

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.Nos.58/11 & 59/11

Friday... this the 22nd day of July 2011

C O R A M :

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

O.A.No.58/11

Abdul Khader Kunju Naina,
S/o.late Muhammed Kunja Naina,
Junior Engineer (Civ),
O/o.the Garrison Engineer (NW), Fort Kochi.
Residing at C/o.K.P.George, Kalarikkal House,
Mundamveli P.O., Kochi.

...Applicant

(By Advocate Mr.R.Sreeraj)

V e r s u s

1. Union of India represented by Secretary
to Government of India, Ministry of Defence,
New Delhi – 1.
2. The Chief Engineer,
Military Engineer Services,
Southern Command, Pune – 11.
3. The Chief Engineer (Naval Works),
Military Engineer Services, Naval Base,
Kochi - 4.

...Respondents

(By Advocate Mr.Sunil Jacob Jose,SCGSC)

O.A.No.59/11

P.P.Gopinathan,
S/o.late P.K.Padmanabhan,
Junior Engineer (Civ),
O/o.the Garrison Engineer (NW), South Kochi.
Residing at Poovathumkadavil House,
Madathumpady P.O., Poya (via), Thrissur.

...Applicant

(By Advocate Mr.R.Sreeraj)

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1. Union of India represented by Secretary
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Military Engineer Services, Naval Base,
Kochi - 4. ...Respondents

(By Advocate Mr.Sunil Jacob Jose,SCGSC)

These applications having been heard on 15th July 2011 this Tribunal on the 22nd July 2011 delivered the following :-

ORDER

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

As the above two OAs have the same legal issue, these are dealt with in this common order.

2. The facts of the case in OA No. 58 of 2011 are as hereinafter mentioned. The applicant, is functioning as JE (Civ) in the office of GE(I) (NW) Fort Kochi, which comes under CE (NE) Kochi. He stands transferred to CWE (NW) Mumbai coming under CE (Navy) Mumbai in a non sensitive post vide Annexure A-1 transfer order. On receipt of the transfer order, the applicant has penned a representation to the second respondent for review and cancellation of the transfer order so far as the applicant is concerned. Annexure A-3 refers. This was forwarded through proper channel on 14-09-2010 but the G.E (NE) returned the said representation along with letter dated 13 Nov2010, referring to another letter dated 04 Nov 2010 of the 3rd respondent. In the said letter of 04 November, 2010, there was a reference of another letter dated 15th October, 2010 of the 2nd respondent, stating that the representation is returned unactioned. The reason for having returned the representation unactioned is that the representation was received after 21 days of the issue of transfer order, whereas, the

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applicant could receive the transfer order only on 6 September, 2010 and his representation was sent on 14 September, 2010. Further, the applicant had requested for waiving the time limit in case there be any delay in filing the representation, vide Annexure A-4 and there is no response for the same so far. Mainly legal grounds have been taken by the applicants vide para 5 of the O.A. In addition, non consideration of the representation has also been taken as one of the grounds. Yet another ground taken is that the transfer is inter alia on CML basis, as has been spelt out and yet there have been replacements and the same makes the transfer order vitiated.

3. The facts of the case in respect of the applicant in OA No. 59 of 2011 are by and large the same save that his posting order is to CWE (Navy) Vasco and that he could receive the transfer order on 31-08-2010 and submitted a representation on 06-09-2010 vide Annexure A-3. However, the respondents proposed to relieve the applicant on 31-01-2011 vide Annexure A-4. Other contentions are as in the other O.A.

4. Respondents have contested the O.A. and their contentions, which are by and large the same in both the cases are as under :-

On 9th August 2010, when 6 JE (Civ), including the applicant were posted out of Kochi under CML-10 following reasons were taken into account for the said posting :-

a) Kochi complex was surplus.

b) As per Para 42 of A2 "while computing the period of tenure in a sensitive appointment, entire service profile of the individual will be considered irrespective of stay in the present unit/station/complex. In case there is only one Division/Sub Division in a station/complex, they will be transferred to another station/complex". Individual was continuously at sensitive appointment since 26th July 2004 ie., for more than 6 years.

c) No vacancy at CE/CWE office of his station was available. More over all other individuals at CE/CWE office were junior to individual as per station seniority and could not be moved out.

d) 127 Nos of JE (Civ) were cleared for appointment by Staff Selection Commission during September 2010 out of which 7 Nos of JE (Civ) (all are ladies) were posted to Kochi area. This was necessitated due to reasons that the Department cannot post all the new recruits on particular zone/station purely based on deficiency because it adversely affects the ground work. MES is an organisation were experienced J.Es are required on ground for projects and works at all the zones. These aspects amount to organization interest and better functioning of department and are above few individuals personal requirements when individual was posted out, Kochi complex was definitely surplus as on date also.

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5. Rejoinder and additional reply have also been filed. In his additional rejoinder the applicant has elaborately submitted the legal as well as the factual points which resemble written arguments.

6. Counsel for the applicants has argued that when the representations were sent on time, returning the same unactioned is illegal. Again, when the transfer is on CML basis, which has to be without any replacement, providing replacement would mean that the move of the applicant is for accommodating others. This is impermissible. Further, there is no surplus and there is only deficiency in the Kerala region and the same has not been properly verified by the respondent.

7. Counsel for the respondents has reiterated the stand taken in the counter and the additional reply. The Additional reply also contained the same contentions and averments as in the main reply.

8. Arguments were heard and documents perused. At the very outset, it is emphasized that the limited scope of judicial review on transfer of employees is fully kept in view while dealing with the issue here. To refer to a few decisions of the Apex Court -

(a) Who should be transferred where, is a matter for the appropriate authority to decide.

