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**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.529/08

Tuesday this the 29th day of December, 2009

C O R A M :

**HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER
HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER**

P.B.Venu Nath,
S/o.P.R.Balakrishnan Pillai,
Master Craft Man,
Naval Ship Repair Yard, (NSRY),
Naval Base, Kochi.
Residing at 663/52, Priyadarshini Nagar,
Konthuruthi, Thevara, Kochi – 13.

...Applicant

(By Advocate Mr.P.V.Mohanan)

V e r s u s

1. Union of India represented by Secretary,
Ministry of Defence, New Delhi.
2. Flag Officer Commanding in Chief,
Southern Naval Command, Kochi.
3. V.R.Sanjeevan Pillai,
Charge Man Grade II,
Radio Shop, NSRY (K),
Naval Base, Kochi.
4. Chief Staff Officer (Personal and Administration),
Head Quarters, Southern Naval Command,
Kochi.

...Respondents

(By Advocate Mr.Sunil Jacob Jose,SCGSC [R1,2&4]
& Mr.P.K.Madhusoodhanan [R3])

This application having been heard on 9.11.2009 the Tribunal on the
29.12.2009 delivered the following :-

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ORDER

HON'BLE Mr. GEORGE PARACKEN, JUDICIAL MEMBER

The applicant's grievance is against the Annexure A-15 Memorandum dated 1.2.2008 by which the 3rd respondent has been promoted as Charge Man-II (Radio) in the scale of pay of Rs.5000-150-8000. His contention is that the said respondent was not entitled for promotion as he was undergoing a major penalty.

2. The brief facts of the case are that both the applicant and V.R.Sanjeevan Pillai, 3rd respondent, were working as Master Craft Man (MCM for short). Their next promotion was to the post of Charge Man Grade-II (Radio). In the Annexure A-2 "Seniority List of Combined Personnel from Radar and Radio Trade", the position of the 3rd respondent was Sl.No.8 with his date of appointment as MCM on 4.2.2000 and that of the applicant was Sl.No.10 with his date of appointment as MCM on 20.5.2003. Between them was VH Ameer at Sl.No.9.

3. According to the Navy Group 'C' (Technical Supervising Staff) Recruitment Rules, 1993, the post of Charge Man Grade-II was a selection post. The method of recruitment was (i) 75% by promotion failing which by direct recruitment and (ii) 25% by direct recruitment. By the amended Annexure A-1 "The Navy Groups 'B' and 'C' Dockyards or Naval Ship Repair Yards (Technical Supervisory Staff Recruitment Rules, 2007" notified on 6.2.2007 the method of recruitment has been changed to 33 1/3% by direct recruitment and 66 2/3% by promotion. Tradesman Highly



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Skilled having eight years service in the grade rendered after appointment thereto on a regular basis in the scale of pay of Rs.4000-100-6000 and who have passed the departmental qualifying test is eligible for consideration for promotion. The applicant and the 3rd respondent were eligible to be considered by the DPC in accordance with their positions in the seniority, subject to suitability and fitness. A substantive vacancy of Charge Man Grade-II was to arise with effect from 2.1.2007. In anticipation of the said vacancy the DPC was convened on 30.5.2006. According to the applicant, the 3rd respondent was not eligible for promotion as a disciplinary proceeding warranting major penalty was initiated against him vide Memorandum of Charge dated 17.3.2006 on the allegations that he committed manipulations in the matter of his tour on LTC with family. On culmination of the disciplinary proceedings, vide Annexure A-4 dated 2.1.2007, he was imposed with a major penalty of "reduction of his pay by one stage from Rs.6200/- to Rs.6050/- in the time scale of pay of Rs.5000-150-8000 for a period of one year with effect from 1.2.2007 with a direction that he will not earn increment of pay during the period of reduction and that on the expiry of this period, the reduction will have the effect of postponing his future increments of pay. However, the 2nd respondent forwarded only the name of the 3rd respondent for consideration of the DPC. Neither the service records nor the details regarding the pendency of disciplinary proceedings and admission of guilt by him have been forwarded to the DPC. Therefore, the DPC considered the claim of the 3rd respondent alone. He has also submitted that neither the DPC had drawn any select list nor published any such list. No sealed



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cover procedure was also adopted by the DPC. Rather, the DPC minutes were kept as a secret and no efforts were made to finalise the selection proceedings and to appoint the incumbent who was selected. As such, the substantive vacancy which arose on 2.1.2007 remained unfilled for more than one year. According to the applicant, he had rendered outstanding service all through his service career and he bagged merit certificates for meritorious services. He was also granted cash awards for meritorious service by the Vice Admiral. He was deputed for special training in USSR and obtained the certificate issued by the Ministry of Defence, USSR. He has, therefore, submitted that he was demonstrably superior to respondent No. 3.

