

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. No.513 / 2005

Friday, this the 12th day of January, 2007

CORAM :

**HON'BLE DR.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE MR.N.RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

V.A.Mathew
UDC (now converted to Social Security Assistant)
Employees Provident Fund Organisation
(E.P.P.O), Sub Regional Office
Kochi - 682 017 : Applicant

(By Advocate Mr. Vellayani Sundara Raju)

Versus

1. Union of India represented by
Secretary To Government
Ministry of Labour
New Delhi
2. The Regional Provident Fund Commissioner (I)
Regional Office, Kerala
Trivandrum
3. The Assistant Provident Fund Commissioner (Admn)
Kochi - 17
4. The Regional Provident Fund Commissioner
KOCHI - 17 : Respondents

(By Advocate Mr.George Joseph)

The application having been heard on 09.01.2007, the
Tribunal on - 12-1-2007 - delivered the following :

ORDER

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

The applicant is aggrieved by Annexure A-1 and A-2 orders
whereby his request for consideration of his case for promotion to
the post of Assistant and for consideration for promotion as UDC
(Selection Grade) were respectively rejected.

2. The following is the admitted position with reference to the facts of the case:-

- (a) The applicant has been functioning as Upper Division Clerk and the avenue of promotion open to him are (a) Assistant and (b) UDC (SG).
- (b) For the post of UDC (SG), the eligibility condition is 17 years service as UDC which the applicant could fulfill on and after 21.01.2000.
- (c) On 14.09.1999 two independent DPC proceedings were conducted - (a) one for UDC(SG) and (b) the other for Assistant.
- (d) In so far as UDC (SG) was concerned, the applicant's case was kept in sealed cover on the basis that vigilance clearance was not available.
- (e) For consideration to the post of Assistant, the Department has not considered the case of applicant as his case for UDC (SG) was under sealed cover.
- (f) On 18.11.1999 the applicant was issued with certain charge sheet and disciplinary proceedings commenced. Similarly in January, 2000 also one more charge sheet was issued to the applicant.
- (g) The first charge sheet issued on 18.11.1999 culminated with certain penalty order against which the applicant had preferred an appeal. This appeal also having been dismissed, the applicant filed OA 200/02 which was decided by Annexure A-6 order dated 18.06.2004. According to the said order, both the penalty advice and appellate order were set aside with consequential benefits of the applicant. As regards the second disciplinary proceedings, according to the applicant, on his filing of OA, the respondents were directed to complete the proceedings within a specified time frame and on the expiry of the time so prescribed when respondents had prayed for extension, the same was rejected.

3. The applicant requested for consideration of his case for promotion to the post of Assistant and independent of the same, consideration for promotion to the post of UDC(SG), as according to him non consideration of his case for promotion as Assistant was

illegal and he is also entitled to be considered for promotion to the post of UDC(SG) in view of the fact that the penalty orders were quashed and set aside and thus, sealed cover should be operated upon. These have however, been rejected by Annexure A-1 and Annexure a-2 orders impugned herein.

4. Respondents have contested the OA. According to them, in the absence of vigilance clearance the applicant's case was kept in sealed cover in so far as promotion to the post of UDC(SG) was concerned and in view of the sealed cover procedure adopted in respect of promotion to the post of UDC(SG), his case was not considered for promotion to the post of Assistant.


5. The applicant has filed his rejoinder reiterating his stand as contained in the OA.

6. The learned counsel for applicant argued that in so far as his promotion to the post of Assistant was concerned, admittedly, he was not considered in the DPC held on 14.09.1999. As on that date there was no charge sheet that was issued to him nor was the applicant kept under suspension. There is no law which permits the authorities not to consider the case of eligible government servants for promotion to the higher grade when no charge sheet was issued. The reason given by the Department that since vigilance clearance was not forthcoming, the case of the applicant was not considered cannot be accepted in view of the clear decision by this Tribunal vide order dated 08.12.2004 in OA 724/02 wherein it has been held as under :-

"The contention that the applicant's case was not considered for inclusion in the panel for promotion as the integrity and vigilance clearance certificate was not issued is also untenable because that is not condition precedent for considering an officer for promotion. Under these circumstances, we find that the case of the applicant for promotion to the post of Upper Division Clerk (Selection Grade) has not been properly considered in accordance with the rules by the Departmental Promotion Committee and the interest of justice demands a direction to the respondents to have the case of the applicant considered for promotion to the post of Upper Division Clerk (Selection Grade) by constituting a review Departmental Promotion Committee as on 14.09.1999."

