CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.538/09

Thursday **this, the 14 th day of July, 2011**

CORAM:
HON'BLE MR.JUSTICE P.R.RAMAN, JUDICIAL MEMBER
HON'BLE MR.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

Cherian Kurian, aged 56 years,
S/o Late Kurian,
Attumalikal,
Changapuzha Nagar,
Cochin-33
(Deputy Director, ESI Corporation
Zonal Office, Ernakulam). .. Applicant

By Advocate: Shri P.V.Mohanan

vs.

1. The Secretary,
   Labour and Employment,
   Government of India,
   Standing Committee Chairman,
   ESI Corporation, Shram Shakti Bhavan,
   New Delhi-1.

2. The Director General,
   ESI Corporation,
   Panchdeep Bhavan,
   CIG Marg,
   New Delhi-2. .. Respondents

By Advocate: Shri T.V.Ajayakumar

The Application having been heard on 01.07.2011, the Tribunal on 14.07.11 delivered the following:-

ORDER

HON'B LE MR.JUSTICE P.R.RAMAN, JUDICIAL MEMBER:-

The applicant entered the services of the Employees State

Insurance Corporation, hereinafter referred to as as the 'ESI Corporation' as Insurance Inspector with effect from 18.03.1980.Subsequently he was appointed as Assistant Regional Director with effect from 27.10.1992 on being recommended by the Union Public Service Commission. The post of the Deputy Director is the next higher promotional post. The applicant became eligible to be considered for promotion in 1997,but he was promoted to the post of Deputy Director only on 29.3.2007 because a disciplinary action was pending against him and final orders were passed only on 25.6.2005. The charge levelled against the applicant as per the Memorandum of Charges dated 15.04.1997 is that the applicant while working as the Assistant Regional Director , ESI Corporation, Bangalore intentionally and with mala fide intention reduced the amount of contribution due from Rs.1,47,581/- to Rs.7145/- in respect of M/s Laxmi Boilers by ignoring the interest of the ESI Corporation. By the above said act he exhibited lack of integrity and devotion to duty and also exhibited a conduct unbecoming of an employee of the Corporation, thus violating Rule 3(I)(i)(ii) and (iii) of the Central Civil Services (Conduct)Rules,1964 read with the Regulation 23 of the ESIC(Staff and Conditions of Service)Regulations, 1959.The Memorandum of Charges is produced as Annexure A2. Along with the Memorandum of Charges contains the Statement of Imputation of Misconduct in Annexure A2 as per which one Insurance Inspector after inspecting the premises of the establishment of M/s. Laxmi Boilers recommended claiming Rs.1,47,581/- as contribution on omitted wages from the employer amounting to Rs.25,48,635/- for the period from 10/89

to 3/92. Notice of hearing was issued under the signature of the applicant as Assistant Regional Director in a proceeding under Section 45-A of the ESI Act, a provision for the ad hoc assessment of the contribution. The case was posted to 18.05.1994. But the employer did not turn up for personal hearing. Hence the Branch vide noting dated 19.05.1994 submitted the file to the applicant for passing the orders. On 25.5.1994 the applicant endorsed for issuing the order and a draft was accordingly put up on 23.5.95 and which was approved by the applicant. The fair order was signed on 27.5.1994. Later the employer by letter dated 3.6.1994 represented for providing one more opportunity as his non-appearance was due to unavoidable reasons on the date fixed for hearing. The applicant accordingly put up a proposal on 14.6.1994 to the Regional Director for cancellation of the order passed earlier and to reopen the case. This proposal was accepted by the Regional Director on 14.6.1994. Subsequently the employer was heard on 15.6.94 and orders were passed by the applicant reducing the contribution to Rs. 7,145/- as against Rs.1,47,581/- as originally assessed and demanded. The subsequent action was also approved by the Regional Director on 15.6.1994. It was further alleged that the applicant while reducing the contribution payable acted against the interest of the ESI Corporation and the same has been done with a view to favour the employer as is evident according to the ESI Corporation from the following facts, viz. (i) Final order was reopened mentioning that the employer had met the applicant on 19.5.94 whereas no such remarks was recorded by him when the file came to him on three

