

Central Administrative Tribunal
Ernakulam Bench

OA No.584/2013

Mundaythis the 22nd day of August, 2016

CORAM

Hon'ble Mr.Justice N.K.Balakrishnan, Judicial Member
Hon'ble Mrs.P.Gopinath, Administrative Member

P.B. Venu Nath, Aged 53,
S/o P.R. Balakrishnan Pialli,
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)

Versus

1. Union of India Represented by
Secretary, Ministry of Defence,
New Delhi. 110 001
2. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Kochi. 682 004
3. V.R.Sanjeevan Pilial,
Chargeman Grade II,
Radio Shop, NSRY (K),
Naval Base, Kochi. 682 004
4. Chief Staff Officer (Personal And Administration),
Head Quarters, Southern Naval Command,
Kochi. 682 004.

Respondents

(By Advocate: Mr.N.Anilkumar, Sr.PCGC for R1,2 &4)
Mr.P.K.Madhusoodhanan for R3)

The OA having been finally heard on 20th July, 2016, this Tribunal delivered the following order on 22-08-2016



ORDER

By P.Gopinath, Administrative Member

This is the third round of litigation by the applicant claiming promotion to the post of Chargeman Grade-II. The facts of the case in brief are that the applicant commenced service as Radio Mechanic S.K. on 22.12.1986. He was promoted as Highly Skilled II and Highly Skilled I on 12.4.1989 and 4.7.1995 respectively. On 20.5.2003, the applicant was placed in the grade of Master Craftsman. The next promotional post is that of Chargeman Grade II (Radio). The applicant claims that he is qualified to be promoted as Chargeman Grade II (Radio) against the vacancies that had arisen on or after 16.8.2004. The post of Chargeman Grade II is declared as a selection post and the method of selection is detailed in Annexure A1 amended Recruitment Rules. Selection is made by convening a DPC. According to the applicant, a substantive vacancy of Chargeman Grade II arose on 2.1.2007 and it remained unfilled. Another vacancy arose on 1.3.2008 and the DPC considered only the claim of one V.H.Ameer, the immediate senior of the applicant. By Annexure A5 proceedings, V.H.Ameer was promoted as Chargeman Grade-II. Later, WOT (K) (Warship Overseen Team) issued a letter postponing the requirement of Chargeman-II (Radio) and consequently the promotion order of V.H.Ameer was cancelled vide Annexure A6. By Annexure A7 proceedings, V.H.Ameer was promoted as Chargeman Grade.II (The dates of promotion and its cancellation create a confusion as Annexure A6 is dated 26th May 2008 whereas Annexure A7 is dated 1st March 2008). By proceeding dated 1st February 2008, the third

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respondent was promoted as Chargeman Grade-II. The applicant submits that the third respondent was under cloud as a major penalty had been imposed on him in a disciplinary proceeding. The third respondent was not eligible to be considered for promotion. Instead the applicant being the lone eligible candidate, should have been considered, contends the applicant.

2. The promotion granted to the 3rd respondent was challenged by the applicant by filing OA No.529/2008. Though the aforesaid OA was allowed by setting aside the order impugned, the applicant's prayer to declare him eligible to be promoted against the vacancy of Chargeman Grade-II which had arisen on 2.1.2007 was declined. Subsequently, in compliance of the Tribunal's direction, a fresh DPC was convened and by proceedings at Annexure A12 & A13, the third respondent was promoted as Chargeman (Radio) w.e.f. 1st February 2008. The applicant filed another OA No.896/2010 challenging Annexures A12 & A13. That OA was disposed of directing the respondents to convene a meeting of DPC to consider as per law all eligible candidates including the applicant and the 3rd respondent for promotion to the post of Chargeman Grade-II for which a vacancy had arisen on 2.1.2007 and to take further appropriate action. In implementation of the above order, DPC was convened and V.H.Ameer was promoted as Chargeman Grade-II w.e.f. 2.1.2007. Subsequently by Annexure A17 the third respondent was also promoted as Chargeman Grade-II with effect from 1.3.2008. In the aforesaid background, the applicant has filed this OA seeking the relief of:-

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(i) Set aside Annexure A17 by which the 3rd respondent was promoted as Chargeman Grade II (Radio) w.e.f. 1.3.2008.

