".....With reference to your representation dated 6.10.88, it is intimated that you were not eligible for promotion w.e.f. 30.11.83, since a punishment was current at that time."

The learned counsel for the respondents was good enough to show us the proceedings of the DPC meeting held on 18.2.84 to consider cases of 27 Linemen for promotion to higher grade with effect

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from 30.11.83 under the One Time Bound Promotion Scheme. The DPC approved 25 Linemen for promotion and 6 were considered as unfit for promotion. The applicant is one of these six. The reason given against him was that "case relating to assault on his JE on 28.12.83 is pending enquiry under rule 14 and punishment current as on 30.11.83."

5. So far as the currency of punishment is concerned, in para 5 of the counter affidavit the respondents have clarified what punishment was current on 30.11.83 in following terms:

"It is submitted in reply to paragraph 1 that the punishment of withholding the increment which was due to the applicant on 1.1.83 for a period of one year without cumulative effect issued by JEP OD-1, Changanacherry vide his Memo No.C.1/81-82 dated 15.4.82 was current on the due date for promotion. The punishment was current upto 1.1.1984. Acknowledged copy of the punishment order shows that in the light of the general service record of the applicant and the fact of imposition of penalty, he was adjudged unsuitable by the DPC which was endorsed by the second respondent who is the competent authority in the case. The second respondent issued letter No.E.371/IV/30 dated 26.12.1988 in reply to the applicant's representation dated 6.10.1988."

The applicant has flatly denied the currency of the punishment as on 30.11.83 but he has argued that even if there was such a punishment current on that day, that by itself does not preclude his case from consideration for promotion. As regards the currency of the punishment order dated 15.4.82, the respondents have not produced a copy of the same. From the file of the confidential report produced by the respondents, however, it is found that in the confidential report for the period from 1.4.82 to 31.3.83 the Reporting Officer has recorded that the applicant "was awarded a punishment of withholding of increment for one year for playing cards while on duty and for insubordination vide Memo No.C-1/81-82 dated 15.4.82." Thus, we have no reason to disbelieve the averment made by the respondents.

6. But the question is whether the applicant could be denied consideration for promotion and declared ^{at Annex II order} as "not eligible" merely

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because the punishment of withholding of increment was current on 30.11.83. This question was dealt with at length by the Chandigarh Bench of this Tribunal in **Parveen Kumar Aggarwal V. I.C.A.R., Krishi Bhawan, New Delhi and Others, II (1988) ATLT (CAT) 684**. The Tribunal quoted from Department of Personnel & A.Rs. O.M.No. 22011/6/75-Ests.(D) of 30th December 1976 as follows:

"An officer whose increments have been withheld or who has been reduced to a lower stage in the time scale, cannot be considered on that account to be ineligible for promotion to higher grade as the specific penalty of withholding promotion has not been imposed on him. The suitability of the officer for promotion should be assessed by the competent authority as and when occasion arises for such assessment. In assessing the suitability the competent authority will take into account the circumstances leading to the imposition of the penalty and decide whether in the light of the general service record of the officer and the fact of the imposition of the penalty he should be considered suitable for promotion. Even where, however, the competent authority considers that in spite of the penalty the officer is suitable for promotion, the officer should not be promoted during the currency of the penalty."

(emphasis added)

It quoted from DGP&T's letter No. 35/9/84-SPB II, dated 19th May 1984 also as follows:

"Promotion of an official can be given effect to during the currency of the punishment of monetary recovery. In this connection as reference is invited to the instructions issued by the M.H.A. in O.M.No. 22011/1/68-estt.(A), dated the 16th February, 1979 stating inter alia that the punishments of censure, recovery of pecuniary loss and stopping of increment do not constitute a bar to promotion of the official provided, on the basis of overall assessment of his record of service, the Departmental Promotion committee recommends his promotion to the next higher post." (emphasis added)