occasions, i.e. on 19.5.94, 25.5.94 and 27.5.95. There was also no evidence available to show that the representative of the employer appeared before him on 19.5.1994. If it was otherwise, the applicant could have considered the case before passing final order on 27.5.1994 when the draft was put up before him. His explanation that it was an inadvertent omission was not convincing.(ii) His action of reducing the contribution without making any effort to reconcile the difference is by ignoring the interests of the Corporation.(iii)The proposal to cancel the 45-A order was put up on 14.6.94 to the Regional Director , approved by the Regional Director on the same date, the employer was heard on 15.6.1994 and the proposal to reduce the contribution was also put up to the Regional Director on 15.6.1994, the Regional Director approved the same on the same date. Thus rushing up of the cancellation of the order, hearing of the employer, reducing the contribution and getting approval by the Regional Director within a span of two days, will show that the applicant and the then Regional Director has acted hand in glove with the employer.(iv)Though there is only one contract employee drawing more than Rs.1600/- a number of such persons had been taken into account as drawing more than the prescribed limit and their wages exempted by the applicant. (v) That the Vigilance conducted inspection; it was pointed out that the records maintained by the employer are not genuine.(vi) That on the basis of the vigilance report an order under Section 45-A of the Act has been passed on 31.3.97 after personal hearing and the amount of contribution assessed as Rs. 1,63,536/- . The above said acts are stated to be

exhibition of lack of integrity and devotion to duty and conduct unbecoming of an employee of the Corporation.

2. The applicant denied the charges, but not being satisfied with the reply given an enquiry was conducted and the Enquiry Officer submitted his report and his conclusions were as follows-

> "(I) It is seen that the area inspector(PW.3) pointed out the omitted wages in his inspection report in the absence of records which were not produced before him in spite of affording reasonable opportunities to the employer consequent and based on the report, a claim for Rs.1,47,581/- against the employer was made. This process is normally found acceptable when the employer fails to produce the relevant document to the area Inspector and not otherwise.
>
> (II) On appeal by the employer, the then RD ordered for reopening of the 45-A order, reassessment and issue of revised claim of contribution on the authority of which, the CO heard the employer, re-verified the documents and reduced the contribution to Rs.7,145/- after being satisfied with the genuineness of the documents, transactions transcribed from the main ledgers to the profit and loss account statements and after due application of mind and best judgment as required under various instructions.
>
> (III) The Vigilance inspector(PW.) I., after verifying the same set of records which were produced before the CO submitted a report pointing out omitted wages to the tune of Rs.20,53,795/- on which ESI contribution has been worked out to the extent of Rs.1,48,900/-. But, this exercise by the Vigilance inspector has been carried out in the same manner as was done by the area Inspector i.e. without having verified any supporting documents/vouchers etc., in support of the omitted wages arrived at by him which is found to be inconsistent with the normal inspection by Vigilance which is expected to bring out the facts and figures with proper documentary evidences so as to assert with absolute degree of definiteness/accuracy of the contribution amount arrived at by him in view of the follow-up action which will have a legal backing or force based on his report. In other words, it is only based on Ex.P.2. the case has been reprocessed by issue of an order under sec. 45-A of ESI Act(Ex.P.5) regardless of the earlier 45-A order dated 27/31.5.1994 another "letter form" claim for Rs.7,145/-(Ex.P.1).

(IV) It is seen from the details of three different ESI contribution amounts that, at all the three stages i.e. inspection by area inspector(PW.3) re-verification by the CO and Vigilance inspector (PW.I) have brought out three different figures relating to omitted wages and consequent contribution due in respect of one and the same unit after verifying the same set of records produced to all the three officers except PW.3 to whom only the ledgers were made available.