4. The applicant has further submitted that for another substantive vacancy which arose with effect from 1.3.2007 also, the DPC was convened on 29.5.2007 but the said DPC also did not take any steps to prepare any select list. Instead, the DPC considered the claim of only V.H.Ameer, his immediate senior for one vacancy, even though the vacancy which arose on 2.1.2007 was still remained unfilled. Thereafter, V.H.Ameer was promoted as Charge Man Grade-II (Radio) with effect from 6.6.2007 vide Annexure A-12 order of same date. However, since the Warship Overseen Team (WOT for short) issued order postponing the requirement of Charge Man Grade-II to 2009 the promotion of V.H.Ameer was cancelled the same day. Later on, he was promoted against a substantive vacancy with effect from 1.3.2008.



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5. Later, without conducting any review DPC the 3rd respondent was promoted as Charge Man Grade-II with effect from 1.2.2008 vide Annexure A-15 order of the same day on the premises that he was selected against the vacancy arose on 2.1.2007 by the DPC held on 30.5.2006. According to the applicant, the action of the respondents in keeping the vacancy unfilled which arose on 2.1.2007 till 31.1.2008 enabling the 3rd respondent to get himself promoted to that post was wrong as the applicant was eligible to be considered for promotion during that period. Aggrieved by the aforesaid Annexure A-15 order, he made Annexure A-16 representation stating that the DPC has not considered him for promotion even though he was eligible to be promoted during the period from 2.1.2007 to 31.1.2008.

6. The applicant further submitted that one more substantive vacancy of Charge Man Grade-II has arisen on 20.5.2008 consequent on the demise of Shri.K.J.Antony. The substantive vacancy which was postponed by WOT in the year 2007 has also become available. According to the applicant, he is entitled to be considered against the vacancy which has arisen on 20.5.2008. But no DPC was held so far. However, on enquiry he came to know that no DPC will be held as the said vacancy has been set apart for direct recruitment and the other vacancy will be treated as reserved for Scheduled Caste candidates based on post based roster.

7. According to him, the next vacancy of Charge Man Grade-II will arise only after a decade and he has been victimised and his legitimate claim for promotion has been defeated. He has, therefore, demanded that the



Annexure A-15 proceedings dated 1.2.2008 promoting the 3rd respondent may be annulled and he may be promoted to the category of Charge Man Grade-II in his place.

8. The counsel for the applicant has also relied upon the judgment of the Apex Court in Union of India Vs. K.V.Janakiraman (AIR 1991 SC 2010) in which it has been held as under :-

“ According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be

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irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal."


9. In the reply statement the respondents have submitted that for the vacancy of Charge Man Grade-II which has arisen on 6.1.2007, a list of five candidates including the applicant and the 3rd respondent was placed before the DPC which met on 30.5.2006. The 3rd respondent, the senior most among them was considered for the promotion. He was assessed "very good" as against the bench mark of "good". However, since he had been issued with a charge sheet under Rule 14 of CCS (CCA) Rules 1965 in March, 2006 he was not recommended for promotion. They have also submitted that according to the rules in force, the senior most person is to be assessed by the DPC even though the disciplinary case was pending against him. The findings of the DPC was, however, kept in sealed cover with necessary notation on the cover. The same proceedings were also continued in the subsequent DPCs till he was cleared from the penalty. When the penalty period is over, he would become eligible for promotion to that post. They have also submitted that the rules further stipulates that if a person is barred from promotion due to the pending disciplinary proceedings, a permanent vacancy has to be reserved for such a person when his/her case is placed in sealed cover by DPC. The respondents department had only followed the aforesaid procedure in the case of the 3rd respondent. Since the applicant was at 3rd position in the seniority list at



