

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 94 / 2008

Wednesday, this the 29th day of April, 2009.

CORAM

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

C.P.Abdulla Koya,
U.D.Clerk,
Collectorate, Kavaratti.Applicant

(By Advocate Mr R Premchand)

v.

1. The Administrator,
Union Territory of Lakshadweep,
Kavaratti.
2. The Secretary (General Administration & Services),
Union Territory of Lakshadweep,
Kavaratti.Respondents

(By Advocate Mr S Radhakrishnan)

This application having been finally heard on 4.3.2009, the Tribunal on 29.4.2009 delivered the following:

ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

Challenge in this O.A is against the Annexure A-4 office memorandum issued by the respondents rejecting his representation dated 5.1.2007 to grant him regular promotion as Upper Division Clerk (UDC for short) with effect from 28.5.1993 i.e. the date on which the DPC has considered his case first for promotion and kept it in the sealed cover.

2. The facts of the case are that the applicant entered the U.T.

Administrative service as Godown Keeper at Cooperative & Marketing Society, Kiltan with effect from 10.5.1993 and he was posted as Godown Keeper at Kadamat with effect from 16.8.1984. As a Godown Keeper it was his responsibility to keep a watch on the movement of civil supplies items like rice and sugar under the Public Distribution System through the fair price shops. A disciplinary case was initiated against him vide order No.F.No.13/46/86 Coop. dated 27.6.1989 under Rule 14 of the CCS(CCA) Rules, 1965. The charges against him were as under:

"ARTICLE - I

- 1) That the said Shri C.P.Abdulkoya, LD Clerk while functioning as Godown Keeper, Kadmat has wilfully caused a shortage of 7163.0 kgs of rice to Kadmat Island Cooperative Supply & Marketing Society by falsification of accounts as per the entries made in the Stock Register at page 164 (Vol.II) of the year 1985-86 and the weighment details recorded in the weighment register folios 77 to 90 of the above year.
- 2) That the said Shri C.P.Abdulkoya has caused a shortage of 26 Kgs of raw rice by short accounting the weighment of rice unloaded from M.V.Amindivi on 2.8.85 by correcting the original entries in the weighment register.
- 3) That the said Shri C.P.Abdulkoya has misappropriated 400 Kgs of fine boiled rice by making an entry of issue of 1600 Kgs of rice against the actual issue of 1200 Kgs in page No.156 of the stock register against indent No.9 dated 11.9.1985.
- 4) That the said Shri C.P.Abdulkoya has misappropriated 75 Kgs of fine boiled rice by recording in the stock register issue of 975 Kgs against the actual issue of 900 Kgs on 16.9.1985.
- 5) That the said Shri C.P.Abdulkoya has withdrawn from the stock unauthorisedly 4.7 Kgs of fine boiled rice recording the issue of 892.7 Kgs of rice against the actual issue of 888 Kgs as per indent No.89 dated 1.12.1985.
- 6) That the said Shri C.P.Abdulkoya has withdrawn from the stock of 400 Kgs of free sale sugar without actually having issued the stock to the sale sections on 19.7.1986.
- 7) That the said Shri C.P.Abdulkoya has misappropriated 50Kgs of fine boiled rice by falsification of accounts as per entries in the stock register dated 25.6.1987.
- 8) That the said Shri C.P.Abdulkoya has appropriated 50Kgs of free sale sugar by falsification of accounts of the society as per entries in the S.R. Page 33 dated 23.3.1987.

9) That the said Shri C.P.Abdulkoya is responsible for causing shortage of 3 Kgs of fine boiled rice by falsification of accounts."