(V) It is also found that the details of figures in Ex.P.2 arrived at by the PW.1 has come under scrutiny by the CO resulting in discrepancies between the figures in the ledger and the figures complied by the PW.I in his Vigilance report and the discrepancies pointed out by the CO has been accepted and confirmed by the PW.I. This position shows that the PW.I in his report brought out the figures, which were not as accurate as expected after a "super check". Apart from this fact, it is also observed that, none of the prosecution witnesses have disputed the fact that the Profit and Loss account statement contained the facts and figures, which are reflected in the main ledgers, maintained by the employer untied various heads."

In view of the above discussions and also in view of the documentary and oral evidences adduced before me, I hold that the charges against the charged officer have not been proved."

3. The Disciplinary Authority, however, disagreed with the findings of the Enquiry Officer for his own reasons and ultimately entered a finding of guilt and imposed a punishment of 'Censure' on the applicant. Annexure A6 is the copy of the Order dated 26.5.2005 imposing the punishment. The disagreement memo (Annexure A3) was communicated, representation was submitted by the applicant(Annexure A4) and it was after consideration of the representation that the final orders imposing the punishment was passed, as mentioned above. Though an appeal was preferred by the applicant vide Annexure A7, the Appellate Authority also concurred with the finding of the Disciplinary Authority and dismissed the appeal by Annexure A8 dated 15.05.2008.

4. The applicant thereafter preferred a revision before the Revisional Authority which was also dismissed as per Annexure A12.

5. The applicant seeks to quash Annexures A6, A8 and A12, which are orders respectively passed by the Disciplinary Authority, Appellate Authority and the Revisional Authority and he seeks for a declaration that he is entitled to have been selected and appointed to the post of Deputy Director with effect from 6.10.1997 with all consequential benefits including arrears of pay, seniority and to promote him to the next higher post on due date with all consequential benefits. He also seeks for direction to the respondents to open the sealed cover kept at the time of DPC held in June 1997 and promote him to the cadre of Deputy Director w.e.f. 6.10.1997 and that the penalty of censure shall not disentitle him for promotion to the next higher post.

6. It is contended by the applicant that the applicant was exercising a quasi judicial function when the amount of contribution on omitted wages was assessed and passed an order under Section 45-A of the ESI Act and the Memorandum of Charges issued were direct interference of such function which on the face of the factual matrix available in the case, is unsustainable as the statement of allegation supporting the charges itself will reveal that the allegations cannot be attributed as misconduct in the eye of law. If at all there was an error in the order passed, that was a matter for rectification by the higher authority

and cannot fall as a subject matter for disciplinary action. It is also pointed out that the Enquiry Officer has entered a clear finding that the applicant is not guilty of the charges with reasons thereof. The Disciplinary Authority has no material to disagree with the report of the Enquiry Authority. That the decision of the Disciplinary Authority is based on material from external agencies unconnected with the charges. That the report of the Enquiry Officer was not furnished to the applicant and thus denied an opportunity to persuade the Disciplinary Authority not to disagree with the finding of the Inquiry Officer. The para 2 and 3 of the disagreement memo are not included in the charges, though the Appellate Authority finally dropped para 1 and 2 , but did not interfere with the Order of the Disciplinary Authority. At any rate, the delay in finalizing the disciplinary proceedings having due regard to the ultimate penalty imposed on the applicant being minor in nature viz. 'Censure' has adversely affected his promotion. It was orally argued referring to the reply filed by the respondents that the applicant was not considered for promotion in the subsequent vacancies even by adopting sealed cover until the final order was passed and only promoted him in future vacancy in 2007.

