

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.52/10

Wednesday, this the 20th day of September 2011

C O R A M :

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER

M.P.Paulose, S/o.Paulo,
Rtd. Postmaster (HSG II),
Kalady M.D.G. P.O.
Residing at Mullasedath House,
Marottichode, Kalady – 683 574.Applicant

(By Advocate Mr.P.C.Sebastian)

V e r s u s

1. The Director of Postal Services (HQ),
O/o.the Chief Postmaster General,
Kerala Circle, Thiruvananthapuram.
2. The Director Accounts (Postal),
Pension Section, Thiruvananthapuram.
3. The Sr. Supdt. of Post Offices,
Aluva Division, Aluva.
4. The Union of India represented by Secretary
to Govt. of India, Ministry of Communications,
Department of Posts, New Delhi.Respondents

(By Advocate Mr.George Joseph,ACGSC)

This application having been heard on 20th September 2011 this
Tribunal on 28th September 2011 delivered the following :-

O R D E R

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The applicant joined service as Time Scale Postal Clerk in 1967 and
after successive promotion was posted as HSG II (BCR) with effect from
1.10.1991. While the applicant was working as Sub Postmaster,

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Angamally, a burglary took place and certain cash was stolen from the Post Office. The applicant was charge sheeted under Rule 16 of CCS (CCA) Rules for contributory negligence and was awarded punishment of recovery of Rs.50,364.85 from his salary in 36 monthly instalments. O.A.149/03 was filed by him challenging the order of penalty which was allowed vide order dated 20.10.2005 (Annexure A-5). In 2006 the applicant was proceeded against under Rule 14 of CCS (CCA) Rules levelling the very same charges as contained in the earlier disciplinary proceedings and the applicant challenged the same by filing O.A.97/07 which also was allowed vide Annexure A-7 order dated 20.6.2008. The charge sheet was quashed and set aside. The applicant made a representation (Annexure A-8) in respect of his case for promotion for which DPC was held in January, 2007. He was informed by Annexure A-9 order dated 30.12.2008 stating that the action was underway as per the direction of the Tribunal dated 20.6.2008 for grant of notional promotion to HSG I with effect from 12.1.2007 and grant of benefits thereof. Vide Annexure A-1 order dated 21.1.2009 the respondents had promoted the applicant as HSG I on ad hoc basis in the Pay Band 2 (Rs.9300-34800) with Grade Pay of Rs.4600/- with effect from 25.2.2007, the date from which immediate junior to the applicant was promoted in the cadre. By that time the applicant had already superannuated. The promotion given to him was only notional and the benefits were restricted to refixation of last pay drawn for pensionary purpose only. The applicant has filed this O.A claiming actual promotion and arrears arising out of such promotion.



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2. The respondents have contested the O.A. According to them, in accordance with the decision in the case of K.V.Jankiraman Vs. Union of India (AIR 1991 SC 2010) no arrears of salary for the period prior to the date of actual promotion need to be paid. In the instant case, as the notional promotion was granted after the applicant superannuated, the claim cannot be admitted.

3. The applicant has filed his rejoinder stating that on promotion the applicant was entitled to exercise his option for fixation of pay. As per revised pay rules, after fixation of pay as on 1.1.2006, increment accrues at the rate of 3% of the revised pay and Grade Pay on 1.7.2007. The said increment, however, has been denied to the applicant without justifiable reason. The applicant had retired only on 30.6.2008. Thus the applicant is entitled to annual increment also and corresponding pension.

4. Counsel for the applicant argued that the decision of the Apex Court in Jankiraman's case in fact goes in his favour. In addition, he is due for one increment as his promotion dates back to 25.2.2007 and the applicant retired only on 30.6.2008.

5. Counsel for the respondents, on the other hand, stated that on the principle of 'no work, no pay', the applicant is not entitled to any arrears of pay and allowances for the period of notional promotion. As regards increment, his case was dealt with in accordance with the revised pay rules, 2008 effective from 1.1.2006.