(ii) Declare that the applicant is deemed to have been promoted as Chargeman Grade II (Radio) w.e.f. 1.3.2008 in PB-II of Rs.9300-34800 with Grade Pay of Rs.4200/- with all consequential benefits including seniority and arrears of pay.

3. Respondents resist the OA contending that there is no illegality or irregularity or infirmity in granting promotion to the third respondent by Annexure A17 and the same cannot be assailed by the applicant. The punishment imposed on the third respondent was not a permanent bar for being considered for promotion. Therefore, the applicant is estopped from challenging the fundamental right of the third respondent to be considered and promoted to the non-selection post of Chargeman Grade II (Radio) on finding him fit and suitable. It is specifically stated that the post of Chargeman Gr.II (Radio) is a non-selection post and not a selection post as contended by the applicant. The applicant being MCM (Radar) was not even eligible to be considered for the vacancy of Chargeman-II (Radio). Till the level of Foreman (Gazetted), trades of Radar and Radio are different and independent with reasoning that the technologies being dealt with by these two trades of Radio and Radar are vastly different and require different skills to handle maintenance, repair and refit aspects vide Annexure R6 Integrated Headquarters of Ministry of Defence (Navy) letter No.FM/1228 dated 31 March 2010. Thus, both the trades of Radio and Radar stand bifurcated and independent with effect from 29 October 2009 and promotions are to be effected separately. Apart from that, the applicant had foregone his promotion to the post of Chargeman-II Radar at Ezhimala to avoid transfer to Ezhimala and in that place his junior one M.G.Sebastian, MCM (Radar) was promoted



and posted. Moreover, the third respondent's promotion was effected after his penalty period was over.

4. A rejoinder has been filed by the applicant reiterating the contentions raised in the OA.

5. We have heard learned counsel on both sides. We have also gone through the pleadings and records.

6. The respondents have specifically stated that the post of Chargeman-II is a non-selection post, not a selection post as averred by the applicant. The Supreme Court had an occasion to clarify on the distinction between Selection Post and Non-Selection Post. The Hon'ble Supreme Court held that where appointment is in the category of seniority-cum-suitability, it would be a case of "Non Selection Post Appointment" and where the requirement is to prepare a panel on inter-se merit, the post is a "Selection Post" *[1993 Supp.*

(2) SCC 326 UOI Vs. Dr. B. Rajaram & Ors., (vide para 28); [1995 (6) SCC 684

UOI & Ors. Vs. Virpal Singh Chauhan & Ors., (vide para 23 and 24)]. It is thus apparent that a post which is treated as a "Non Selection Post" would usually be a "Promotional Post", and only then does the issue of seniority come into consideration. In AIR 1998 SC 2565 the Apex Court had held that the criterion of seniority cum merit in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior even though less meritorious, shall have priority. As per Statutory Rules and Orders No.08 (SRO-08) published in Gazette of India dated 6th February 2007 the post of Chargeman Grade-II is a non-selection post and the method of selection is by promotion of Tradesman Highly Skilled having



eight years service in the grade on regular basis and should have passed the departmental qualifying test. The combined seniority list pertains to period prior to 29 October 2009 when both the trades of radio and radar trades were considered together for the purpose of promotion as per Annexure R4 order. However, Annexure R4 order has been superseded by issue of Annexure R6 order separating both the trades of Radio and Radar and separate seniority lists of Radio and Radar trades has been published as per Annexures R8 and R9. Chargeman Grade-II is a non-selection post. The DPC has to consider the eligibility of the candidates who are in the consideration zone for the post as per the criteria and the 3rd respondent being the senior most has to be considered for the post while the applicant herein who was placed 2nd as per seniority list cannot be considered for the post bypassing the 3rd respondent who fulfills the eligibility criteria for the post.

7. The Apex Court in **UOI Vs. Janaki Raman AIR 1991 SC 2010** had discussed in the different context of application of a severe penalty of reduction in rank to a selection post. The Apex Court had discussed the gradations of punishment by stating that the penalty short of dismissal will vary from reduction in rank to censure. The Apex Court held as follows:-

“8.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 (emphasis provided) 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 at par with the other employees and his case has to be treated differently. The least that is expected of any administration is that it does not reward an employee with promotion

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retrospectively from a date when for his conduct before that date he is penalized in praesenti. When an employee is held guilty and penalized and is, therefore, not promoted at least till the date on which he is penalized, he cannot be said to have been subjected to 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, such a denial is not illegal and unjustified.....".