7. The case of the respondents as revealed from their pleadings is that if as requested for by the applicant to treat him as having been selected and appointed to the post of Deputy Director w.e.f. 6.10.1997 with all consequential benefits it would adversely affect the seniority and all other consequential benefits of a number of officers of the ESI

Corporation who had been promoted to the post of Deputy Director w.e.f 6.10.1997 and thereafter till 29.3.2007 (when the applicant was promoted to the above post) and cannot be allowed especially when none of those who would thus be affected are made parties. It is then contended that the undue haste shown by the applicant in the matter was suspicious, that the contribution was drastically reduced by the subsequent order dated 15.6.1994 and a letter asking the employer to pay the amount as quantified within two weeks. That letter is produced as Annexure R1(b) which is written in the handwriting of the applicant himself. That no reference was made to the earlier order in Annexure R1(b) nor was the earlier order cancelled. They reiterate the allegations contained in the charge sheet and would seek support of the subsequent order passed by the Deputy Director vide his Order dated 31.3.97 whereby the Deputy Director had redetermined the amount at Rs.1,63,536/- with interest of Rs.6,520/- by Annexure R1(c) which was upheld by the Employees Insurance Court, an in vain attempt on the part of the employer to challenge the same. It is also contended that in O.A.No.376/97 filed by the applicant seeking to challenge the charge sheet itself (Annexure A2) was repelled by the Bangalore Bench of the Tribunal holding the allegation of mala fide leading to the issue of the aforesaid charges, is not well-founded. That case was filed by the applicant for ad hoc promotion after quashing Annexure A2. The other part of the order of the Tribunal in O.A.No.376/97 directing the holding of the review meeting of the screening committee to consider the case of the applicant was challenged before the Hon'ble High Court of Karnataka in W.P(C) No.190

of 1999 and by Annexure R1(e) judgment, the Hon'ble High Court set aside the order of the Tribunal. Hence the original documents were stuck in the Headquarters because of the pendency of those cases and could be sent to the Enquiry Officer only on 19.2.98.The applicant had also made many representations and objections in the course of the enquiry and even sought to drop the disciplinary proceeding. Hence the enquiry could not be proceeded with. Mean while the applicant was transferred from Karnataka region to the Kerala region which was the subject matter of O.A.No.578/2000 before the Central Administrative Tribunal, Ernakulam Bench,which was subsequently dismissed. Thus the applicant was adopting dilatory tactics. Thus out of the 6 years time taken for completing the enquiry, delay of 4 years was contribution of the applicant himself.The other reason for the occurrence of the delay was due to the transfers and retirement of the Enquiry Officers and the Presenting Officers. With reference to the allegation of non-consideration of the materials on record by the Disciplinary Authority it is contended that the Disciplinary Authority disagreed with the finding of the Enquiry Officer for various reasons stated in the disagreement memo (Annexure A3).The disagreement memo is thus supported by documentary as well as logical conclusions. If there is some evidence to support the charges there is hardly any reason for interference by a Court of law. Regarding furnishing the copy of the enquiry report it is submitted that the earlier omission to supply a copy was rectified later on noticing the same and a copy of the report was sent to the applicant on 29.5.2006. Further the applicant did not seek for a copy of the

enquiry report and he obtained a copy of the report before he submitted Annexure A4 representation. As the applicant himself has referred to the contents of the report wherever he found it necessary to make a reference thereof. By imposting a minor penalty, the delay, if any occurred in finalizing the proceedings, have been taken note of as otherwise initiated was one for imposing a major penalty. But the applicant was actually imposed only a minor penalty. The allegation that the Disciplinary Authority had been influenced by the recommendation of the other officers and the decision making process suffered, is denied as incorrect and untenable. The applicant had been promoted as Deputy Director with effect from 29.3.2007 as he could not be considered for promotion earlier on account of the pendency of disciplinary proceeding held against him and non-according of vigilance clearance. His case for regular promotion was earlier considered by the Departmental Promotion Committee on 6.10.1997 and kept in sealed cover till the termination of the disciplinary proceedings pending against him strictly in accordance with the instructions contained in O.M.No.22011/4/91/Estt.(A) dated 14.9.1992 issued by the DOP&T. The said O.M. is applicable to the ESI Corporation. Since the applicant was not exonerated and a penalty of 'Censure' was imposed, sealed covered could not be opened and his prayer to that effect is not, therefore, sustainable. Reliance is placed on the decision of the Apex Court in K.V.Janaki Raman, reported in AIR 1991 SC 2010. Also relies on the decision of the Apex Court in State of M.P. vs. I.A.Quershi, 1998(9)SC 261. It is prayed that the O.A. is devoid of merit and hence dismissed.

