

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 8/2007

MONDAY THIS THE 23rd DAY OF APRIL, 2007

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER**

Vijayan S/o late PK Raghavan Channar
Civilian Motor Driver Grade-I
O/o Assistant Garrison Engineer (Independent)
(R & D) Kakkanad , Thrikkakara PO
Kochi-682021

Applicant

By Advocate Mr. R. Sreeraj

Vs.

- 1 Union of India represented by
its Secretary to Government of India
Ministry of Defence
New Delhi.
- 2 The Chief Engineer,
Military Engineering Services
Headquarters,
Southern Command, Pune.
- 3 The Assistant Garrison Engineer
(Independent)
(R&D) Kakkanad,
Thrikkakkara P O
- 4 The Chief Engineer
R&D Military Engineering Services
Picket, Secunderabad- 6500003.

Respondents

By Advocate Mr. P.M. Saji, ACGSC

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant is aggrieved by Annexure A-1 order of the second respondent dated 26.4.2006 by which he is transferred to the office of the Chief Engineer (NAVAC) Ezhimala, a hard tenure station and a place 386 Kms away from Kochi where he presently works and also by Annexure A-1(A) letter dated 20-10.2006 issued by the 4th respondent rejecting the comprehensive representation submitted by him. He is also aggrieved by the Annexure A-1(B) dated 13.12.2006 order issued on behalf of the second respondent by which the representations submitted by the persons on the direction of the Tribunal in O.A. 769/2006 have been rejected.

2 The applicant is a Civilian Motor Driver Grade-I working under the third respondent. The category of Civil Motor Drivers (CMD for short) is a Group-C cadre, he is aged 53 years and he has been working in the said post for the last 28 years. He has submitted that his transfer to Ezhimala is in gross violation of the guidelines for transfer of Group-C and D employees issued by the Department themselves - Annexure A-3. According to these guidelines, the category of CMD is not liable to be posted out on tenure basis. Also, the power to transfer has been utilised by incompetent authority as the applicant is not working under the CE(NAVAC) Ezhimala. It is alleged that eight CMDs working under the CE(NAVAC) Ezhimala

had been adjusted in various offices in Kochi before ordering transfer of the applicant to Ezhimala and hence it is clear that the power to transfer was obviously used for collateral purposes. The respondents cannot justify their action on the ground of adjustments of surplus/deficiencies either as there is no surplus in the category of CMD in the office of the third respondent. Moreover, even after the station strength is reckoned, there is deficiency, the respondents would have called for volunteers for posting to Ezhimala or they could have resorted to direct recruitment to fill up the deficiency. The Engineer-in-Chief Branch has issued posting order dated 16.4.2003 and the respondents have resorted to para 57 of the guidelines for ordering the applicant's transfer on the ground that the CE(NAVAC) Ezhimala office in Kochi has been asked to move "enbloc" to Ezhimala. In such cases, the personnel can be selected based on their length of service in the station/complexes i.e. the longest stayee will move by making local adjustment. The applicant submits that the plea of the transfer "enbloc" is a camouflage as out of the 21 persons listed in Annexure A-1, only 5 persons are being shifted out of Kochi. Of the five, this Tribunal has already quashed the transfer order of two women employees as per the orders in O.A.492/06 and 494/06. In the case of another two employees in O.A. 538/06 and 539/06 the movement orders have been stayed. All the group-C personnel working in Kochi office were adjusted in other offices in Kochi. One Mr. Sundaram who was attached to the office of the CE (NAVAC) Ezhimala and who ought to have been shifted to Ezhimala if the plea

of transfer enbloc is correct, has been accommodated in the applicant's office. Likewise one Mr. Jambu working at the Mangalapuram office coming under the CE(NAVAC) Ezhimala had also been accommodated in Kochi instead of accommodating him at Ezhimala. M/s PA Prabhakaran, T. David, KC Raju, A.P Paul, K.R. Radhakrishnan Nair, T.S James and A.C Balakrishnan are all CMDs attached to the office of CE(NAVAC) Ezhimala who are now accommodated at Kochi instead of taking them to Ezhimala. Also one Mr. Preman has been accommodated in Kochi instead of at Lakshadweep to which place he has been posted. Hence it is argued that the transfer of the applicant is thus hit by legal malice and is arbitrary, contends the applicant.