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6. Arguments were heard and documents perused. The issue of entitlement or otherwise to pay and allowance in the event of promotion from a retrospective date, especially in case where the individual was subjected to a disciplinary proceedings had been the subject matter of various O.Ms. The Government of India (Dept. of Personnel & Training) issued an Office Memorandum No.22011/1/79, Estt.(A) dated January 30, 1982 on the subject of promotion of officers in whose cases "the sealed cover procedure" had been followed but against whom disciplinary/court proceedings were pending for a long time. The Memorandum stated that according to the existing instructions, cases of officers (a) who are under suspension or (b) against whom disciplinary proceedings are pending or a decision has been taken by the competent disciplinary authority to initiate disciplinary proceedings or, (c) against whom prosecution has been launched in a court of law or sanction for prosecution has been issued, are considered for promotion by the Departmental Promotion Committee (hereinafter referred to as the 'DPC') at the appropriate time but the findings of the Committee are kept in a sealed cover to be opened after the conclusion of the disciplinary/court proceedings. While the findings are kept in the sealed cover, the vacancy which might have gone to the officer concerned is filled only on an officiating basis. If on the conclusion of the departmental/court proceedings, the officer concerned is completely exonerated, and where he is under suspension it is also held that the suspension was wholly unjustified, the sealed cover is opened and the recommendations of the DPC are acted upon. If the officer could have been promoted earlier, he is promoted to the post which is filled on an officiating basis, the officiating arrangement being terminated. On his

promotion, the officer gets the benefit of seniority and fixation of pay on a notional basis with reference to the date on which he would have been promoted in the normal course, but for the pending disciplinary/court proceedings. However, no arrears of salary are paid in respect of the period prior to the date of actual promotion. The Memorandum goes on to state further that it was noticed that sometimes the cases in the courts or the departmental proceedings take unduly long time to come to a conclusion and the officers undergo considerable hardship, even where it is not intended to deprive them of promotion for such a long time. The Government, therefore, in consultation with the Union Public Service Commission examined how the hardship caused to the Government servant in such circumstances can be mitigated and has laid down the following procedure in such cases :

"3.(i)(a) It may be ascertained whether there is any departmental disciplinary proceedings or any case in a court of law pending against the individual under consideration, or

(b) There is a prima-facie case on the basis of which a decision has been taken to proceed against the official either departmentally or in a court of law.

(ii) The facts may be brought to the notice of the Departmental Promotion Committee who may then assess the suitability of the official(s) for promotion to the next grade/post and for the purpose of this assessment, the D.P.C. shall not take into consideration the fact of the pending case(s) against the official. In case an official is found 'unfit for promotion' on the basis of his record, without taking into consideration, the case(s) pending against him, the findings of the D.P.C. shall be recorded in the proceedings. In respect of any other kind of assessment, the grading awarded by the D.P.C. may be kept in a sealed cover.

(iii) After the findings are kept in a sealed cover by the Departmental Promotion Committee subsequent D.P.Cs., if any, held after the first D.P.C. during the period the

disciplinary/court proceedings may be pending, will also consider the officer's case and record their findings which will again be kept in sealed cover in the above manner.

In the normal course, on the conclusion of the disciplinary/court proceedings, the sealed cover or covers may be opened, and in case the officer is completely exonerated i.e. no statutory penalty, including that of censure, is imposed, the earliest possible date of his promotion but for the pendency of the disciplinary/court proceedings against him, may be determined with reference to the position(s) assigned to him in the findings in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such position. The officer concerned may then be promoted, if necessary by reverting the junior most officiating person, and he may be given a notional promotion from the date he would have been promoted, as determined in the manner indicated above. But no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion.

7. Deptt. of Personnel and Training issued another Office Memorandum No. 22011/2/86. Estt.(A) dated January 12, 1988 in supersession of all the earlier instructions on the subject including the Office Memorandum dated January 30, 1982 referred to above. There is no difference in the instructions contained in this and the earlier aforesaid Memorandum of January 30, 1982, except that this Memorandum provides in paragraph 4 for a six-monthly review of the pending proceedings against the government servant where the proceedings are still at the stage of investigation and if as a result of the review, the appointing authority comes to the conclusion on the basis of material and evidence collected in the investigation till that time, that there is no *prima facie* case in initiating disciplinary action or sanctioning prosecution, the sealed cover is directed to be opened and the employee is directed to be given his due promotion with reference to the position assigned to him by the DPC. A further

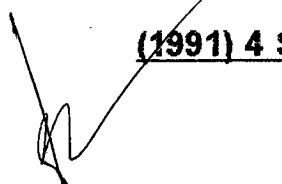


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guideline contained in this Memorandum is that the same sealed cover procedure is to be applied where a government servant is recommended for promotion by the DPC, but before he is actually promoted, he is either placed under suspension or disciplinary proceedings are taken against him or a decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken.