8. In the rejoinder filed by the applicant it is stated that there was no delay in submitting the reply to the Memorandum. The Memorandum of Charges was delivered to the applicant only on 31.101994 and he submitted his reply on 11.11.1994. The applicant had prayed for day-to-day posting and to conclude the proceedings which was initially not allowed. It was only later Shri Jayavelu conducted the proceedings on a day-to-day basis.

9. We have heard the arguments of the learned counsel Mr. P.V.Mohanan appearing on behalf of the applicant as also Shri T.V.Ajayakumar, learned counsel appearing for the respondents. Considered the respective pleadings and perused the judgments cited.

10. It cannot be disputed that if the disciplinary proceedings are not vitiated and the penalty imposed was to be sustained, sealed cover procedure adopted in 1997 is validly done and the sealed cover cannot be reopened. In this connection we need only refer to the decision of the Apex Court in Union of India vs. K.V.Jankiraman; AIR 1991 SC 2010, wherein it was held that the employee found guilty of misconduct cannot be placed on par with other employees and his case has to be treated differently. Therefore, there is, 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 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 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. In State of M.P. and another vs. I.A.Qureshi;(1998)9 SCC 261, it was held that sealed cover containing the recommendation of the DPC can be opened only in cases of exoneration and not otherwise. When the departmental enquiry culminated in the imposition of the minor penalty of 'Censure' it was held that sealed cover could not be opened. The contention that "Censure" amounted only to a warning and not to a minor penalty was rejected. It was also held in a situation where the sealed cover procedure was followed and departmental enquiry ended in imposition of a minor penalty, the employee concerned can be considered for promotion only on prospective basis provided there was a vacancy. Reference was.

however, made to the circular dated 2.5.1990 which contained the guidelines in the matter of giving effect to the minor penalty of "Censure".A translated version of the circular was extracted in paragraph 4 of the judgement. After referring to the circular and relying thereon, it was held in para 5 that from the aforesaid circular it would be evident that the sealed cover containing the recommendations of the DPC has to be opened only in those cases where the delinquent officer has been fully exonerated by the departmental enquiry and in cases where the delinquent officer has been punished in the departmental proceedings , the sealed cover is not to be opened and the delinquent officer cannot be granted promotion on the basis of the recommendations of the DPC which is kept in the sealed cover.

11. Going by the facts as pleaded, the applicant who was an Assistant Director had to perform certain quasi judicial duties and in the performance thereof, certain lapses were noticed on his behalf which led to the initiation of a disciplinary action and Annexure A2 Memorandum of Charges dated 15.04.1997 was served on him. The disciplinary action culminated in an order imposing a minor penalty of 'Censure' only by Annexure A6 order dated 26.5.2005. Thus there was a delay of nearly 8 years from the date of issuance of the Charge Memo till the final order imposing the punishment was passed in 2005. He was in the feeder category for promotion to the post of Deputy Director. The Departmental Promotion Committee considered his promotion by adopting a sealed cover procedure in the vacancy which arose in 1997. It