(b) A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights.

Shilpi Bose vs State of Bihar(1991) Supp.2 SCC 659

(c) It is settled law that a transfer which is an incident of service is not to be interfered with by the courts unless it is shown to be clearly arbitrary, or vitiated by mala fides or **infraction of any professed norm or principle.** (*Emphasis supplied*)

(i) N.K. Singh vs Union of India (1994) 6 SCC 98

(ii) Abani Kanta Ray vs State of Orissa (1995) Supp 4 SCC 169

(iii) Mohd. Masood Ahmad vs State of U.P. (2007) 8 SCC 150

9. In the instant case, since the E-in-C's Branch has clearly expressed that the transfer guidelines would be followed in letter and spirit, vide Annexure A-2. The said guidelines are the professed norms or principles and it is to be seen whether there is any infraction of the same, whereby the applicant's transfer gets vitiated.

10. The grievance of the applicant is that the applicant's representation, vide Annexure A-3 has not even been forwarded to the Headquarters. It is the case of the applicants that the professed norms have been followed more in breach than in compliance. To hammer home the point, the counsel for the applicant has referred to the contents of para 3 and 4 of Annexure A-3 representation in O.A.58/11. The same is reproduced below:-

"3. My posting is ordered quoting para 42 of the policy guide lines of 2007 August letter. Here it is submitted that I have not completed continuous six years executive\ service in this station. I joined in this station GE (NW) Fort Kochi on completion of my hard tenure at Port Blair during Apr 2007 as per your HQ posting order. So quoting Para 42 and issuing posting order to me is not at the best interest and it is total violation of the provisions. In this connection your HQ is requested to kindly link para 40 (k) (iii) on the above subject. Either the Government letter or the policy in force not stipulate that because of long stay in a particular station the individual can be posted out. In any of the policy letter stipulated that the subordinates service in a station is restricted to 3 years and bound to moved out whereas employee should not be employed continuously in the executive appoints to avoid undue benefits if any. It is the duty of the Zonal CE to issue LTO in time as stipulated.

4. The posting order issued without implementing/adhering to para 36 (a), (b) & (c) are against the norms. More over the posting order issued without considering the authorization, sanctioned strength and the CML ratio of JE (Civ). According to my knowledge this station is authorized for 64 JE (Civ) excluding Mily auth (ie CE (NW) – 7 Nos, CWE Kochi – 3 Nos, GE (NW) North Kochi – 16 Nos, GE (NW) South Kochi – 16 Nos, GE (NW) Fort Kochi – 16 Nos & AGE (I) R&D Kochi – 6 Nos) to make room for posting, while according establishment sanction the strength is reduced and which in turn results in CML posting. Once in a while a station can get affected by CML posting but in Kochi every year postings are issued under CML. Consequent on new appointment of JE (Civ) issued during Oct 2009 the percentage of CML position could have been increased. According to my knowledge the station is authorized for 64 JE (Civ) (ie. civilian strength) taking into consideration of the staffing pattern and the work load factor. If so the station can hold 30 Nos of JE (Civ) at Kochi area as per the CML % as the CML and ceiling has to be based on the actual authorization and not on the sanctioned strength. Against the 30, the station is presently holding 25 J.Es including including the seven numbers posted out hence the posting order issued is not in order. A CML posting order issued during 2009 Jul based on the 2009-10 establishment, hence issuing again a CML posting on the existing sanction cannot be in the best interest of the organization. The subordinate establishment sanction for the year 2010-11 has not yet been issued. Also the CML % is not yet intimated or circulated for information. The requirement of the staff for the newly raised formations were met from the available resources hence my posting order is totally against the laid down rules on the subject. The sensitive to non sensitive turn over is to be order by the Zonal CE as per the policy. Further your HQ is requested to place

the station and seniority list of JE (Civ) of each station under the jurisdiction of Southern Command Pune in the Web site so that it will be easy to find out and point out the discrepancy in the posting in time and it will be transparent. Without implementing para 36 (c) as specified ie making region, issuing posting order to Mumbai and asking to move cannot be justified. It is not out of place to mention here that in the case of officers orders were issued indicating regions."

11. The applicants have averred vide para 4.4 of their respective OA that their representation had not been considered by the competent authority, as these were not at all sent by the office to the Headquarters.

12. Law is settled on one issue that whenever such a representation is made against a transfer order, the respondents should duly consider the same, as otherwise, the individual has no means to challenge the decision. The respondents cannot justify their not forwarding the representation to the Headquarters on the ground that the same was beyond 21 days. What is to be seen is whether the representation had been addressed to the Headquarters and submitted through proper channel within the stipulated time. This having been done, if there be any delay in sending the same to the Headquarters, the applicant cannot be faulted with nor can he suffer for the inaction on the part of the respondents.

13. The other part of the case is relating to the total number of the sanctioned strength, borne strength and the CML strength about which we need not dilate since it is not exactly the function of the tribunal to work out the arithmetical calculation. It is for the respondents to verify from the records and take decision accordingly.

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14. In view of the above, the OAs are disposed of with a direction to the respondents to consider the Annexure A-3 representation of the applicants and arrive at a judicious decision. Till then the applicant's transfer be kept in abeyance. Should on justifiable ground, the transfer has to take place, sufficient time from the date of disposal of the representation be given to enable the applicants to prepare for their move. Relieving the individuals without affording time or in absentia would naturally raise some doubts on the bona fide of the action of the respondents. If there be any administrative exigencies, temporary transfer could be resorted to.

(Dated this the 22nd day of July 2011)

✓ Dr.K.B.S.RAJAN
JUDICIAL MEMBER

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