The Tribunal came to the conclusion that in accordance with these instructions "it is crystal clear that imposition of a minor penalty like censure, recovery of pecuniary loss, withholding of increment and withholding of promotion do not constitute an impediment in the way of the delinquent official for further promotion/confirmation." But the Tribunal did not accept the direction and instruction of 30th December 1976 that the officer should not be promoted during the currency of the penalty. It observed as follows:

".....However, the further condition that in the case of employees who have been awarded a minor penalty of "withholding of increment" or "withholding of promotion" can

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be made only after the expiry of the penalty appearing in Memos dated 30th December, 1976 and 16th February, 1979, constitutes a real threat to the future career of a delinquent official inasmuch as it interdicts the competent authority from promoting him even though he has been otherwise found suitable and fit for promotion to the next higher post by the Departmental Promotion Committee/Selection Committee as the case may be. We are unable to find any justification/rationale behind this self-contradictory policy inasmuch as once a delinquent official who has been punished for delinquency in the discharge of duties in accordance with the rules and only a minor penalty of the kind mentioned above is imposed on him, but has been found to be quite fit and suitable for promotion to the next higher grade, he cannot be punished twice. Withholding of promotion is in itself a recognised penalty under Rule 11 of the CCS (CCA) Rules (for short "the Rules") like the penalty of 'withholding of increments of pay'. There is no provision in the Rules which would warrant imposition of two penalties at one and the same time. In other words, there cannot be two concurrent penalties. It is true that under explanation to Rule 11, non-promotion of a Government servant whether in substantive or officiating capacity, after consideration of his case, to a Service, grade or post for promotion to which he is eligible, is not a penalty. It may, therefore, be well inferred that every non-promotion of a Government servant may not in itself amount to a penalty in the sense that it does not entail penal consequences. All the same when the promotion of a person is withheld on the ground that he is already undergoing another punishment of a minor nature, say "withholding of increment" as in the instant case, it will certainly amount to imposition of two penalties/double jeopardy. Hence the aforesaid instruction directing that even where the competent authority considers that in spite of penalty, the officer is suitable for promotion, the officer should not be promoted during the currency of the penalty is absolutely unwarranted, unjustified and arbitrary in nature. Indeed from office Memo dated 19th May 1984 adverted to above it would appear that stopping of increment does not constitute a bar to promotion of the official provided, on the basis of overall assessment of his record of service, the Departmental Promotion Committee recommends his promotion to the next higher post. Such an instruction therefore, will be violative of the principle of equality enshrined in Articles 14 and 16 of the Constitution. It is well settled that "wherever there is arbitrariness in State action whether it be of the Legislature or of the executive or of on 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action." It is because any action that is arbitrary must necessarily involve the negation of equality, and if it affects any matter relating to public employment, it is also violative of Article 16. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal protection by law. See **A.L.Kalra v. Project and Equipment corporation (1984) 3 SCC 316** and **E.P.Royappa v. State of Tamil Nadu, AIR 1974 SC 555** in this context. So looked

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at the matter from this angle there is no escape from the conclusion that the interdict contained in the above mentioned Memos that the delinquent official who is undergoing punishment of a minor penalty should not be promoted during the currency of the penalty even if the competent authority considers that in spite of the penalty, the officer is suitable for promotion must be held to be violative of Articles 14 and 16 of the Constitution of India as being wholly arbitrary, unwarranted and unjustified. Indeed, denial of promotion to a delinquent official during the currency of minor penalty of withholding of increment will amount to double punishment of both 'withholding of increment' as well as 'withholding of promotion' which is totally unwarranted by the rules. If in any case it is intended that promotion of a delinquent official be withheld, it is certainly open to the competent/disciplinary authority to impose such a penalty in a given case, but the competent authority cannot introduce the penalty of "withholding of promotion" indirectly when the delinquent official is already undergoing punishment of "withholding of increment". Apart from any thing it will amount to colourable exercise of power too. Hence, this rider is struck down as being violative of Articles 14 and 16 of the Constitution apart from being contrary to the letter and spirit of the provisions contained in the Rules which contemplate imposition of only one penalty at one time." (emphasis added) *g*