is admitted by the respondents in paragraph 30 of the reply that because of the pendency of the disciplinary proceeding he could not promoted in the year 1997, 2001 or 2004. It is, however, not their case that sealed cover procedure was adopted in the subsequent vacancies in 2001 or 2004, the case of the applicant was not even reviewed during the interregnum period when the disciplinary proceedings was pending and he was given promotion only in 2007 after finalization of the disciplinary proceedings dated 25.6.2005. Admittedly, the applicant's case was considered for regular promotion by the Departmental Promotion Committee only in 2007. According to the respondents, it is specifically contended in paragraph 27 that the case of the applicant was considered by the DPC on 6.10.1997 and was kept in the sealed cover. It is further admitted in paragraph 30 of the reply statement that the applicant could not be promoted in the year 1997,2001 or 2004 as the disciplinary proceedings were pending. Hence, in 2001 and 2004 the DPC had been held for promotion, but the case of the applicant was not considered. There is no case for the respondents that they adopted sealed cover procedure during these years also. In other words, after considering his case in 1997, the applicant's case for promotion was not considered in the subsequent years in 2001 or 2004 and only after culmination of the disciplinary proceedings that in 2007, he was promoted. While it is true that the sealed cover need not be opened if the officer concerned is imposed a punishment including 'censure' as held by the Apex Court in (1998)9 SCC 261, it has to be remembered that the Apex Court was considering the issue based on the provisions contained in the circular

dated 2.5.1990 which contained the guidelines in the matter of giving effect to the minor punishment of censure about the promotion of government servants. A translated version of the circular is extracted in paragraph 4 of the said judgment and with reference to the said circular that in paragraph 5 it was held that from the aforesaid circular, it would be evident that the sealed cover containing the recommendations of the DPC has to be opened only in those cases where the delinquent officer has been fully exonerated by the departmental enquiry and in cases where the delinquent officer has been punished in the departmental proceedings, the sealed cover is not to be opened and the delinquent officer cannot be granted promotion on the basis of the recommendations of the DPC which is kept in the sealed cover. As far as the present case is concerned, the relevant circular is the O.M.No.22011/4/91-Estt.(A) dated 14th September, 1992 issued by the DOPT. A copy of the said O.M. is made available to us in the course of the arguments. As per para 2.1 of the O.M. the DPC has to assess the suitability of the Government servants coming within their purview along with other eligible candidates including those who are under suspension or in respect of whom charge sheet is issued or against whom criminal case is pending along with other candidates, but the assessment of the DPC in the case of those who are faced with disciplinary action is to be kept in sealed cover and the same procedure as has been outlined in para 2.1 has to be followed by the subsequent Departmental Promotion Committees convened till the case/criminal prosecution against the Government servant is concluded. Thus the non-consideration of the case of the

applicant for promotion in 2001 and 2004 without adopting the sealed cover procedure is per se contrary to the Departmental instructions as contained in the O.M., referred to above. If ultimately the disciplinary action ends in imposing a punishment, as per para 3.1 of the same O.M. the finding in the sealed cover need not be acted upon and his case for promotion be considered by the next DPC in the normal course and having due regard to the penalty imposed on him. As per para 4 of the same O.M. it is necessary to ensure that the disciplinary case/ criminal prosecution instituted against any Government servant is not unduly prolonged and all efforts to finalize expeditiously the proceedings should be taken so that the need for keeping the case of a Government servant in a sealed cover is limited to the barest minimum. Therefore it was decided that the appointing authorities concerned should review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of six months from the date of convening of the first DPC which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also in every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings/ criminal prosecution and further measures to be taken to expedite their completion. As per para 5 of this O.M. in spite of six months review, referred to in para 4, there may be some cases, where the disciplinary case/ criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC, which kept

its findings in respect of the Government servant in a sealed cover.In such a situation the appointing authority may review the case of the Government servant, if he is not under suspension to consider the desirability of giving him an ad hoc promotion keeping in view certain aspects referred in clauses (a) to (e) thereunder. The respondents have no case that the case of the applicant was reviewed every six months as provided in para 4 or as the case may be as provided in para 5 even after the lapse of two years after the DPC held in 1997 and kept his case in the sealed cover. They also could not adhere to the time limit as prescribed in the O.M. and complete the disciplinary proceedings within the least time as it is required to be done. Therefore in the light of the above provisions if the sealed cover is not to be opened,his eligibility for consideration in 2001 and 2004 could not have been denied.There may be cases where a Government servant may be inflicted a punishment of barring of an increment. So he may not be entitled to be promoted during the currency of the punishment. In case of punishment by way of demotion to a lower rank, only after he gets promotion from the feeder category after suffering the punishment, the question of considering him for future promotion to the higher post in the normal course would arise for consideration. But in the case of a punishment of "censure", the position is slightly different.If the enquiry was concluded and punishment imposed within a period of one or two years, then certainly the next DPC would have considered his case for promotion, of course taking into consideration the punishment imposed and may decide whether he should be promoted or not either in 2001 if not in 2004. Because of the

