

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.NO.612/2001

Tuesday, this the 16th day of July, 2002.

CORAM;

HON'BLE MR A.V.HARIDASAN, VICE CHAIRMAN

HON'BLE MR T.N.T.NAYAR, ADMINISTRATIVE MEMBER

Dr.T.Lekshmana Thanulinga,
Deputy Controller of Explosives,
43/350, Power House Extension Road,
Ernakulam North,
Cochin-682 018.

- Applicant

By Advocate Mr tC'Govindaswamy

Vs

1. Union of India represented by
its Secretary to Government of India,
Ministry of Industry,
Department of Industrial Development,
New Delhi.

2. The Chief Controller of Explosives,
A-Block, 5th Floor, CGO Complex,
Seminary Hills,
Nagpur-440 006.

3. The Deputy Chief Controller of Explosives,
Department of Explosives,
Power House Extension Road,
Ernakulam North,
Cochin-682 018.

- Respondents

By Advocate Mr PMM Najeeb Khan, ACGSC

The application having been heard on 28.6.2002 the Tribunal on
16.7.2002 delivered the following:

O R D E R

HON'BLE MR T.N.T.NAYAR, ADMINISTRATIVE MEMBER

The applicant, presently working as Deputy Controller of Explosives at Ernakulam, is aggrieved by A-1 memorandum dated 5.1.2001, whereby his request for fixation of his

initial pay at Rs.9100/- in the scale of Rs.8000-13500 by protecting the pay last drawn by him as Lecturer in Regional Institute of Education, Bhopal under National Council of Educational Research & Training(NCERT for short) in the light of A-3 O.M. dated 7.8.89 is rejected. The brief facts are:

2. The applicant had joined the post of Senior Scientific Assistant in the Government Opium & Alkaloid Works, Madhya Pradesh on 13.7.95. Thereafter, he took up the job of Lecturer in the Regional Institute of Education, Bhopal under National Council of Educational Research & Training (NCERT for short) on 19.9.97 and continued there till 12.6.98 on a pay scale of Rs.8000-13500. The applicant, in pursuance of his application forwarded through proper channel, and after a due process of undergoing selection and interview, was appointed as Deputy Controller of Explosives, Ministry of Industry, Government of India, at Cochin. He joined the said post on 15.6.98 in the scale Rs.8000-13500. The last pay drawn by the applicant in the previous post as Lecturer under/autonomous Society, NCERT was Rs.9100/- since 4 additional increments had been allowed to him, owing to his Ph.D qualification. Seeking fixation of pay at the stage of Rs.9100/-, the applicant made A-4 and A-5 representations. These representations were duly forwarded to the Government of India. The applicant is seen to have addressed A-8 letter dated 18.1.2001 to the Secretary, U.P.S.C. with the request to issue necessary recommendations for the fixation of his pay on the basis of the pay last drawn by him in the previous organisation. However, by the impugned Memo A-1 dated 5.1.2001, the applicant was informed by the 2nd

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respondent that the applicant's case could not be considered for protection of pay in terms of the Government of India O.M.No.12/1/96-Estt(Pay-I) dated 10.7.98(A-12) and that, accordingly higher basic pay of Rs.9100/- could not be allowed ~~by the U.P.S.C.~~ in the absence of any specific recommendations/for fixing higher pay to the applicant. Against this, he made a representation(A-9) to the 2nd respondent claiming protection of pay in the light of Government of India decision No.28(under F.R.22)(A-3). Then he made a detailed representation (A-10) to the 1st and 2nd respondents citing the statutory provisions and maintaining that, as a Government servant he was entitled to pay fixation under FR-22-C since changed as FR-22(1)(a)(1). He also claimed consequential benefits like further increments. Since no favourable orders were forthcoming a further representation (A-11) enclosing supporting documents, was forwarded to the 1st and 2nd respondents. As there has been no response, the applicant has filed this application praying for the following main reliefs:

(a) Call for the records leading to the issue of A-1 and quash the same;

(b) Call for the records leading to the issue of A-12 and quash the same, or in the alternative, declare that A-12 to the extent it is given retrospective effect, is arbitrary, discriminatory, contrary to law and unconstitutional;

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(c) Declare that the applicant is entitled to have his initial pay in the post of Deputy Controller of Explosives fixed at the stage of Rs.9100/- in the scale of pay Rs.8000-13500 with effect from 15.6.98 and direct the respondent accordingly.