3. During the pendency of the aforesaid disciplinary proceedings against him, a DPC was held on 25.5.1993 to consider the cases of promotion of LDCs to the post of UDCs. Since the disciplinary proceedings were still pending against the applicant, his case was kept in "sealed cover". He submitted a representation dated 31.8.1994 to the department to consider him also for promotion to the post of UDC. The Secretary Administration vide his OM No.F.No.12/73/93-Service dated 13.9.1994 informed him that his case for promotion to the post of UDC can be considered only after 27.5.1995 or on termination of the disciplinary proceedings whichever is earlier. Later on, the applicant was promoted and posted as UDC on ad hoc basis subject to the outcome of the disciplinary proceedings pending against him vide office order F.No.12/46/99-Services dated 28.6.1996. However, the disciplinary authority passed the final order on 25.10.1999 for the recovery of pecuniary loss suffered by the Government for his negligence and imposing the minor penalty of "censure" with a warning. According to the Government of India Decision (1) under rule 11 of G.B.Sing Compilations of CCS(CCA) Rules, 2003 Edition, read with Govt. of India, OM No.22011/4/91-Estt(A), dated 14.9.1992 of the Ministry of Personnel, Public Grievances & Pension (Department of Personnel & Training), where a departmental proceedings have ended with imposing a minor penalty of Censure or recovery of pecuniary loss to Govt. etc. the recommendation of the DPC in favour of the delinquent employees kept in the sealed cover, shall not be given effect to. But the case of such employees for promotion may be considered by the next DPC in the normal case when it meets after conclusion of the departmental proceedings.

4. The next DPC meeting was held on 26.8.2000 in which 57 employees junior to the applicant were promoted but the case of the applicant was not considered due to certain administrative reasons. Thereafter, another DPC was convened on 13.10.2005 and vide order dated 30.5.2006 (Annexure A-2) the respondents ordered for the applicant's regular promotion in the grade of UDC with retrospective effect from 26.8.2000 itself. His position in the seniority list of UDCs was also tentatively fixed above one Shri P.N.Abdulkoya whose name was first in the office order dated 28.8.2000.

5. The applicant made Annexure A-3 representation dated 27.11.2006 and submitted that the disciplinary proceedings initiated against him on 27.6.1989 was completed only on 25.10.1998 after a lapse of 9 years and 4 months for not his fault and, therefore, he ought to have given regular promotion with retrospective effect from the date on which his junior was promoted, on the recommendation of the DPC held on 28.5.1993 itself. He has also submitted that though he was found fit to be promoted by the DPC in the year 1996, yet he was granted only ad hoc promotion on the ground that the disciplinary proceedings were pending. He has, therefore, filed this Original Application and sought a direction to be issued to the respondents to grant him regular promotion as UDC at least with effect from 28.6.1996 i.e. the date of his ad hoc promotion to that post.

6. In the reply statement, the respondents have admitted that the applicant's case was considered by the DPC at its meeting held on 28.5.1993 along with 15 others but due to the pendency of the departmental inquiry against him, the DPC placed his case in the sealed cover. Later, he was promoted on ad hoc basis vide Annexure R1(a) letter dated 28.6.1996 on the basis of the Government of India, DoPT's OM No.22011/4/91-Estt.(A) dated 14.9.1992 (Annexure R1(b)) the

relevant portion of which reads as under:

"SIX MONTHLY REVIEW OF "SEALED COVER" CASES

4. It is necessary to ensure that the disciplinary case/criminal prosecution instituted against any Government servant is not unduly prolonged and all efforts to finalise expeditiously in 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.

PROCEDURE FOR AD HOC PROMOTION

5. Inspite of the six monthly review referred to in para 4 above, there may be some cases, where the disciplinary case/criminal prosecution against the Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC, which kept its findings in respect of the Government servant in a sealed cover. In such a situation the appointing authority may review the case of the Government servant, provided he is not under suspension, to consider the desirability of giving him ad hoc promotion keeping in view the following aspects:

- a. Whether the promotion of the officer will be against public interest;
- b. Whether the charges are grave enough to warrant continued denial of promotion;
- c. Whether there is any likelihood of the case coming to a conclusion in the near future;
- d. Whether the delay in the finalisation of proceedings, departmental or in a court of law, is not directly or indirectly attributable to the Government servant concerned; and
- e. Whether there is any likelihood of misuse of official position which the Government servant may occupy after ad hoc promotion, which may adversely affect the conduct of the departmental case/criminal prosecution."

7. They have also produced Annexure R1(c) order dated 5.7.1998 according to which the applicant himself has agreed to repay the shortages of Rs.36,028/- and out of which he has actually remitted Rs.20,500/-. The disciplinary authority,

therefore, permitted him to pay the balance of Rs.15,528/- in lumpsum within one month from the date of issue of the order.

