

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A No. 581 / 2008

Friday, this the 9th day of October, 2009.

CORAM

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

HON'BLE MR K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

V.D.Sisirkumar,
Deputy Commissioner of Income Tax (Exemption),
(Retired), O/o the commissioner of Income Tax, Aayakar Bhavan,
Kowdiyar.P.O., Thiruvananthpuram.Applicant

(By Advocate Mr P Santhoshkumar)

v.

1. Union of India represented by the
Secretary,
Central Board of Direct Taxes,
Ministry of Finance,
Department of Revenue,
Government of India,
New Delhi.
2. The chief commissioner of Income Tax,
Kochi.
3. The Commissioner of Income Tax,
Thiruvananthapuram.Respondents

(By Advocate Mr A.D.Raveendra Prasad, ACGSC)

This application having been finally heard on 17.9.2009, the Tribunal on 9.10.2009 delivered the following:

ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER


This is the 4th round of litigation by the applicant. His contention in this O.A is that he was entitled for promotion as Deputy Commissioner of Income Tax

with retrospective effect from 1.1.2006 i.e. the date from which his juniors have been promoted to the post, rather than from 13.4.2006 i.e. the date on which the DPC met and recommended his case for promotion because the disciplinary proceedings initiated against him ended up only with minor penalty of censure.

2. The brief facts of the case are that the applicant was issued with a charge sheet vide Annexure A-1 Office Memorandum dated 23.9.2004. The allegation against him was that he had committed gross irregularities in the completion of scrutiny assessments, when he was working as Income Tax Officer, Ward 3, Division II, Trivandrum. The said disciplinary proceedings culminated with the Annexure A-3 letter dated 28.6.2006 issued by the disciplinary authority imposing him with the minor penalty of censure. He made the Annexure A-4 appeal dated 21.7.2006. During the pendency of the appeal respondents issued the Annexure A-5 order dated 19.9.2006 promoting a number of Assistant Commissioners of Income Tax, both seniors and juniors to the applicant, as Deputy Commissioners of Income Tax. As the applicant's name was omitted from the said list and since he was going to retire on 31.12.2007 from service, he made the Annexure A-6 representation dated 22.9.2006 stating that he was denied the promotion without considering the aforesaid appeal against the order of censure which was pending. He has also requested to take necessary action to open the "Sealed Cover", if any, in his case and to take a decision on the appeal filed by him at the earliest and to grant him promotion as Deputy Commissioner with retrospective effect from 1.1.2006. Since there was delay in disposing of the aforesaid appeal, he approached this Tribunal vide O.A.61/2007 and the same was disposed of vide Annexure A-7 order dated 27.2.2007 directing the Union of India represented by Secretary, Central Board of Direct Taxes to dispose of his statutory appeal dated 21.7.2006 within a period of one month. Meanwhile, he was promoted as Deputy



Commissioner of Income Tax with retrospective effect from 13.4.2006 vide the Annexure A-8 notification dated 20.7.2007. Aggrieved by the aforesaid notification, he made the Annexure A-9 representation dated 21.8.2007 to the respondents once again requesting that his promotion should be from 1.1.2006 i.e. the date on which his junior was promoted as Deputy Commissioner of Income Tax. As no favourable decision was taken on the aforesaid representation, he again moved this Tribunal by O.A.664/2007 and the same was also disposed by the Annexure A-10 order dated 29.10.2007 directing the respondents concerned to consider and dispose of his representation and convey the decision within a period of one month. Pursuant to the aforesaid direction, respondents issued the Annexure A-11 impugned order dated 26.12.2007 stating that he was eligible for consideration for promotion to the grade of Deputy Commissioner of Income Tax with effect from 1.1.2006 but no promotion was made because the vigilance clearance was withheld in his case. Thereafter, the Director General, Vigilance informed the respondents that the penalty of censure was imposed upon him on 12.4.2006 and in terms of DoPT OM dated 15.12.2004, according to which a Government servant on whom a minor penalty has been imposed should be considered for promotion by the DPC which meets after the imposition of the said penalty and after due consideration of full facts leading to imposition of the penalty, if he is still considered fit for promotion, the promotion may be given effect after the expiry of the currency of the penalty. In his case, penalty was imposed on 12.4.2006 and the subsequent DPC held by way of circulation on 17.4.2007 and considered him fit for promotion and accordingly he was promoted on 13.4.2006. They have also submitted that the aforesaid OM dated 15.12.2004 has clarified that promotion is to be taken effect only from a date of subsequent to the expiry of the currency of the penalty, the officer would be entitled to pay fixation in the promotional grade with effect from