(d) Direct the respondents to grant the applicant all consequential benefits including arrears thereof.

3. Respondents have opposed the O.A. by stating that under the existing rules and instructions, particularly R-III clarificatory O.M., the applicant was not entitled to the pay protection requested for, that the applicant was only a probationer in the previous organisation, that the UPSC did not recommend the protection of pay requested for, that the applicant's pay in the previous organisation was fixed at Rs.9100/- only on account of the 4 additional increments for the higher educational qualification of Ph.D being a special factor considered in the earlier organisation (NCERT) and not relevant in the new organisation (Department of Industrial Development) and that therefore, the applicant could not be given the benefit of those increments solely relatable to higher qualification of Ph.D. Although Ph.D qualification was desirable as mentioned in the advertisement, no special incentive or entitlement was offered for persons holding Ph.D Degree in respondent-department. R-III(A-12) O.M. was nothing but a clarification of the A-3 O.M. In the circumstances, the pay fixed at Rs.8000/- is in order and the

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O.A. is liable to be dismissed, according to the respondents.

4. The applicant in his rejoinder, has disputed the averments made in the reply statement, by stating that in terms of A-3, the applicant's pay protection should be without any reference to the permanency or otherwise of the post, or absence of lien. The absence of the specific recommendation from the UPSC would also not invalidate the applicant's claim. A-12, i.e. R-III, was a new circular and therefore, it would have no application to the applicant who joined the service prior to 10.7.98. There were quite a few instances of fixation of pay of new entrants to the respondent-department who had been probationers in the previous organisation. That being so, the applicant's right to pay protection in accordance with the instructions contained in A-3 O.M. could not be denied, according to the applicant.

5. The additional reply statements, filed by the respondents and the additional rejoinder, filed by the applicant are in effect strong reiterations of their respective stands.

6. We have considered the pleadings and other relevant material on record. We have also heard the learned counsel on either side.

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7. According to Shri Martin G Thottan, learned counsel for the applicant, the applicant was drawing a basic pay of Rs.9100/- in the previous post and the nature of the increments granted was irrelevant once it was admitted that he was drawing basic pay of Rs.9100/- in the appropriate scale in the previous organisation. A-3 is the relevant O.M. which was applicable for fixing the pay of the applicant. Considerations of temporary nature of the post or the absence of lien or the absence of recommendation from the UPSC were also irrelevant, it is maintained. A-12 O.M. dated 10.2.98 would not be relevant in the applicant's case as that O.M. was issued after the applicant had joined the organisation. A-12(R-III) relied on by the respondents could not be treated as a clarification merely because the expression 'clarification' was used in the said circular. In any case, to the extent it affects the applicant's right, A-12 is under challenge, according to the learned counsel. The applicant's case had to be dealt with in terms of A-3, and in that view of the matter, the applicant was entitled to protection of the last pay drawn by him in the previous organisation, it is urged by the learned counsel. Ms. Sheljam, learned counsel representing Shri PMM Najeeb Khan for respondents, on the other hand, would state the applicant having joined the respondent-department on 15.6.98, his pay was fixed at the minimum of the new scale provisionally in the absence of proper LPC from the previous organisation. It was only in March, 1999 that the applicant's previous employer confirmed that his basic pay had been fixed at Rs.9100/-. By the time the applicant's pay fixation could be taken up, the