7. According to the counsel, resort to sealed cover procedure is provided for only in those cases where, at the time when DPC meets, charge sheet should have been issued. Counsel for the applicant relies upon the decision of the Apex Court in the case of *UOI Vs. K.V.Jankiraman, 1991 SC 2010* (Para 6 & 7). Thus, according to the counsel, non consideration of the case of the applicant for promotion to the post of Assistant was thoroughly illegal.

8. Similarly, adoption of sealed cover is illegal even in respect of promotion to the post of UDC(SG) as the applicant was not issued with any charge sheet as on 14-09-1999 when DPC met. Again, in so far as promotion to the post of UDC(SG) was concerned, as the penalty advice was already quashed and set aside the authorities ought to have acted upon DPC recommendations kept in the sealed cover. In respect of the second disciplinary proceedings, the contention of the applicant is that the same too cannot be proceeded further in view of the rejection by this Tribunal of the application of the respondents for extension of time to complete the proceedings.



9. Per contra counsel for respondents submitted that the applicant was not considered in the DPC held on 14.09.1999 for the post of Assistant since no vigilance clearance was given. According to the counsel, the decision of this Tribunal in OA 724/02 is of least assistance to the applicant as in the case the applicant therein fulfilled the minimum years of service of 17 years on the date when DPC met where as the applicant fell short of a few days for completion of 17 years when the DPC met on 14.09.1999 to consider his case for promotion as UDC (SG).

10. In rejoinder the counsel for applicant submitted that he relied upon the decision in OA 724/02 to the limited extent that or consideration by DPC, vigilance clearance certificate is not a condition precedent.

11. Arguments were heard and documents perused. Admittedly, as on 14.09.1999 there was no enquiry pending against the applicant. Para 6 & 7 of the judgment of the Apex Court in Jankiraman explains as of when for the periods of sealed cover procedure disciplinary proceedings can be said to have commenced. The same is extracted below:-

6. On the first question, viz., as to when for the purpose of sealed cover procedure the disciplinary criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge memo/charge sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge memo/charge

sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge memo/charge sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalize the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos.1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;"

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full bench has intended, the two conclusions can be reconciled with each other. The conclusion No.1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. The deny the said benefit, they must be at the relevant time pending at the stage when charge memo/charge sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

We, therefore, repel the challenge of the appellant authorities to the said finding of the Full Bench of the Tribunal.

7. The Full Bench of the Tribunal, while considering the earlier Memorandum dated 30th January, 1982 has, among other things, held that the portion of paragraph 2 of the memorandum which says "but no arrears are allowed in respect of the period prior to the date of the actual promotion" is violative of Articles 14 and 16 of the Constitution because

withholding of salary of the promotional post for the period during which the promotion has been withheld while giving other benefits is discriminatory when compared with other employees who are not in the verge of promotion when the disciplinary proceedings were initiated against them.

12. In the instant case the first charge sheet was issued only on 18.11.1999 and second one much later. According to the respondents vide Para 10 of their counter, the Department had decided not to suspend the applicant as to damage the good industrial relation although vigilance wing had recommended for minimum suspension of the applicant. Thus, when no charge sheet was issued on or before 14.09.1999 and when the applicant was not kept under suspension non consideration of the case of the applicant for promotion to the post of Assistant is certainly a serious legal lacuna as the applicant had a vested Fundamental right to be considered for promotion when he is eligible for the same. As such, Annexure A-1 order cannot be sustained. The contention of the respondents that in view of non receipt of vigilance clearance the applicant was not considered as to be summarily rejected in view of the decision of this Tribunal. In OA 24/02 (Annexure A-10). As regards promotion to the post of UDC (SG) the respondents contention is that the applicant did not complete 17 years as on 14.09.1999 and by the time he completed the minimum period, he came under cloud whereby the departmental proceedings had already been initiated. Be that as it may, once the penalty proceedings have been over and by virtue of Annexure A-6 order the penalty order has been set aside with consequential benefits, the case of the applicant for UDC(SG) should have been reviewed and the sealed cover procedure adopted should have been acted upon. This has not been done. Thus, Annexure A-2 order also suffers from serious legal infirmity.