the date of actual promotion only, even if a person junior to him in the panel was promoted earlier, it will have no bearing on the pay to be allowed on promotion to the officer on whom a penalty was imposed and there shall be no stepping up of his pay. Therefore his claim for promotion to the grade of DCIT with effect from the date of promotion of his junior is not justified. The applicant once again approached this Tribunal vide O.A.139/2008 challenging the aforesaid Annexure A-11 letter dated 26.12.2007 but the same was disposed of by Annexure A-12 order dated 13.3.2008 holding that the statutory appeal made by him was yet to be disposed of, and if only the appellate authority takes a decision to modify the penalty order in his favour, he could be considered for retrospective promotion. Later, the respondents issued the Annexure A-13 letter dated 10.3.2008 stating that the appeal filed under Rule 26 of the CCS(CCA) Rules against the order of penalty dated 28.6.2006 passed under Rule 15 of the said Rules is not maintainable as no appeal lies against the order passed by the President. Applicant has, thereafter, filed the present O.A seeking a declaration that he was entitled for promotion as Deputy Commissioner of Income Tax with effect from 1.1.2006 instead of 13.4.2006.

3. In the reply statement filed by the respondents, they have reiterated their position as held by them in the Annexure A-11 letter dated 26.12.2006.

4. We have heard the learned counsel on both sides. The contention of the applicant is that the minor penalty of censure has no period of currency and hence the respondents could not have taken the view that in terms of the DoPT's OM dated 15.12.2004 referred to above, the promotion could not be given to the applicant during the currency of the penalty. In this context it is profitable to extract the aforesaid O.M itself which is as under:



"No.22034/5/2004-Estt(D)
 Government of India
 Ministry of Personnel, Public Grievances and Pensions
 (Department of Personnel & Training)
 December 15, 2004.
OFFICE MEMORANDUM

Subject: Promotion of persons undergoing a penalty – clarification regarding

The undersigned is directed to refer to DoPT OM No.21/5/70-Estt (A) dated 15th May, 1971 (reiterated vide O.M.No.22011/2/78-Estt (A) dated 16.2.1979) and to say that in terms of the provisions of these Office Memoranda, a Government servant, on whom a minor penalty of withholding of increment etc. has been imposed should be considered for promotion by the Departmental Promotion Committee which meets after the imposition of the said penalty and after due consideration of full facts leading to imposition of the penalty, if he is still considered fit for promotion, the promotion may be given effect after the expiry of the currency of the penalty. It has, however, been separately clarified vide Office Memorandum No.22011/2/92-Estt(D) dated 30th November, 1995 that in such cases, the seniority would be fixed according to the position of the officer in the panel on the basis of which he is promoted on expiry of the period of currency of the penalty.

2. Doubts have been expressed regarding the pay fixation and date of commencement of the eligibility service in such cases. It is clarified that since the promotion is to take effect only from a date subsequent to the expiry of the currency of the penalty, the officer would be entitled to pay fixation in the promotional grade with effect from the date of actual promotion only. Even if a person junior to him in the panel is promoted earlier, it will have no bearing on the pay to be allowed on promotion to the officer on whom a penalty was imposed, and there shall be no stepping up of his pay.

3. Similarly, as the officer undergoing penalty is not to be promoted during the currency of the penalty, the eligibility service in the promotional grade for further promotion shall commence only from the date of actual promotion and in no case, it may be related, even notionally, to the date of promotion of the junior in the panel.

(Alok Saxena)
Director

To
All Ministries/Departments of the Government, of India."