6. From the above, it is clear that the impugned order at Annexure-II that the applicant was ineligible for promotion during the currency of the punishment is prima facie against the very instructions of the Government of India dated 30th December 1976 as quoted above. The ruling of the Chandigarh Bench of the Tribunal has qualified those instructions by saying that the currency of the penalty by itself does not make the official ineligible for promotion and that if he is found suitable for promotion the promotion cannot be postponed till the penalty period expires. Thus, the currency of the minor punishment of withholding of increment cannot ^{before us} debar the applicant ^{from} being considered on merits for suitability for promotion as on 30.11.83. *g*

7. We further think that the DPC gravely misdirected itself by considering the applicant as not fit for promotion merely because "a case relating to assault on his JE on 28.12.83 is pending enquiry under Rule 14." Since the suitability of the official had to be considered as on 30.11.83, the subsequent development of the assault as on 28.12.83 could not be considered by the DPC for his suitability as on 30.11.83. This question was considered by this Bench of the Tribunal in TAK 218/87. In its judgement dated 12th April 1989, to which one of us was a party, reliance was placed on the O.M. dated 20th May 1981 of the Ministry of Home Affairs (Department of Personnel & A.R.) in which it was laid down that for

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considering promotion against a vacancy in a particular year the record of service upto the end of the previous year or the period ending in March of the year in which the vacancies occur only should be taken into account and not the subsequent ones. The following observations were made in the concluding para of that judgement

"In the conspectus of facts and circumstances we allow the petition only to the extent of directing the respondents to get the suitability of the petitioners for promotion to Lower Selection Grade reviewed by a DPC as in 1982. The DPC while assessing their suitability should take into account the Confidential Reports only upto 31.3.1982 and any entry factual or otherwise in respect of an event subsequent to that date should not be taken into account. The DPC also should not take into account any adverse entry relating to the period subsequent to 31.3.82 and any uncommunicated adverse entry relating to the period prior to 31.3.82 in making the assessment."

Accordingly, the DPC could not take into account the event of 28.12.83 and the proceedings sequel to that event for considering the suitability of the applicant for promotion as on 30.11.83.

7. We had occasion to glance through the confidential roll of the applicant and found that a number of adverse entries recorded in 1983 and preceding and subsequent years have not been communicated to the applicant. It is an established law that uncommunicated adverse remarks cannot be considered for withholding promotion and the selection process is vitiated if such remarks are considered. (Brij Mohan Singh Chopra Vs. State of Punjab, 1987 (2) SLR 55 (SC); Gurdayal Singh Fijji Vs. State of Punjab and Others, AIR (1979) SC 1622 etc.)

8. In the facts and circumstances, we allow the application, set aside the impugned order dated 26.12.88 at Annexure-II and direct the respondents to convene a meeting of a Review DPC as on 18.2.84 and get the case of the applicant considered for promotion to the next higher grade under the One Time Bound Promotion Scheme as on 30.11.83 with a clear direction that no entry

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factual or otherwise or reference to event subsequent to 30.11.83 should be taken into account. The Review DPC also should not take into account any adverse ^{or good} entry relating to the period subsequent to 30.11.83 and ^{must} ignore any uncommunicated adverse entry relating to the period prior to that date. The respondents are directed to thereafter take a decision on the basis of the recommendations of the Review DPC ^{about promotion of the applicant} with effect from 30.11.83. If the applicant is not found fit as on 30.11.83, the Review DPC should consider his suitability for promotion in each of the subsequent years by following the same principles as indicate above, that is, events and entries subsequent to the year of consideration and uncommunicated adverse entries prior to the year of consideration should not be taken into account. On his promotion through the Review DPC in any year, all consequential benefits including seniority and arrears of pay should also be given to the applicant. Action on the above lines should be completed within a period of six months from the date of communication of this order. There will be no order as to costs.


(A.V. Haridasan)
Judicial Member


(S.P. Mukerji)
Vice Chairman