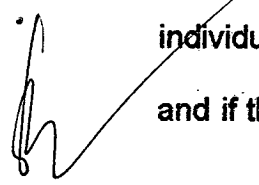
13. In view of the above, order dated 01.07.2004 (Annexure A-1) and that dated 11.04.2005 (Annexure A-2) are liable to be quashed and set aside.

14. The applicant has sought inter-alia the following reliefs:-

(b) to direct the 2nd respondent to convene a review DPC and promote the applicant to Assistant in any one of the sanctioned 46 posts in that category with retrospective effect i.e from the date of the sanction of the post on 2.9.1999 with all consequential benefits;

(c) to issue necessary order or direction declaring that the applicant was eligible and entitled to be considered for promotion to Assistant and UDC (Selection Grade) on 14.9.1999, when the DPC was held, on the very ground that no charge memo was issued on him and no charge sheet in any criminal case was pending against him, and hence the decision of the apex court reported in AIR 1991 SC 2010 and the order of this Hon'ble Tribunal in Annexure A-10 are squarely applicable in the case of the applicant.

15. What would be the consequence when the impugned order at Annexure A-1 is quashed and it is held that the applicant ought to have been considered for promotion to the post of Assistant along with others in the DPC held on 14-09-1999? The clock has to be set back to the date of 14-09-1999; review DPC be conducted and on the basis of the norms for promotion then existing, the case of the applicant should be considered along with others for filling up of the vacant posts of assistant and if the applicant is found suitable for promotion, the panel should be rescheduled placing the applicant in that position as decided by the DPC and the same should be acted upon by promoting the applicant from the date his junior has been promoted. If so, the next question is whether the promotion should, from the date of promotion of the junior, be on notional basis or with pay and allowances. Where sealed cover procedure is adopted and ultimately, the individual is exonerated, the sealed cover should be opened and acted upon and if the individual is to be promoted, the promotion would be from the date



of junior's promotion but the same would be notional basis till the actual date of promotion. Order dated 12-01-1988 {See Union of India vs K.V. Jankiraman (supra) } and 14-09-1992 of the DOPT provide as such. But the case in hand is different. Here, since no disciplinary case could be said to be pending in the eye of law, the question of following the sealed cover procedure would not arise. In that event, the applicant is entitled to full pay and allowance from the date of promotion of the junior. In this regard, it is appropriate to rely upon the decision in the case of **Union of India v. Sudha Salhan (Dr), (1998) 3 SCC 394**, the Apex Court has held as under:-

3. The Tribunal by its impugned judgment allowed the original application and directed as under:

In the result, therefore, we allow the OA and direct the respondents to open the sealed cover pertaining to promotion of the applicant to Specialist Grade II (Senior Scale Officers in non-teaching Specialist Sub-Cadre) in pursuance of the recommendations of the DPC which met on 8-3-1989. Further in case the recommendation of the DPC is in her favour, we direct the respondents that the appellant be promoted retrospectively from the date her immediate junior had been promoted and pay the salary and allowances to her. We further direct that she is entitled to consequential benefits, like seniority and fixation of pay. This may be done within a period of two months from the date of receipt of a copy of this order.

4. The Union of India is in appeal before us.

5. The Tribunal has found it as a fact that on the date on which the Departmental Promotion Committee met to assess the case of the petitioner, she was neither under suspension nor was any charge-sheet issued to her. The Tribunal, consequently, relying upon its own Full Bench decision as also a decision of this Court in New Bank of India v. N.P. Sehgal allowed the original application and issued the directions noted above.