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the time the DPC was convened for preparing select list for the vacancy which arose in January, 2007, he was not in a position to be considered for the only anticipated vacancy available at the time. They further submitted that as per the guidelines contained in DoPT OM No.22011/4/91-Estt. (A) dated 14th September 1992, a person, who is issued with a charge sheet and subsequently imposed with a penalty for his misconduct, is under cloud only during the penalty period. Since the 3rd respondent was the senior most to be considered for the promotion for the post of Charge Man Grade-II (Radio) amongst the list of 5 employees placed before the DPC in May, 2006, the DPC has adopted the sealed cover procedure in the case of the 3rd respondent and when his penalty period has expired on 31.1.2008 he was promoted with effect from 1.2.2008. The applicant could not be considered for the post during the period since the only vacancy arose on 2.1.2007 had to be kept unfilled for the 3rd respondent to promote him on completion of the penalty period.

10. As regards the vacancy against the newly sanctioned post for Charge Man Grade-II Radio at WOT, Kochi which arose on 1.3.2007, the DPC was held in the year 2007 and V.H.Ameer who was the next senior was promoted. Later on, the said promotion was cancelled on the same day due to the non-requirement of the unit. Subsequently, V.H.Ameer, who was senior than the applicant, was promoted against a vacancy which arose on 29.2.2008.



11. They have also submitted that the vacancy which has arisen on 20.5.2008 consequent to the demise of K.J.Antony has been earmarked for direct recruitment and another vacancy which has arisen as a result of revised requirement of WOT Kochi has been earmarked for SC candidate for departmental promotion against the 7th point in the roster. The applicant being a General candidate is not entitled to be considered for that post.

12. The 3rd respondent has also filed a reply statement which is in agreement with the reply statement filed by the official respondents.

13. The applicant in his rejoinder has submitted that even if the department had adopted sealed cover procedure, none of the procedure contemplated in adopting sealed cover procedure was followed. The extent rule/instruction does not contemplate that the substantive vacancies could remain unfilled till senior is exonerated on the culmination of disciplinary proceedings or till the currency of penalty imposed against the senior is over. If the senior was under cloud, his claim could be kept in sealed cover till the proceedings were finalised and vacancy could be filled by promoting the junior qualified incumbent from the select list. In the instant case at the time when Departmental Promotion Committee held, charges were framed against the 3rd respondent. A penalty of reduction of pay involving postponing of future increments was imposed on 1.2.2007. The penalty is grave and major as it has got impact in service career till retirement. Therefore, the finding of internal selection committee in the

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sealed cover, if any, should not have been acted upon and the claim of the 3rd respondent for promotion should have been considered by the next internal selection held in normal case subsequent to the date on which the pending case has been declared against him. In other words, the procedure adopted by the department is illegal. The vacancy which arose on 2.1.2007 ought to have been filled by appointing the applicant who is demonstrably superior.

14. We have heard counsel for the parties. We have also gone through the records relating to the DPC made available by the counsel for the respondents. We find that the 3rd respondent was under cloud with the issuance of the charge sheet against him on 17.3.2006. A substantive vacancy of Charge Man Grade-II (Radio) was to arise on 2.1.2007. To fill up the said vacancy, a DPC was convened in anticipation on 30.5.2006. The department placed an eligibility list comprising 5 persons including the 3rd respondent and the applicant in the order of their seniority before the said DPC for its consideration. The 3rd respondent was the senior most among them. As the DPC assessed him and found that his overall grading was "very good" as against the bench mark of "good", other persons in the eligibility list was not assessed. The DPC also noted in its meeting that the 3rd respondent was facing departmental proceedings. His case was, therefore, kept in sealed cover. The DPC again met on 29.5.2007 to fill up the two vacancies, the one which have arisen earlier on 2.1.2007 and the newly arisen vacancy on 1.3.2007 and considered 6 persons including the 3rd respondent and Shri.V.H.Ameer. The applicant's name does not figure



in the list of persons included in the zone of consideration. The DPC assessed only the names of the 3rd respondent and Shri.V.H.Ameer in the order of their seniority against the said two vacancies. Both of them were graded as "very good". As the 3rd respondent was still undergoing the penalty, the assessment in respect of him was again kept in sealed cover. Shri.V.H.Ameer who was also found fit was recommended for promotion to the 2nd vacancy. Others in the list were again not assessed in terms of the GOI Min.PPG&P OM No.22011/2/2002-Estt.(A) dated 6.1.2006 "as sufficient number of employees with prescribed bench mark have become available." Later, on expiry of the penalty period on 31.1.2008, the department on its own has opened the sealed cover containing the assessment of DPC in respect of the 3rd respondent and promoted him as Charge Man Grade-II (Radio) with effect from 1.2.2008 against the vacancy kept unfilled, after approval from the competent authority.