3 The applicant has also cited few other reasons for rejection of his case as arbitrary and unreasonable. For example, the applicant is a Group-C employee, he has been included in the transfer order meant for Group-D employees, though his representation was rejected not by second respondent but by the 4th respondent in usurping the jurisdiction vested with the 2nd respondent. The applicant has further pointed out his personal difficulties that his wife is ailing and his college going daughter is studying second year B.Sc and there is no married accommodation or colleges facilities available at Ezhimala. The hospital and other facilities are available only 20 Kms away at Payyannur. He has sought the following reliefs:

I) To quash Annexure A-1 insofar as it relates to the applicant and Annexure A-1(A) Annexure A-1(B) and Annexure A-1(C)

II To declare that the applicant's transfer to Ezhimala a tenure station is against Annexure A-3 norms, illegal, arbitrary, unjust and unreasonable.

III To direct the respondents to permit the applicant to continue to work as a Civilian Motor Driver under the 3rd respondent.

IV Such other relief as may be prayed for and this Tribunal may deem fit to grant

V) Grant the cost of this Original Application.

4 The respondents have filed reply statement. They have given the background leading to the shifting of the office of the CE ((NAVAC), Ezhimala from Kochi to Ezhimala. They have submitted that Military Engineering Services (in short MES) is responsible for carrying out capital works and repair services for the three arms of defence forces allied departments, Cantonment Boards and Public Bodies. The following units/formations of MES are functioning at Kochi. They are providing MES Coverage to the Military/Navy/Air Force Units/formations in the station:-

- a) Chief Engineer Naval Works Kochi
- b) Addl. Chief Engineer (Liaison) Kochli
- (c) Garrison Engineer (I) Naval Works, Kochi
- (d) Garrison Engineer (I) Naval Works, Fort Kochi
- (e) Garrison Engineer (I) E/M Naval Works, Kochli
- (f) Assistant Garrison Engineer (I), NAD, Alwaye
- (g) Assistant Garrison Engineer (I) R&D Kochi.

5. The offices as mentioned from Sl. No. (b) to (f) are working under the control of the Chief Engineer Naval Works, Kochi. Further when Central Government decided to start a Naval Academy at Eezhimala, due to the lack of infrastructure and other accommodation facilities, the office of the Chief Engineer (NAVAC) Office, which was sanctioned for providing MES coverage to the Naval units at Ezhimala was temporarily stationed at Kochi. Under his controlling authority the following 7 offices are working at Ezhimala from the year 1998 onwards.

- i) Garrison Engineer (I) B/R No.1 Eezhimala
- ii) Garrison Engineer (I) B/R No.2 Eezhimala
- iii) Garrison Engineer (I) B/R No.3 Eezhimala
- iv) Garrison Engineer (I) B/R No. 4 Eezhimala
- v) Garrison Engineer (I) B/R No. 5 Eezhimala
- vi) Garrison Engineer (I) B/R No. 6 Eezhimala

6. Since office buildings and other facilities are made available now at Ezhimala it was decided to shift the office Chief Engineer (NAVAC), Ezhimala also from Kochi to Ezhimala and it is now functioning there. The office of the Chief Engineer (R&D) Secunderabad, respondent No. 4 is the higher authority of respondent No. 3 who has his office at Kakkanad wherein applicant is working now. The commanding authority of all the Chief Engineers is the respondent No. 2 who is also the appointing and transferring authority of category of Motor Drivers in which post the applicant is now working.

7 Respondents submitted in view of the above position necessitating the issue of transfer orders invoking para 57 of Engineer-in-Chief's Branch Army HQ New Delhi posting guidelines Annexure A-3 dated 16.4.2003.

8 In terms of the above guidelines, the seniormost individual in the required categories who were working at Kochi units have been posted as per Annexure A-1 posting order due to exigency of service. Out of the 21 seniormost persons arrayed in Annexure A-1, 15 individuals are taken from the other units/ formations located at Kochi and six individuals are from CE (NAVAC), Ezhimala which was stationed at Kochi. They have also submitted that out of 52 sanctioned strength at Ezhimala there are only 6 persons available there as Driver and thus there is acute shortage of staff. On the contrary, against 26 sanctioned posts in the same category at Kochi, 36 persons are available resulting surplussage of employees. All employees shown in Annexure A-4 produced by the applicant are juniors to the applicants on the date of transfer. The respondents have also submitted that the category of CMD in Group-C cadre are liable to be transferred and posted anywhere in India as per the requirement of the organisation. They admit that the transfer order of another CMD Shri K.P. Mathew who is senior to the applicant was not implemented and that was due to the occurrence of blindness of his wife in spite of an operation. They also denied any knowledge of disease of the wife of the applicant as alleged and that family

obligations cannot be allowed to interfere with the organisational requirement. Therefore they submit that the posting order in respect of the applicant has been issued strictly as per station seniority and there is no violation of the guidelines and the Annexure A-3 guidelines do not provide indefeasible legal right to the applicant to continue in one station.