8. Later on in OM dated 31-07-1991 there was a slight modification to the OM dated 12-01-1988 in that the stipulation of various contingencies under which sealed cover was to be adopted were reviewed and one of the contingencies, i.e. "Government servants against whom an investigation on serious allegations of corruption, bribery or similar grave misconduct is in progress either by the CBI or any other agency, departmental or otherwise." had been deleted from the O.M. In that O.M. it was further clarified that where such sealed cover procedure had been adopted under the above heading, the same would be opened and if the official had been found fit and recommended by the DPC, he will be notionally promoted from the date his immediate junior has been promoted. The pay of the higher post would, of course, be admissible only on assumption of actual charge in view of provisions of F.R. 17(1).

9. The above two O.Ms have been profusely referred to in the decision by the Apex Court in the case of Union of India vs K.V. Jankiraman (1991) 4 SCC 109 and when the question of entitlement to or otherwise of



the backwages in respect of retrospective promotion came up, the Apex Court took into account the rule position as available in the aforesaid O.Ms and had ultimately held as under :-

"23. There is no doubt that when an employee is completely exonerated and is not visited with the penalty even of censure indicating thereby that he was not blameworthy in the least, he should not be deprived of any benefits including the salary of the promotional post. It was urged on behalf of the appellant-authorities in all these cases that a person is not entitled to the salary of the post unless he assumes charge of the same. They relied on F.R. 17(1) of the Fundamental Rules and Supplementary Rules which reads as follows :

"F.R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."

24. It was further contended on their behalf that the normal rule is "no work no pay". Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension. When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his.

This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/ criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardize public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum :

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

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10. Thus, on the direction of the Apex Court, the Department of Personnel had in its O.M. Dated 14th September 1992 issued the following :-

On the conclusion of the disciplinary case/criminal prosecution which results in dropping of allegations against the Government servant, the sealed cover or covers shall be opened. In case the Government servant is completely exonerated, the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the junior-most officiating person. He may be promoted notionally with reference to the date of promotion of his junior. "However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so. It is not possible to anticipate and enumerate exhaustively all the circumstances under which such denials of arrears of salary or part of it may become necessary. However, there may be cases where the proceedings, whether disciplinary or criminal are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non availability of evidence due to the acts attributable to the employee, etc. These are only some of the circumstances where such denial can be justified.

11. The above position continues from then.

12. From the above, it is clear that where the proceedings are dropped the sealed cover shall be opened and if found fit, the individual would be promoted on notional basis from the date his junior stood promoted and in so far as the entitlement to the arrears, the same depends

upon the facts and circumstances of each case. If the delay in conclusion of the proceedings is attributable to the individual, he should be not afforded any benefit by way of arrears of pay and allowance as it would amount to giving a premium to his delay tactics. Again, where the exoneration is not full and complete and is based on benefit of doubt, no arrears should be paid.

13. Shortly after the delivery of the judgment in the case of K.V. Jankiraman, in the case of State of M.P. Vs Syed Naseem Zahir 1993 supp (2) SCC 225, the Apex Court has held as under :-

7. It is no doubt correct that in view of Jankiraman case the DPC was not justified in keeping the recommendation pertaining to Syed in a "sealed cover", but it is difficult to ignore glaring facts in a given case and act mechanically. Even in Jankiraman case while dealing with Civil Appeal Nos. 51-55 of 1990 this Court observed as under :

"In view of the aforesaid peculiar facts of the present case, the DPC which met in July 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge-sheet in the departmental proceedings was issued in August/December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary."