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clarificatory instructions contained in R-III(A-12) regarding the scope of A-3 O.M. were received. The matter was pending, and therefore, in terms of the latest instructions of the DOPT, the applicant's case for pay fixation could not be considered with reference to the earlier instructions. This was the circumstance under which R-III(A-12) instructions were applied in the applicant's case. Inviting our attention to Paragraph 4 of R-III(A-12) O.M., the learned counsel for the respondents would contend that while cases already decided in a manner different from the instructions contained in the said O.M. in consultation with the DOPT, did not call for revision, pending cases were to be decided in accordance with the clarification contained in the said O.M. Thus, the applicant's case fell within the mischief of R-III(A-12), and his pay had to be fixed in accordance therewith. It was therefore necessary that the applicant ought to have completed the period of probation successfully for being regularised/confirmed in the post in the previous organisation and that the UPSC ought to have given a specific recommendation to the respondent-Ministry to the effect that the initial pay of the applicant should be fixed at a higher amount. These conditions were not fulfilled in the applicant's case and therefore, there was no question of allowing any pay protection, the learned counsel for the respondents would urge.

8. We have given our anxious consideration to the point at issue with reference to the case records and the arguments putforward by the rival counsel. We find that the applicant

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had entered service with effect from 13.7.95. The applicant's averment to this effect is supported by A-13 draft seniority list of Deputy Controller of Explosives, drawn by the 2nd respondent. That the applicant joined the post of Lecturer in NIE, Bhopal under the NCERT on 19.9.97 and that he was in that post till 12.6.98 is not controverted. That he took up his new assignment as Deputy Controller of Explosives on 15.6.98 in pursuance of Ministry's letter No.I/30/95/Expl. dated 30.4.98 also cannot be denied. Thus the applicant's pay was to be fixed with effect from 15.6.98. The only question that has to be answered is as to how his pay was to be fixed. It is seen that the applicant was drawing pay of Rs.9100/- in the scale of Rs.8000-13500. It would appear from the records that the applicant's pay came to be fixed at Rs.9100/- on account of grant of 4 additional increments by virtue of his Ph.D qualification. In other words, though his basic pay was Rs.8000/- in the scale Rs.8000-13500, in accordance with the rules, regulations and instructions in force, he was eligible for 4 additional increments, i.e. 275×4 , which raised his pay to Rs.9100/-. The procedure applicable to protection of pay in respect of candidates recruited from Central Autonomous bodies, Public Undertakings etc. as contained in the DOPT's O.M.No.12/88-Estt.(Pay-I) dated 7.8.89(A-3) was, according to us, in force when the applicant joined the post of Deputy Controller of Explosives after having been duly relieved from the previous organisation, i.e. NCERT. The procedure as contained in R-III(A-12) OM, though described as clarification, is in fact an amended procedure issued more than 9 years after A-3 O.M. was issued. R-III(A-12), in

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our opinion, cannot have retrospective effect. The applicant's pay was to be fixed with reference to his date of joining i.e. 15.6.98. As on that date, A-3 OM was holding the field. There is no reference to any imperative condition regarding the recommendation of the UPSC for a higher initial pay or any stipulation that the Government servant ought to have successfully completed the period of probation thereby rendering himself eligible for confirmation; nor is there any reference to lien in the A-3 O.M. Had the applicant's pay been fixed with reference to the date of joining the respondent-organisation, there would have been no question of any recommendation from the UPSC to be considered or the permanency or otherwise of the post to be taken into account. In this connection, it is considered pertinent to extract A-3 O.M. as it appears in Swamy's Compilation of FR SR Part-I, General Rules, 14th Edition:

"(28) Protection of pay is admissible for candidates recruited from Central Autonomous Bodies/Public Sector Undertakings: - As per extant rules/orders, pay protection is granted to candidates who are appointed by the method of recruitment by selection through the Union Public Service Commission, if such candidates are in Government service. No such pay protection is granted to candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, when they are so appointed in Government. As a result of this, it has not been possible for Government to draw upon the talent that is available in non-Government organisations.