delay in completing the proceedings, he stands to lose such consideration. In other words, even when a punishment is imposed, the Departmental Promotion Committee is entitled to take into consideration of such punishment and decide his case for promotion to the future vacancies arisen after he was charge-sheeted. Therefore while the respondents are taking shelter under one paragraph of the O.M. to contend that he need be considered for promotion in the next arising vacancy, they have completely violated the other provisions contained in the O.M. which necessitates the conducting of the review every six months and even to consider for ad hoc promotion after two years when the Departmental proceedings could not be finalized. Coming to the question as to whether the delay was attributable on the part of the employee. The respondents was only placing reliance on the O.As filed by him before this Tribunal and the representations made by him seeking to drop the disciplinary proceedings. Nowhere it has been stated that the disciplinary proceedings was at any time stayed by any Court proceedings. On the other hand it was the specific case of the applicant that he even requested for a day-to-day conduct of the enquiry after the 2nd O.A. was disposed of by the Bangalore Bench of the Tribunal. Therefore, we find that there was no impending circumstances justifying the delay in completing the proceedings in the factual situation especially when the very penalty imposed was only 'Censure' which may have an adverse consequence on the employee to consider his eligibility for promotion during the several occasions when even juniors to the applicant could have been considered for such promotion. The

contention of the respondents that they could not consider his case for promotion earlier on account of the pendency of the disciplinary proceedings is unconvincing and contrary to the provisions contained in the O.A. which is already referred to in the above paragraph. The non-according of the vigilance clearance is also no ground as the respondents are bound to place the matter before the DPC for reviewing his case every six months.

12. We may consider as to whether the allegation raised against the applicant because he is exercising quasi judicial function, it is liable to be set aside. As held by the Apex Court in AIR 1999 SC 2881, disciplinary proceedings against a quasi judicial authority would certainly lie, but mere mistake of law or wrong interpretation of law cannot be the basis for initiating the proceedings. But in the present case the subject matter of allegation raised is not the decision as such rendered by the applicant stemming from any mistake of law or wrong interpretation of law. Here the allegation contained in the Memorandum of Charges is per se regarding the procedural irregularities in the matter of not recording the presence of agent on 19.5.1994 and despite the fact that the delinquent had recommended for cancellation of the first order on that ground also, did not refrain from passing an order on 27.5.1994 when final order was signed by him. Even if there may be some explanation for not recording in the file about the attendance made by the employer's representative on 19.5.1994 as the case was already put up for orders on 23.5.94, one cannot find any justifiable reason for not remembering the

same and passing orders on 27.5.1994 if as a matter of fact that was a reasonably good ground for reopening the case, as proposed. Further the delinquent officer though obtained the permission of the higher authority for rehearing the case, the next day he reheard the matter without any notice to the employer and further passing an order on the next day looms large having due regard to the other circumstances narrated in the statement of allegations. Normally after obtaining the permission of the higher authority it is contended that the matter ought to have been posted for rehearing after due notice to the parties which is also not done in this case. It is the further case of the respondents that there was a sharp reduction of the amount of contribution determined by the second order. If independently considered, it is open to a quasi judicial authority to make an assessment which may result in either reduction or increase in the amount as the case may be and the opinion formed by the quasi judicial authority when he makes an assessment, merely because there was a reduction in the amount of contribution so assessed from the amount earlier determined, is no reason to hold that it amounts to a misconduct. But when considered along with the other circumstances of passing an order so hastily, cannot be said to be one falling outside the purview of a misconduct. Hence, we are unable to accept the contention of the applicant that the charges levelled against the applicant cannot be attributed as a misconduct at all. The Enquiry Officer though found the delinquent not guilty of the charges, the Disciplinary Authority did not agree with this finding, which he is entitled to under law. We do not find sufficient reason to interfere with the said order. Even though it is