9 The applicant has filed a rejoinder denying the averments of the respondents especially relating to the contentions regarding deficiency of MT Drivers at Ezhimala and surplus in the same category at Cochin. The applicant has expressed surprise how the deficiency of 46 in the category pointed out by the respondents can be met by deploying a single person like him. It is again reiterated that the respondents should have resorted to the procedure prescribed in paragraphs 35 to 39 of the Transfer Guidelines for declaring the surplus at Cochin and shortage at Ezhimala. The applicant would then have got a posting to one of his choice stations. Therefore it is alleged that the respondents invoking para 57 without jurisdiction is with the malafide intention to impose the transfer on the applicant. It is also pointed out that the applicant being above 52 years of age, is not liable for a tenure transfer.

10 The respondents have filed additional reply statement referring to "Command Manning Level" (CML) adopted in the Department for adjusting surplus and stated that paras 35 to 39 of the guidelines of

the transfer policy are not relevant in the applicant's case and that exemption of age factor is operative from 57 years as specified in para 59. They have repeated that the applicant was neither due for tenure posting nor posted out to complete his tenure liability. Hence they contend that there is no substance in the allegation that any injustice has been done to the applicant.

11 We have heard the learned counsel Shri R. Sreeraj for the applicant and Shri P.M. Saji, ACGSC appearing for respondents and carefully perused the pleadings and the judgments referred to.

12 The learned counsel for the applicant took us through the provisions of the guidelines and strenuously argued that the transfer which have been ordered invoking para 57 of the Guidelines are totally misplaced. In addition to invoking para 57 in Annexure A-1 impugned order, the respondents have also relied on the CML to determine the surplus in each category among the Group-C and Group-D employees. He drew our attention to para 1 of the impugned order at Annexure A-1 which read as follows:-

"The postings are being ordered under the provision of Para 57 of E-in-Cs Br. Posting Guidelines dt. 16 April, 2003. The following persons are surplus at Kochi complex as per CML and the seniormost person at Kochi complex are being posted out to Ezhimala from Gp-D employees. Surplus Group-C employees will be posted during CML-06."

Therefore the respondents are mixing up the provisions of the guidelines in order to favour certain individual and causing undue

hardship to others. It is further argued that the respondents have while explaining the existence of the units and formations in Cochin and other places, have themselves admitted that office of the CE, (NAVAC) started functioning in the year 1998 and out of the 7 units working under the authority of CE (NAVAC) 6 offices have been functioning from Ezhimala from 1998 onwards and only one office of CE, (NAVAC) is functioning from Kochi which is now shifted to Ezhimala and according to the counsel this could not be conceived as enbloc shifting of the CE Kochi office to Ezhimala necessitating invocation of para 57 of the Guidelines. The further contention regarding adjustment of surplus and deficit staff could have been determined and tackled by the stipulations in paras 35 to 37 of the guidelines and the contention made earlier that the transfer has been clearly motivated by collateral issues and legal malice were reiterated.

13 The learned counsel for the respondents based his arguments on the various rulings of the Hon'ble Supreme Court in the following judgments in (i) State of U.P. And another Vs. Siya Ram and another (2004 SCC (L&S) 1009) (ii)State of UP and Ors. Vs. Gobardhan Lal (AIR 2004 All LJ 1466) (iii) (2004) 11 SCC 402 laying down the ratio that unless shown to be vitiated by malafides or made in violation of statutory provisions, Courts or Tribunals should not sit as appellate authorities over transfer orders and that Courts should not attempt to take over the reins of executive/

administration. On facts, the learned counsel argued that the applicant who is a Group C employee is liable to be posted anywhere in India and that shifting of the CE(NAVAC) office is a policy matter. As seen from the records there is a deficiency in the category of Drivers in the Ezhimala office, the applicant had given an undertaking before the respondents that he is willing to work anywhere in India during his service. Even if there has been violation of guidelines, it does not create a cause of action to the applicant to defy the transfer order as guidelines are not legally enforceable.