2. The question as to how pay protection can be given in the case of candidates recruited from Public Sector Undertakings, etc., has been engaging the attention of the Government for sometime. The matter has been carefully considered and it has been decided that in respect of candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, who are appointed

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as direct recruits on selection through a properly constituted agency including departmental authorities making recruitment directly, their initial pay may be fixed at a stage in the scale of pay attached to the post, so that the pay and DA, as admissible in the Government will protect the pay plus DA, already being drawn by them in their parent organisation. In the event of such a stage not being available in the post to which they have been recruited their pay may be fixed at a stage just below in the scale of the post to which they have been recruited, so as to ensure a minimum loss to the candidates. The pay fixed under this formulation will not exceed the maximum of the scale of the post to which they have been recruited. The pay fixation is to be made by the employing Ministries/Departments after verification of all the relevant documents to be produced by the candidates who were employed in such organisations.

3. These orders take effect from the first of the month in which this Office Memorandum is issued, i.e. 1st August, 1989.

[G.I., Dept. of Per. & Trg., O.M.No.12/188-Estt.(Pay-I), dated the 7th August, 1989.]"

The applicant had applied for the post of Deputy Controller of Explosives and accepted the same on the basis of the then existing provisions. Therefore, it is reasonable to conclude that the applicant legitimately expected pay fixation/protection as per the extant rules and in the light of the service conditions/terms made known to him at the time of his appointment. It is well settled that no service conditions or terms on the basis of which an offer of appointment is accepted can be changed to the disadvantage of the appointee by a retrospective operation of any amended rules or service conditions or terms. In our considered view, the conditions incorporated in A-12 O.M. cannot have retrospective effect adversely affecting the legitimate right of the applicant. A cursory reading of A-12 O.M. might perhaps give the impression that it is only by way of a clarification of the earlier O.M.(A-3) dated 7.8.89. However,

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on a closer scrutiny, it would be evident that the said O.M. contains certain conditionalities which were never thought of or even hinted at in the earlier O.M.(A-3). It is profitable here to extract of A-12 O.M.:

"(30) Protection of pay for candidates recruited from Autonomous Bodies/Public Sector Undertakings is admissible, if the selection is through interview only. - This Department's O.M., No.12/1/88-Estt. (Pay-I) dated 7.8.1989, 28.2.1992 and 8.6.1993 (GIOs. (28) & (29) above) lay down guidelines for protection of pay in respect of the candidates working in Public Sector Undertakings, etc., on their appointment as Direct Recruits on selection through a properly constituted authority including Departmental authorities. The O.M., dated 7.8.1989 was issued on the initiative of the UPSC.

2. This Department has received certain cases seeking clarification as to the exact scope of this Department's O.M., dated 7.8.1989 (GIO (27) above) and the conditions under which benefit under that O.M. is admissible. The matter has been examined in consultation with the UPSC and the position is clarified as under.

3. The benefit of pay protection is available to the Government servants on their recruitment by selection through UPSC, subject to fulfilment of certain conditions. The benefit under the O.M., dated 7.8.1989 was extended to the candidates working in Central PSUs/State PSUs/Universities/Semi-Government Institutions/Autonomous Bodies, etc., with a view to drawing talent, which is available in those organisations. The question whether the objective underlying the above orders could be achieved through Open Competitive Examination in which the employees from Public Sector Undertakings, etc., also appear, has been considered. It is clarified that the benefit of pay protection under the above orders is available only, if the selection is through interview and not through an Open Competitive Examination. Wherever the protection under the above orders is to be given, the Commission will indicate in its recommendation letter to the Ministry concerned that pay of such candidate(s) should be fixed as per the guidelines laid down in the above orders. Further, the benefit would be available to an officer coming from PSU, etc., only if the officer has completed the period of probation successfully for being regularised/confirmed in the post in the parent organisation.

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4. The Ministry of Agriculture, etc., are requested to keep the above clarification in mind in fixing the pay in such cases. The cases already decided otherwise in consultation with this Department need not be reopened.

[G.I., Dept. of Per. & Trg., O.M. No. 12/1/96-Estt. (PayOI), dated the 10th July, 1998.]"