5. The Hon'ble Apex Court had occasion to consider the question of impact of minor penalty of censure on promotion in its judgment in **Union of India and others v. A.N.Mohanan** [2007 AIR SCW 2773]. The controversy in the said case was that the departmental enquiry was started against the respondents therein on 3.8.1999. The DPC made the selection on 1.11.1999. Since the enquiry was pending against the respondents, sealed cover procedure was adopted. On 13.9.2001 the penalty of censure was awarded. Promotion was granted to the respondents on 26.11.2001. However, he claimed that the promotion should have been given to him with effect from 1.11.1999. He moved this tribunal for such a direction. The Tribunal in its order held that the penalty of censure was not a bar for promotion and though the sealed cover procedure was adopted, the sealed cover should have been opened and the recommendation of DPC should have been given effect to, by giving promotional benefit to the respondent with effect from 1.11.1999. The Writ Petition filed before the High Court was also dismissed. The contention of the appellant, i.e. the Government of India was that the effect of Rule 3.1 of the O.M relating to promotion of Government servants dated 14.9.1992 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions clearly stipulates that where penalty has been imposed, findings of the sealed cover/covers are not to be acted upon and the cause of promotion can be considered by the next DPC in the normal course. The Apex Court after considering the aforesaid submission of the Union of India and relying on its earlier judgment of the Apex Court in **Union of India v. K.V.Jankiraman** [AIR 1991 SC 2010] allowed the appeal holding that award of censure is a blameworthy factor and having regard to the penalty imposed upon the respondents therein, his claim for promotion with effect from 1.11.1999 was unacceptable. The operative part of the aforesaid judgment of the



Apex Court is as under:

"8. Few Rules as contained in the Office Memorandum need to be noted:

Rules 3 and 3.1 read as follows:

"Rule 3 : On the conclusion of the disciplinary case/criminal prosecution which results in dropping of allegations against the Govt. servant, the sealed cover or covers shall be opened. In case the government servant is completely exonerated, the due date of his promotion will be determined with reference to the position assigned to him in the findings kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the Junior, most officiating person. He may be promoted notionally with reference to the date of promotion of junior. However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the appointing authority by taking into consideration all the facts and circumstances of the disciplinary proceedings/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so. It is not possible to anticipate and enumerate exhaustively all the circumstances under which such denials of arrears of salary or part of it may become necessary. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc., these are only some of the circumstances where such denial can be justified.

Rule 3.1: 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 finding of the sealed cover/covers shall not be acted upon. His case for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on him."

9. Though learned counsel for the respondent submitted that awarding of censure does not amount to awarding of penalty, the same is clearly untenable. In Union of India etc.etc. v. K.V. Jankiraman etc.etc. (AIR 1991 SC 2010) at page 2017 it was held as follows:

"We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary



of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated from disciplinary/ criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the, administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal.


While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

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

Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

10. Awarding of censure, therefore, is a blameworthy factor. A bare reading of Rule 3.1 as noted above makes the position clear that where any penalty has been imposed the findings of the sealed cover are not to be acted upon and the case for promotion may be considered by the next DPC in the normal course.

11. Having regard to the penalty imposed on him, undisputedly the respondent has been given promotion with effect from 26.11.2001. His claim for promotion with effect from 1.11.1999 was clearly unacceptable and, therefore, the CAT and the High Court were not justified in holding that he was entitled to be promoted with effect from 1.11.1999. The order of High Court



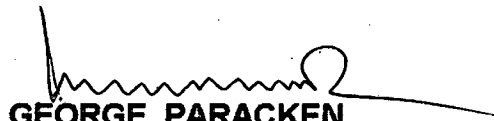
affirming the view taken by the CAT cannot be sustained and is, therefore, set aside.

12. The appeal is allowed without any orders as to costs."

6 In our considered view, the aforesaid judgment of the Apex Court squarely applies in this case also. As censure is a blameworthy factor in the service career of a Government servant one who has been censured cannot be equated with another who is without any blemish and both of them cannot be granted promotion from the same due dates. The respondents have, therefore, promoted him with effect from 13.4.2006 i.e. the next date on which he was imposed with penalty of censure. We, therefore, do not find any merit in this O.A Accordingly the same is dismissed. There shall be no order as to costs.



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER



GEORGE PARACKEN
JUDICIAL MEMBER

trs