14 At the outset, we like to make it clear that we are very well aware of the dicta laid down by the Hon'ble Supreme Court in the matter of transfers that challenge to an order of transfer has normally to be eschewed and that Courts and Tribunals in transfer matters cannot substitute their own decision to that of the competent authority. On the other hand it is an equally settled position that if the courts/tribunals have convincing reasons and if the allegation of malafides are based on cogent material or ^{is} is made in violation of statutory provisions, challenge to such order on certain well settled and recognised grounds or reasons can be entertained within the limitations laid down in law. We therefore deal with the facts and circumstance of this case fully conscious of these limitations. Annexure A-1 order which is one of the impugned orders in this O.A. had come to be challenged before us in different Original

Applications. This order has been issued transferring 21 employees of different categories. The applicant herein is at Sl.No. 20 and belongs to the category of CMD-II as noted in the order but as admitted by the respondents in the reply as stated to hold the post of CMD-I. Two women employees in the same order at Sl. No. 1 and 9 had approached this Tribunal in O.A. 492 and 494 of 2006 and the orders of transfer have been quashed. Another O.A. filed by Sl. Nos. 2 and 3 in the category of Daftaries is pending and a stay of the transfer order has been granted therein.

15 Various provisions of the transfer guidelines have been referred to in the pleadings. The respondents have contended therein that the transfers are being ordered under the provision of para 57 of the Guidelines for transfer of Group-D employees in the respondent organisations at Annexure A-3. As pointed out by the applicants the respondents have also stated in para 1 of the impugned order that the transfers are consequent to finding the persons enumerated therein as surplus. The provisions of paras 56 and 57 relevant to both conditions are re-produced below:-

"56 In all cases where staff is rendered surplus, the readjustment will be carried out by posting out the longest stayees in the station/complex. In the case of postings involving inter command transfers, the juniormost person in the grade within the command will be moved. When the surplus staff is to be adjusted within this Command, the staff concerned will be informed of the stations/complexes and approximate number of vacancies available there at to enable them to opt for three stations/complexes of choice from amongst such stations/complexes. If the number of optees for

particular stations/complexes is more than the number of vacancies available, posting will be considered in the order of seniority i.e. Longest stayee will get first opportunity to be adjusted as per the option given. Those could not be accommodated at their stations/complexes of choice for want of vacancies will be posted a per job requirement.

57 In the exigencies of service, situation may arise when offices/works units are asked to move enblock to other locations. In such cases the personnel to be moved will be selected based on their length of service in the stations/complexes i.e. The longest stayee will move by making local adjustments."

The contention of the applicant is that the respondents are using para 57 as a camouflage for effecting the transfers to avoid taking action under para 56.

16 In addition to the above, the applicant has contended that it is an undisputed fact that Ezhimala is a tenure station and the transfer to tenure stations are governed by provisions of Paras 13 & 22 of the guidelines. The respondents have argued that when the transfers are in accordance with para 57, none of the other guidelines would apply.

17 The question arising for our consideration is two fold- firstly whether the reliance on para 57 for making the transfers in the facts and circumstances of the case was correct and secondly whether the provisions of para 57 have overriding effect over other provisions of the Guidelines and whether the respondents can give a go-by to the other provisions of the Guidelines as contended by them. The first question therefore is whether shifting of the CE,

(NAVAC) Ezhimala can be considered as a policy decision for enbloc shifting. This question has been briefly considered by the Tribunal in other OA Nos. 493/2006 and 494/2006 wherein we have expressed our view that it does not stand to reason that the office which is constituted in 1998 itself with 7 units out of which 6 were functioning from Ezhimala since 1998 and the 7th office is being shifted now can be deemed to be an enbloc shifting. The respondents have also not produced any document or order in which such a shifting has been ordered. We are also in dark as to what is the strength of that office taking all the categories of employees and what is the Command Manning Level (CML) as far as that office is concerned. In the absence of records we are constrained to arrive at certain surmises on the basis of the pleadings before us. Annexure A-1 impugned order as stated earlier lists 21 persons of which there are only 2 CMDs - one the applicant and the other person who is since retained in Kochi. The respondents have submitted in para 4 of the reply that out of the 52 sanctioned strength at Ezhimala there are only 6 persons in the category of Drivers which would imply that there is deficiency of 46 employees there. The very veracity of this statement is doubtful. Even if such a huge deficiency existed it has been there since 1998. It is not clear as to how the posting of only two CMDs by the impugned order can rectify this huge deficiency. Further it has been pointed out by the respondents in their additional reply statement that there are 26 sanctioned posts at Kochi against which 36 persons are available

implying that there is a surplus of 10. Even granting the contention of the respondents that para 57 gives them power to post all the seniors who are available in the entire Kochi complex and not confining them ~~xxxx~~ to pick^{ing} the employees from the office of CE (NAVAC) at Kochi, why only the applicant is singled out for adjusting the surplus which is 10 in number is not explained. If this order was intended to provide posting to all the surplus employees, the 10 seniormost employees of which the applicant could have also been one, should have been transferred.