10. It is true that the date on which A-12 circular would take effect is not mentioned. In our opinion, it takes effect only on the date on which it is issued in so far as it contains conditions which are invoked thereby adversely affecting the applicant whose case is squarely covered by the earlier O.M. (A-3) dated 7.8.89. Any interpretation that legitimises retrospective validation of A-12 O.M. dated 10.7.98 cannot be accepted and for this reason, the respondents' argument has to be rejected. Pay protection has to be done in accordance with FR-22 in the applicant's case in accordance with A-3 O.M. dated 7.8.89 with reference to the last pay drawn in the earlier post. The applicant while in the earlier post in the scale of 8000-13500 was drawing a basic pay of Rs. 9100 plus admissible allowances. The circumstances under which his basic pay came to be fixed at Rs. 9100/- by grant of 4 additional increments is immaterial in deciding the manner in which his pay is to be protected as per A-3 O.M. He had applied for the post of Deputy Controller of Explosives through proper channel and was selected in accordance with due process of selection, viz, interview by the UPSC. Whether the post he was holding was permanent or temporary or whether he had acquired a lien or not are totally irrelevant considerations. The benefit of 4 increments on account of his higher qualification cannot be taken away on

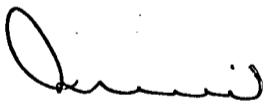
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the ground that such higher qualification did not attract any incentive in the new post.

11. In the light of the facts and circumstances discussed and the reasons adduced above, we hold that the application should succeed. The impugned A-1 order is set aside. The instructions contained in the impugned A-12 O.M. shall not be given retrospective effect to the prejudice of the applicant's claim. The applicant is entitled to have his initial pay in the post of Deputy Controller of Explosives fixed at the stage of Rs.9100/- in the scale of Rs.8000-13500 with effect from the date on which he joined the post. Respondents are directed to grant the applicant all the consequential benefits including arrears within a period of three months from the date of receipt of copy of this order.

12. There is no order as to costs.

Dated, the 16th July, 2002.


T.N.T. NAYAR
ADMINISTRATIVE MEMBER


A.V. HARIDASAN
VICE CHAIRMAN

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APPENDIX

Applicant's Annexures

1. A-1: True copy of the Memo No.nil dated 5.1.2001 issued by the 2nd respondent.
2. A-2: True copy of the Order No.F.REI/BPL/Accts/RP/98-99/8232 dt.1.3.99.
3. A-3: True copy of Govt. of India, DOPT OM No.12/88-Estt(Pay-I) dt.7.8.89.
4. A-4: True copy lof the representation dated 10.3.99 addressed to the Dy. Chief Controller of Explosives.
5. A-5: True copy of the representation dt.31.10.2000 addressed to the 1st respondent.
6. A-6: True copy of the Memo No.Eb/23 dt.11.3.99 issued from the office of the 3rd respondent.
7. A-7: True copy of the letter No.A-19018/128/98-Exp. dt.12.4.2000/17.4.2000 issued from the 2nd respondent to the 1st respondent.
8. A-8: True copy of the representation dt.18.1.2001 addressed to the UPSC.
9. A-9: True copy lof the letter dt. ni. addressed to the 2nd respondent.
10. A-10: True copy of the letter dt.19.4.2001 addressed to the respondents 1&2.
11. A-11: True copy of the letter dt.21.5.2001 addressed to the respondents 1&2.
12. A-12: True copy of the Govt. of India, DOPT OM No.12/1/96-Est(Pay-I) dt.10.7.98.
13. A-13: True copy lof the Draft seniority list of Dy. Controller of Explosives issued from the department of Explosives, Nagpur.

Respondents' Annexures:

14. R-I: Photocopy of the service book of the applicant.
15. R-II: Photocpy of the OM No.12/1/89-Estt(Pay-I) dt.7.8.89 issued by the Govt. of India, DOPT.
16. R-III:Photocopy lof the OM No.12/1/96-Estt(Pay-I) dt.10.7.98 issued by Govt. of India, DOPT.
17. R-IV: Photocopy of the M.F.O.M.F.1(37):e:III/A/64 dt.6.11.65 issued by the Govt. of India.
18. R-V: Photocopy of the M.F.O.M.No.F.10(2)Estt.III/55 dt.15.2.55 issued by Govt.of India.
19. R-VI: Photocopy of the Rule 26(2) of CCS(Pension) Rules, 1972.