6. The question, however, stands concluded by a three-Judge decision of this Court in Union of India v. K.V. Jankiraman in which the same view has been taken. We are in respectful agreement with the above decision. We are also of the opinion that if on the date on which the name of a person is considered by the Departmental Promotion Committee for promotion to a higher post, such person is neither under suspension nor has any departmental proceedings been initiated against him, his name, if he is found meritorious and suitable, has to be brought on the select list and the sealed cover procedure cannot be adopted. The recommendation of the Departmental Promotion Committee can be placed in a sealed cover only if on the date of consideration of the name for promotion, the departmental proceedings had been initiated or were pending or on its conclusion, final orders had not been passed by the



appropriate authority. It is obvious that if the officer, against whom the departmental proceedings were initiated, is ultimately exonerated, the sealed cover containing the recommendation of the Departmental Promotion Committee would be opened, and the recommendation would be given effect to.

16. In yet another case of *Badrinath v. Govt. of T. N., (2000) 8 SCC 395*, wherein the Apex Court has held, "In fact, if no disciplinary case could be said to be pending in the eye of the law, the question of following the sealed cover procedure would not arise." In that case, the Apex Court had considered as to whether for proceeding further to consider the case of the applicant for promotion, the case has to be remitted back to the respondents. In the peculiar facts and circumstances of the case (where unfair treatment by the State to the appellant was the finding), instead of remitting the matter back to the respondents, the Apex Court itself has directed the respondents to promote the appellant from the date his junior was promoted with all the consequential benefits attendant thereto.

17. A feeble argument was made by the counsel for the respondent that there were two proceedings initiated against the applicant one in November, 1999 and the other in January, 2000 and hence the applicant would not be eligible for promotion. This contention has to be nullified, for, the first one resulted in penalty, which was quashed and set aside by the Tribunal, vide Annexure A-6 order. The second one, was however, not completed within the time calendared by the Tribunal and prayer for extension of time for completing the proceedings was said to have been rejected by the Tribunal. Even if the second one is alive, then also, the same would not have any impact upon the applicant being considered for promotion and if found fit promotion being granted. In this regard, reference is invited to the decision of the Apex Court in the case of *Delhi Jal Board v.*

Mahinder Singh, (2000) 7 SCC 210, wherein, the Apex Court has held as under:-

"5. The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any disciplinary inquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time when DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the Department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection." (Emphasis supplied)

18 Thus, the applicant would be entitled to be considered for promotion and if found fit he shall have to be promoted to the post of Assistant from the date his junior had been promoted in pursuance of the DPC held on 14-09-1999 and the consequential benefits such as fixation of pay, future increments, seniority and eligibility for further promotion would all follow. The applicant has prayed for direction to the respondent to convene a review DPC and promote the applicant to Assistant in any one of the sanctioned 46 posts in that category with retrospective effect i.e. from the date of sanction of the post on 02-09-1999 with all consequential benefit. This prayer for promotion from the date of availability of vacancy cannot be acceded to as the Apex Court in the case of *State of Uttranchal vs D.K. Sharma* (CA No. 5573/06) that an individual is not entitled to promotion pay from the date the vacancy arose.

19.

Even in *K.V. Jankiraman*, the Apex Court has held as under:-

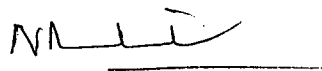
23. *There is no doubt that when an employee is*

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.

20 In view of the above, the OA is allowed. Annexure A-1 and A-2 orders are quashed and set aside. The respondents are directed to hold a review DPC to consider the case of the applicant for promotion to the post of Assistant and in case he is found fit, his date of promotion shall be from the date his junior has been so promoted (in pursuance of the recommendations of the DPC held on 14-09-1999) and his pay would be fixed accordingly. He is entitled to be paid the arrears of the difference in pay and allowances arising out of such promotion and the arrears should be paid to him within a period of three months from the date of communication of this order. Further, the applicant is entitled to the other consequential benefits of seniority in the post of Assistant and for further consideration for higher posts in accordance with law. As the respondents have adopted sealed cover procedure in respect of applicant's promotion to the post of UDC(SG), the same shall be acted upon in accordance with law. within the time limit specified above,

21. Under the above circumstances, there shall be no orders as to costs.

Dated, the 12th January, 2007.



N.RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K.B.S. RAJAN
JUDICIAL MEMBER

VS