15. From the aforesaid factual position, it is seen that the DPC as well as the respondents department have not followed the prescribed procedure in the matter of selection to the post of Charge Man Grade-II (Radio) in its meetings held on 30.5.2006 and 29.5.2007 and the ultimate promotion of the 3rd respondent with effect from 1.2.2008. When the 3rd respondent who was the senior most among the persons included in the zone of consideration was assessed as "very good" which is above the bench mark of "good" but could not be recommended for promotion as the disciplinary proceedings were pending against him, the DPC should have assessed the next person in the zone of consideration and if he was found having



the bench mark or above, should have recommended him for ad hoc promotion as Charge Man Grade-II (Radio). According to para 3.1 of the Government of India, Department of Personnel and Training O.M.No.22011/4/91-Estt. (A) dated 14.9.992, *if any penalty is imposed on the Government servant as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case of promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him.* The Hon'ble Apex Court in Janakiraman's case (supra) has also upheld the above position on the ground that an employee found guilty of misconduct cannot be placed at par with employees and treating his case differently is not discriminatory. The respondents should not have kept the vacancy which has arisen on 2.1.2007 unfilled till the currency of the penalty undergone by the 3rd respondent was over on 31.1.2008. Further, without convening the DPC, the official respondents themselves should not have opened the sealed cover and promoted the 3rd respondent with effect from 1.2.2008. Such a promotion is contrary to the prescribed procedure and the law laid down by the Apex Court in Janakiraman's case (supra). We, therefore, quash and set aside the Annexure A-15 order to the extent that it promoted the 3rd respondent as Charge Man Grade-II (Radio) in the scale of Rs.5000-150-8000. This OA is accordingly allowed to that extent.



16. However, at this stage the other question to be considered is whether the applicant has personally suffered any prejudice or not. In the order of seniority, the applicant was only at the 3rd position. Shri.V.H.Ameer was the next person to be considered for promotion in officiating capacity in the DPC held on 30.5.2006. However, he was not considered at all. As he was assessed as "very good" by the subsequent DPC held on 29.5.2007, it is clear that he was fit for promotion as on 2.1.2007, had he been assessed on 30.5.2006. Therefore, the applicant had no valid claim for promotion as Charge Man Grade-II (Radio) even on ad hoc basis with effect from 2.1.2007. As against the vacancy which has arisen on 1.3.2007, though Shri.V.H.Ameer was promoted as Charge Man Grade-II (Radio) with effect from 6.6.2007, the said promotion was cancelled on the same date due to administrative reasons. In that event if Shri.V.H.Ameer had been promoted on ad hoc basis with effect from 2.1.2007, he would have continued in that capacity till the next DPC which considered him for regular promotion on 29.2.2008. Hence the applicant had no opportunity to get promoted before Shri.V.H.Ameer was promoted.

17. The respondents has also explained in their reply statement that the 3rd vacancy which has arisen on 20.5.2008 has been earmarked for direct recruitment and 4th vacancy which has arisen as a result of the revival of the postponed vacancy by the WOT in the year 2007 has been reserved for Scheduled Caste candidate and the applicant has no claim over them.



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18.. In view of the above position, the prayers of the applicant to declare that he was eligible to have been promoted against the vacancy of Charge Man Grade-II (Radio) which has arisen on 2.1.2007 and to appoint him against that vacancy with consequential benefits or to declare that the vacancy which has arisen on 20.5.2008 is to be filled up by promotion and to consider his claim for such promotion or to declare that the next vacancy which has arisen in the year 2008 is to be filled up by general candidate, cannot be granted.

19. There shall be no order as to costs.

(Dated this the 29th day of December, 2009)


K.NOORJEHAN
ADMINISTRATIVE MEMBER


GEORGE PARACKEN
JUDICIAL MEMBER

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