8. The Apex Court in State of M.P. And Another Vs. I.A.Qureshi (1998)

9 SCC 261 had held that the respondent who had been imposed a minor penalty can be considered for promotion on prospective basis from a date after the conclusion of departmental proceedings.

9. In Rajendra Kumar Srivastava Vs. Sanyut Kshetriya Gramin Bank (2010) 1 SCC, the Apex Court had held that what would offend the rule 'seniority cum merit' is a process, where after assessing the minimum necessary merit, promotions are made on the basis of merit instead of seniority from among candidates possessing the minimum necessary merit.

10. Two important facts to be taken note of in the above judgment is that the promotion was to a selection post and secondly the fact that a promotion committee takes the penalties imposed into consideration. In the case of applicant, promotion was to a non-selection post as averred by the respondents. Secondly the penalty was not current on the date of promotion and the promotion committee did not take the penalty into consideration, may be seeing the lesser degree of penalty awarded.

11. The applicant has produced no rule, that after expiry of the penalty period, the party respondent should not be considered. Once the cloud lifts,



the party respondent has a right to be considered for promotion provided he fulfills the bench mark, if any, for promotion by seniority cum fitness. The applicant's argument that after completion of punishment, the shadow of cloud persists, does not appear to be a reasonable argument as the party respondent has already undergone the prescribed punishment for the wrong done and the wrong cannot shadow him forever. There is no unbridled and blanket debarment, which applies as a threshold feature, to move from scarred to un-scarred status.

12. In this case, the DPC found the third respondent, admittedly senior to the applicant in the feeder grade, fit and eligible to be promoted to the post of Chargeman-II. The process of consideration was made when the third respondent was not undergoing any punishment. According to the respondents, the third respondent was issued with a charge sheet and imposed with the penalty of reduction of his pay by one stage for a period of one year with effect from 1st February 2007 vide Annexure A4 order. This penalty was over by 31st January, 2008. He was promoted with effect from 1st March 2008, i.e., after the currency of the penalty. It is pertinent to note that in paragraph 16 of the Tribunal's order dated 29th December 2009 passed in OA No.529/03 filed by the applicant, it is ordered that the "*the applicant had no valid claim for promotion as Chargeman Grade-II (Radio) even on ad-hoc basis with effect from 2.1.2007*". As per the guidelines contained in Department of Personnel & Training (DoP&T) OM No.22011/4/91-Estt (A) dated 14th September, 1992, if a person is under disciplinary/penalty period and found to be fit for promotion otherwise, the assessment of the DPC in respect of

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such person is to be kept in sealed cover. The above said guidelines further stipulate that if a person is banned from promotion due to disciplinary proceedings, a permanent vacancy should be reserved for such an officer when his case is placed in sealed cover by the DPC. Accordingly the case of the 3rd respondent was kept in sealed cover and on completion of of penalty period on 31st January 2008, he was promoted to Chargeman-II (Radio) with effect from 1st February 2008. The applicant herein was at 3rd position in the seniority list at the time when the 3rd respondent was considered for promotion. The applicant herein had filed OA No.529 of 2008 against the promotion granted to the 3rd respondent and the OA was disposed of by this Tribunal vide Annexure A10 order. While disposing the OA, this Tribunal held that the applicant had no valid claim for promotion as Chargeman Grade-II (Radio) even on ad hoc basis with effect from 2nd January 2007 as the applicant was at 3rd position in the order of seniority and Sri VH Ameer who was senior than the applicant was the next person to be considered for promotion in officiating capacity in the DPC held on 30th May 2006. This Tribunal had observed that the procedure followed in opening the sealed cover without convening a DPC was improper and therefore quashed and set aside the order of promotion to the 3rd respondent. As per the observation made by this Tribunal, a DPC was convened and its meeting was held on 22nd June, 2010, in which the 3rd respondent was recommended to be promoted to the post of Chargeman Grade II (Radio) with effect from 1st February 2008. Based on the proceedings of the DPC which was approved by the Competent Authority, the 3rd respondent was promoted to the post of Chargeman