contended that a copy of the enquiry report was not furnished to the applicant as it ought to be, as held by the Apex Court in Managing Director,ECIL, Hyderabad vs. Karunakar;AIR 1994 SC 1074. We find that the said decision may not fully apply to the factual situations, since admittedly the applicant was aware of the finding of the Enquiry Officer and he had referred to such findings when he submitted his explanation to the Disciplinary Authority to the disagreement memo. Thus, no prejudice is caused to him by the non-supply of the report. Secondly it is a case where the enquiry report was in his favour and not adverse to him. The requirement of furnishing a copy of the enquiry report arises only in cases where such report is adverse to the delinquent employee based on which the Disciplinary Authority proceeds further. If the enquiry report is in favour of the delinquent officer what is required to be done is to convey the contents as is done in the present case in the disagreement memo itself. In this connection, we may only refer to one of the decisions of the Apex Court in AIR1988 SC 2311;Union of India vs.Vishwa Mohan, wherein the Apex Court held as follows:-

> " As stated earlier, the appellant had in his possession the inquiry report/findings when he filed the statutory appeal as awell as the writ petition in the High Court. The High Court was required to apply its judicial mind to all the circumstances and then form its opinion whether non-furnishing of the report would have made any difference to the result in the case and thereupon pass an appropriate order. In paragraph 13, this Court in Managing Director, ECIL, Hyderabad,(1994 AIR SCW 1050)(supra) has very rightly cautioned:-
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> > "The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The Courts should avoid resorting to short cuts."

> In our considered view, the High Court has failed to apply its judicial mind to the facts and circumstances of the present case and erroneously concluded that non-supply of the inquiry report/findings has caused prejudice to the respondent."

Therefore, we find that there is no merit in the contention of the applicant that non-furnishing of the enquiry report when the very report is in his favour and about which he had knowledge at the time of submitting his representation, is in any way, vitiated. What has been imposed by way of punishment is only 'censure' which cannot be in the factual situations is held to be shockingly disproportionate as it is the minimum punishment that has been imposed. Based on our finding, we hold :-

(i) That the delay in completing the disciplinary proceedings have adversely affected the right of the applicant for being considered for promotion in so far as the respondents did not follow the procedure as contemplated in the Office Memorandum of the DOP&T dated 14th September,1992.

(ii) That the respondents ought to have placed the matter for review every six months and considered for an ad hoc promotion on completion of two years when the Departmental proceedings could not be completed.

(iii) The applicant is entitled to be considered for promotion by the Departmental Promotion Committee for the vacancies arose in 2001 and 2004.

(iv) Accordingly, we direct the respondents to hold a review DPC to consider the case of the applicant for promotion from an earlier date either in the vacancy in 2001, if not in 2004, as the case may be. The punishment imposed on the applicant will certainly be placed on record

before the DPC which after considering the guidelines issued in this regard , decide the case of the applicant accordingly. This exercise shall be done within a period of four months from the date of receipt of a copy of this order. Of course in case the applicant is found entitled to be promoted on a relatively earlier date, the DPC may also recommend as to whether he should be paid monetary benefits. If so, from which date. Consequential orders will be passed by the respondents based on such recommendation as expeditiously as possible, at any rate, within a period of one month from the date of receipt of the recommendation of the DPC. The O.A. is allowed, as above.

(K.GEORGE JOSEPH)
ADMINISTRATIVE MEMBER

(JUSTICE P.R.RAMAN)
JUDICIAL MEMBER

/njj/