Keeping in view the facts of this case we are of the view that the "sealed cover" containing recommendations of the DPC in respect of respondent Syed be not opened till the departmental proceedings against him are concluded. As mentioned above the enquiry report has already been received by Syed and it is a matter of days before the disciplinary proceedings would come to an end. In case he is completely exonerated, the "sealed cover" shall be opened and if the recommendation is in his favour, he shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer. In that event, he shall be entitled to all consequential benefits including back

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wages. In case, respondent Syed Naseem Zahir is punished in the proceedings, then action would be taken in accordance with the guidelines as laid down by this Court in Jankiraman case. (emphasis supplied)

14. In the case of Govt. of A.P. v. M. Adbuta Rao, (2005) 12 SCC 258, in 1994 the Departmental Promotion Committee considered the case of respondent therein he was found fit to be promoted as Chief Engineer but promotion was deferred because of the pendency of the enquiry. He was ultimately exonerated and in the meantime, the said respondent retired from service in February 2001. The Apex Court in that case has held as under :-

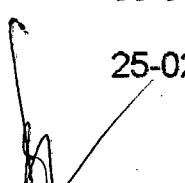
"Now, there is no question of the respondent being promoted. There is only a question of granting the respondent relief in monetary terms. Having regard to the facts of this case, we dispose of the appeal by directing the appellants to grant the respondent consequential benefits as if the respondent had been found fit for promotion by the Departmental Promotion Committee held on 7-10-1994. Such payment to be made within a period of four months from the date of communication of this order."

15. Thus, the Apex Court has held in the above cases that the individual who had been exonerated shall be granted pay and allowances for the period of promotion though it was with retrospective effect. In the instant case, initially, minor penalty was imposed, which was quashed and set aside. This decision was taken on 20-10-2005. This was much prior to the date of either holding of the DPC or the date of promotion of the immediate junior to the applicant. The next proceedings on the self same charge were initiated on 10-10-2006. The very charge sheet itself was quashed and set aside vide order dated 20-06-2008 in OA No. 97/2007. The applicant was,

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therefore, entitled to be considered for promotion as if no charge sheet had been issued in his case. The quashing of the charge sheet was not on any hypertechnical ground or benefit of doubt but on the solid legal ground that there cannot be two disciplinary proceedings against the self same set of facts, more so when the applicant had been thoroughly exonerated in the earlier proceedings and the penalty awarded was withdrawn and the amount recovered from the applicant refunded to him as per the direction of this Tribunal. Thus, the applicant was available to shoulder higher responsibilities and further there was no delay in his approaching the Tribunal challenging the issue of charge sheet. Thus, his is not a case where there has been any delay attributable to the applicant in completion of the court case and thus, denial of back wages to the applicant on the under the provisions of OM dated 14-09-1992 is not justified. The case of the applicant is covered squarely by the decision of the Apex Court in the case of Government of A.P. Vs Adbuta Rao (*supra*).

16. Next is about the entitlement to the increment. The date of promotion of the applicant was from 25-02-2007. Under the extant rules, there is a uniform date of increment i.e. As on first of July every year. If a person completes 6 months in a particular pay as on first of July, he would be entitled to annual increment as on first of July of that year. If, however, there is a short fall, his annual increment would fall due only on the next year July notwithstanding the fact he would have been in the same pay for over one year. In the instant case since the applicant superannuated as on 30-06-2008, he cannot be granted any increment. Thus, the pay as of 25-02-2007 itself would be the last pay drawn.



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17. In view of the above, the OA is allowed to the extent that the applicant is entitled to the grant of pay and allowance in the grade of HS Grade I i.e. Rs 19770/- and he is entitled to arrears of pay and allowance arising therefrom. He is not entitled to any increment on 01-07-2007 as he had not completed six months in the afore said pay scale. Since he had superannuated on 30-06-2008, no increment to the aforementioned basic pay of Rs 19770/- is admissible to the applicant.

18. Respondents are directed to work out the arrears due to the applicant and make the payment within a period of three months from the date of communication of this order.

19. Under the circumstances, there shall be no orders as to cost.

(Dated this the 28th day of September 2011)


K.NOORJEHAN
ADMINISTRATIVE MEMBER

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Dr.K.B.S.RAJAN
JUDICIAL MEMBER