18 The respondents have also not produced any proof to show that the applicant is the seniormost among all the CMDs working in Kochi. They only state that the persons who were working in CE (NAVAC) Ezhimala office and who have been posted at Kochi complex are all juniors to the applicant. But this does not necessarily imply that the applicant is the seniormost among all the staff in the Kochi complex necessitating his transfer to CE (NAVAC) Ezhimala. In fact the respondents have issued the orders at Annexure A-4 on the same date as Annexure A-1 impugned order. The order is styled as "side stepping of staff" and further goes on to say that the posting of some therein are in the interest of the State meaning that the orders are issued in the public interest. First of all the term "side stepping of staff" is not seen in any of the provisions in the guidelines or explained by the respondents in the pleadings. The order issued to 62 persons of various categories

and all these persons are seen to be working in the office of the CE (NAVAC) Ezhimala at Kochi. Apart from other ministerial staff there are 13 Peons, 8 CMDs and 2 Chowkidars and 3 Saffaiwalas included in the order. Since all these persons are seen to be working in the office of the CE (NAVAC) at Kochi it can be reasonably presumed that the CE (NAVAC) office here had a strength of 8 CMDs and all of them have been adjusted at various other offices in Kochi. Against the 8 posts it is the applicant alone who is now posted to Ezhimala as the other persons transferred along with him has been retained. Therefore it is clear that even in the single unit of CE (NAVAC) Ezhimala, there is still deficiency of 7 CMD and according to the respondents themselves the total deficiency of Ezhimala is 46. Taking a cumulative view of the entire situation as it emerges from the above facts we consider that the contention of the applicant that he has been singled out to be shifted to Ezhimala while giving favourable treatment to many others by retaining them and that there is some element of malice in the transfer of the applicant, to a great extent borne out by the records placed before us. The respondents are trying to justify the transfer of the applicant now by referring to adjustment of surplus/deficiencies etc. But the figures referred to by the respondents are not supported by any document nor there appears to be any such emergency to fill up these deficiencies nor a coordinated effort on the part of the respondents to work out the surplus in each category to fill up the gaps meticulously applying the Guidelines in a phased

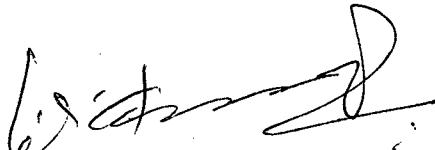
manner. We are able to appreciate that huge deficiencies cannot be made up in one go, as observed, it should have been done in a phased manner thereby avoiding discriminatory treatment and also taking into account the genuine grievances of the employees like the applicant. Such an exercise does not appear to have been done. This piecemeal postings of 21 employees by retaining 62 people working already in the office proposed to be shifted is an imbalanced and half baked attempt to shift the employees on a pick and choose basis without any rationale and that is why the applicants have been constrained to approach this Tribunal in various Original Applications.

19 We are also of the view that the contention of the applicant that Ezhimala is a tenure station and that he is now above 53 years is also a fact to be reckoned by the respondents under para 22 of the provisions of the Guidelines regarding tenure posting and para 55 relates to adjustment of surplus vacancies. The Guidelines should have been applied in a holistic manner. If the provisions regarding tenure transfers and adjustments of surplus staff are also kept in view the longest stayee in the station complexes would have to be given certain choices first as provided for in paras 54 and 55. If these provisions had been followed, then those who could not be accommodated and if there are no volunteers, only then the staff would have been posted as per requirement and that would not have resulted in the feeling of discrimination as seen to have been

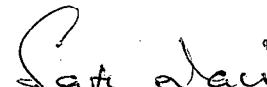
generated now on account of the abrupt issue of Annexure A-1 impugned order.

20 We are therefore of the view that the contentions of the applicant have merit and the orders issued are vitiated by non-application of mind and there are convincing reasons for inferring legal malice in the conduct of the respondents and therefore, they are liable to be quashed. Accordingly Annexure A-1 order is quashed in respect of the applicant. The respondents are directed to allow the applicant to continue to work under the third respondent where he had been working. However, we make it clear that these directions will not stand in the way of the respondents undertaking any exercise in future to adjust the surplus and deficiency in accordance with the Command Manning Level under the various categories in the Cochin complex. While doing so they shall strictly follow the procedure prescribed in paras 35 to 39 read with paras 55 and 56 of the Guidelines at Annexure A-3. Accordingly, the O.A. is allowed. No costs.

Dated 23.4.2007.



DR. K.B.S. RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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