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(Radio) with effect from 1st February 2008. The applicant herein had filed OA No.896 of 2010 seeking identical reliefs as in the OA herein. This Tribunal set aside the promotion order of the 3rd respondent vide Annexure A-14 order observing that the case of the 3rd respondent could only have been considered by the next DPC in the normal course as per Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) O.M.No.22011/4/91-Estt (A) dated 14th September 1992 with further directions to the respondents to convene a meeting of DPC to consider as per law all eligible candidates including the applicant herein and 3rd respondent for promotion to the post of Chargeman Grade-II for which a vacancy arose on 2nd January 2007. Accordingly, a review DPC was convened for the year 2007-2008 and the applicant aswell as the 3rd respondent were included amongst others in the zone for promotion as per this Tribunal's order at Annexure A14 in which Sri V.H.Ameer who had been promoted as Chargeman Grade-II (Radio) with effect from 1st March 2008 was recommended to be promoted to the post of Chargeman Grade-II (Radio) with effect from 2nd January 2007 and he was promoted as Chargeman Grade-II (Radio) with effect from 2d January 2007 while reverting the 3rd respondent to the lower grade of Master Craftsman (Radio) as per Annexure A15 order. The 3rd respondent was included i the consideration zone as he was not under the currency of punishment on the date when the vacancy of Chargeman Grade-II (Radio) arose on 1st March 2008 and also being the senior most amongst the prospective candidates.



13. The CCS (CCA) Rules has covered this matter and the relevant provisions are reproduced:-

2. Cases to whom sealed cover procedure applicable. - At the time of consideration of the cases of Government servants for promotion, details of the Government servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:-

- (i) Government servants under suspension;
- (ii) Government servants in respect of whom disciplinary proceedings are pending; and
- (iii) Government servants in respect of whom prosecution for criminal charge is pending.

2.1 Procedure to be followed in respect of those under cloud- The Departmental Promotion Committee shall assess the suitability of the Government servants coming within the purview of the circumstances mentioned above along with other eligible candidates without taking into consideration the disciplinary case /criminal prosecution pending. The assessment of the DPC including "Unfit for Promotion", and the grading awarded by it will be kept in a sealed cover. The cover will be superscribed 'Findings regarding suitability for promotion to the grade/post of.....in respect of Shri.....(name of the Government servant). Not to be opened till the termination of the disciplinary case/criminal prosecution against Shri.....'. The proceedings of the DPC need only contain the note "The findings are contained in the attached sealed cover". The authority competent to fill the vacancy should be separately advised to fill the vacancy in the higher grade only in an officiating capacity when the findings of the DPC in respect of the suitability of a Government servant for his promotion are kept in a sealed cover.

2.2 Procedure by subsequent DPC- The same procedure outlined in Para 2.1 above will be followed by the subsequent Departmental Promotion Committee convened till the disciplinary case/criminal prosecution/investigation pending or contemplated against the Government servant concerned is concluded.

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 findings 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.

Xxxxxx xxxxxx xxxxxx xxxxxx xxxxxx

4. Six monthly review of "Sealed Cover" cases. - It is necessary to ensure that the disciplinary case/criminal prosecution/investigation 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. It has, therefore, been 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 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months. The review should, *inter alia*, cover the progress made in the disciplinary proceedings/criminal prosecution and the further measures to be taken to expedite their completion.

Hence CCS (CCA) Rules have also made provision for treatment and promotion of persons under disciplinary proceedings. Even when disciplinary proceedings are on-going the third respondent was entitled to be considered for promotion, with the proviso, that the findings of the DPC regarding suitability for promotion be kept in a sealed cover without taking into consideration the disciplinary case. In case of penalty imposed as a result of disciplinary proceedings, the finding of the sealed cover 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..

14. The first relief sought for by the applicant is to set aside the promotion granted to the third respondent. The applicant is not entitled to seek such a relief as the CCS (CCA) Rules cover the conditions under which the third respondent's promotion is to be considered. At the most he can seek relief with reference to his promotion only as per the procedure in force in the department. The respondents have rightly followed the procedure by convening a DPC and considered the third respondent for promotion based

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on his suitability and seniority. Therefore, we find no irregularity or illegality in the procedure adopted by the respondents in granting promotion to the third respondent. Thus the second relief in the OA also fails. The OA is dismissed. No order as to costs.

(P.Gopinath)
Administrative Member

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(N.K.Balakrishnan)
Judicial Member