8. We have heard Shri R Premchand, counsel for applicant and Shri S Radhakrishnan, counsel for respondents. As is evident from the Annexure R-2 (1)(b) DoPT OM dated 14.9.1992 referred to above itself, it was issued by the Government in view of the judgment of the Apex Court in **Union of India & others v. K.V.Jankiraman [(1991) 4 SCC 109]** in which it has been held as under:

"29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. 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, 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 on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a 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 and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For

these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal."

9. According to the existing instructions of the respondents themselves, the most desirable thing is that the departmental enquiries should or be concluded within a maximum period of two years. If it is not concluded for any reason, the appointing authority may promote such Government servant on ad hoc basis, if such an appointment is not against the public interest after obtaining the recommendation of the DPC which will be held in normal course. Paras 3, 5.3 and 5.4 of the O.M dated 14.9.1992 is relevant and they are extracted below:

"3. On conclusion of the disciplinary case/criminal prosecution which results in dropping of allegations against the Government 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 date of promotion of his next junior on the basis of such position. The Government servant may be promoted, if necessary, by reverting the juniormost officiating person. He may be promoted notionally with reference to the date of promotion of his 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 proceeding/criminal prosecution. Where the authority denies arrears of salary of 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 of 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.

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.

3.2. It is also clarified that in a case where disciplinary proceedings have been held under the relevant disciplinary rules, 'warning' should not

be issued as a result of such proceedings. If it is found, as a result of the proceedings, that some blame attaches to the Government servant, at least the penalty of 'censure' should be imposed.

5.3 If the Government servant concerned is acquitted in the criminal prosecution on the merits of the case or is fully exonerated in the departmental proceedings, the ad hoc promotion already made may be confirmed and the promotion treated as a regular one from the date of the ad hoc promotion with all attendant benefits. In case the Government servant could have normally got his regular promotion from a date prior to the date of his ad hoc promotion with reference to his placement in the DPC proceedings kept in the sealed cover and the actual date of promotion of the person ranked immediately junior to him by the same DPC, he would also be allowed his due seniority and benefit of notional promotion as envisaged in para 3 above.

5.4 If the Government servant is not acquitted on merits in the criminal prosecution but purely on technical grounds and Government either proposes to take up the matter to a higher court or to proceed against him departmentally or if the Government servant is not exonerated in the departmental proceedings, the ad hoc promotion granted to him should be brought to an end."

10. Above being the rule position, we find that there was absolutely no justification on the part of the respondents to take nine long years to complete the disciplinary proceedings initiated against the applicant on 27.6.1989 as against the normal period of 2 years. No reasons are forthcoming from the respondents why there was such a long delay in completion of the enquiry proceedings. In any case, the respondents do not have any case that the applicant was responsible for the delay. On the other hand, the respondents themselves have admitted that the applicant was prepared to repay the shortage of Rs.36,028/- and he had in fact already remitted Rs.20,500/- out of it, before 5.7.1998 and the disciplinary authority has allowed him to pay the balance amount in instalments. Thereafter, the proceedings were prolonged for unexplained reasons and finally he was also imposed with the penalty of "Censure" by the order dated 5.7.1998. However, the respondents promoted him on regular basis only with effect from 26.8.2000 i.e. the date of meeting of the next DPC, when the Annexure R1(b) OM issued by the Government of

India, Department of Personnel & Training does not impose any embargo to declare the ad hoc promotion as regular promotion when the penalty imposed is only "Censure". Moreover, the applicant's ad hoc promotion with effect from 28.6.1996 was uninterrupted till he was promoted on regular basis with effect from 26.8.2000. It is also a well settled law that the period of ad hoc promotion shall be treated as regular when the ad hoc promotion has been followed by regularization.

11. In the above facts and circumstances of the case, we allow this Original Application and quash and set aside the Annexure A-4 O.M dated 7.9.2007 to the extent that it denies regular promotion to the applicant with effect from 28.6.1996. We also direct the respondents to issue revised orders granting the applicant regular promotion as U.D.C with effect from 28.6.1996 and further consequential benefit, if any, within a period of two months from the date of receipt of this order. There shall be no order as to costs.



K NOORJEHAN
ADMINISTRATIVE MEMBER



GEORGE PARACKEN
JUDICIAL MEMBER

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