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CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH

CIRCUIT COURT SITTING AT INDORE

Original Application No. 195 of 2005

Indore, this the 20th day of April, 2006

Hon'ble Dr. G.C. Srivastava, Vice Chairman
Hon'ble Shri K.B.S. Rajan, Judicial Member

Neeraj Agrawal,
S/o. Shri Shiv Prasad,
aged 35 years,
MES-439119,
Executive Engineer (OS&C),
DCWE (Contracts),
Headquarters Commander Works
Engineers, Mhow,
r/o. MES 45,
Golf View,
Mhow.

... Applicant

(By Advocate - Shri D.M. Kulkarni)

V e r s u s

1. Union of India,
through Secretary,
Ministry of Defence,
New Delhi 110 011.
2. Engineer-in-Chief,
Army HQ, Kashmir House,
DHQ PO,
New Delhi 110 011.
3. Chief Engineer,
Central Command,
Lucknow.
4. Chief Engineer,
Jabalpur Zone,
Jabalpur.
5. Shri Rajesh K Jain,
MES-486715,
EE (SG),
DCWE (Contracts),
HQ CWE, Jaipur.
6. Shri A.K. Srivastava,
MES-439124, EE (SG),
DCWE (Contracts), HQ CWE,
Wellington (Tamilnadu).

... Respondents

(By Advocate - Shri Umesh Gajankush)

195/05

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ORDER**By K.B.S.Rajan, JM.-**

The simple issue involved in this case is whether the department can take advantage of its own wrong in not considering the case of the applicant for promotion, despite his having the requisite qualification? In the case of *M.K. Shah Engineers & Contractors v. State of M.P.*, (1999) 2 SCC 594, "No one can be permitted to take advantage of one's own wrong."

2. Brief facts: As contained in the OA

(a) The applicant was appointed on 6-7-1993 on the post of Asst. Surveyor of works. He had cleared direct final examination of institution of Surveyors in 1998. Regular DPC for promotion to the post of Surveyor of works was held one 14-10-1998. The applicant was not considered in the DPC because of the mistake on the part of the respondents. His juniors, Respondents No. 5 and 6 were promoted on 23-12-1998 and 22-12-1998 respectively. The applicant has submitted representation which was considered and review DPC was held on 23-03-1999. He was promoted on the post of Surveyor of Works (Now nomenclatured as Executive Engineer) on 15-07-1999. Due to delay in promotion of the applicant to the grade of Surveyor of works, he had drawn less pay than his juniors Respondents 5 and 6.,

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(b) Respondents 5 and 6 have been given Non Functional Selection Grade (NFSG) in the scale of Rs 12,000 – 16,500 vide order dated 7-6-2004. Being aggrieved on non sanction of NFSG, the applicant submitted representation and for stepping up of pay with reference to his juniors w.e.f. 15-07-1999 and payment of arrears thereof. Respondent No. 2 by his order dated 03-12-2004 rejected the representation and intimated that the applicant would be considered in the next DPC due for ²⁰⁰⁵ ~~2005~~ – 06 when he completes his five years requisite service on 01-01-2005.

(c) The applicant prayed for the following relief:-

- (i) Respondents be directed to pay arrears of salary from 22-12-1998 when Respondents No. 5 and 6 were promoted as Surveyor of Works.
- (ii) It be declared that the applicant is entitled to NFSG (12000 – 16500) from the date his juniors (Respondents 5 and 6) have been given i.e. June, 2004.
- (iii) Respondents be directed to pay arrears of salaries when Respondents 5 and 6 were granted salaries of NFSG since June, 2004.

3. The official respondents have contested the OA. According to them, since the result of the Direct Final Examination of the Institution of Surveyors was not intimated on time to Respondent No. 2, which is mandatory qualification for promotion to the post of Surveyor of works, the applicant was not considered at the time when respondents 5 and 6 were

considered for promotion to the post of Surveyor of Works. However, on receipt of information, the Review DPC was held on 25-04-1999 and the applicant was considered for promotion and panel published on 26-05-1999. The essential qualification for NFSG includes, "Minimum regular service of 5 years in respect of the STS pay scale of Rs 10000 – 15200 in respect of those officers who are directly promoted from group B to posts in this pay scale." The applicant was promoted in the scale of Rs 10000 – 15200 on 15-07-1999 and thus, does not complete 5 years requisite service as on 28-04-2004, the day on which DPC was conducted for grant of NFSG scale to the eligible officers and as such, the officer is eligible for grant of NFSG scale only after meeting the requisite qualification of length of service as prescribed in the Govt. order.

4. In the rejoinder, the applicant has stated as under:-

(a) The result of the Direct Final Examination of the Institution of Surveyors was published and intimated to Respondent No. 2 well within time. Part II order to the effect that the applicant has passed the examination was published on 02-03-1998 itself.

(b) SRO 18 had been published in the Gazette of India dated March, 12, 2005 in which following are amplified by a note:-

Note 1: Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered, provided they are not short of the requisite qualifying/eligibility service by more than half of such qualifying/eligibility service of two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who

have already completed such qualifying/eligibility service.

© Though the respondents in Annexure A-1 had assured the applicant that his name will be considered in the next DPC due for 2005 – 06 when he completes 5 years requisite service on 01-01-2005, the cut off date for the DPC, the applicant is still not granted the NFSG i.e. the pay scale of Rs 12,000 – 375 – 16,500.

5. In the sir rejoinder, the respondents have contended that the SRO published in 2005 would be of no avail to the applicant since the same cannot have retrospective effect.

6. Arguments were heard and documents perused. The fact that the applicant had informed of passing the requisite examination well before the convening of DPC is established vide DO Part II order dated 02-03-1998. Thus, the contention of the respondents that the applicant had not kept the authorities informed of his passing the examination is totally wrong. The Rules on Review DPC are very clear. If review DPC is conducted, the clock has to be set back and the position as on the date of original DPC should be kept in view. When the applicant's case was considered in the Review DPC, and he has been found fit for promotion, his promotion cannot but be from the date his junior has been promoted. Thus, the applicant is ^{was} entitled to be promoted from 22-12-1998, when his juniors were promoted. ~~We order accordingly.~~ The authorities themselves have shown the applicant as senior to the private respondents, vide seniority list at Annexure A-2 of the OA.

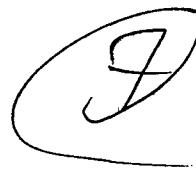
7. Now, with the above ^{deemed} date of promotion, two aspects are to be considered - (a) Arrears of pay and allowances as Surveyor of works from 22-12-1998 to 15-07-1999 as claimed by the applicant vide para 8 (i) of the O.A. and (b) date of promotion to the NFSG (subject to being found fit).

8. As regards (a) above, since the applicant has not agitated at the appropriate time, his claim for arrears is patently time barred. Claiming pay from prospective date is one thing and claiming arrears of pay is another. In the case of *Jai Dev Gupta v. State of H.P.*, (1997) 11 SCC 13 the Apex Court has held as under:-

"2. Learned counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making a number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May 1989. We do not think that such an excuse can be advanced to claim the difference in back wages from the year 1971. In *Administrator of Union Territory of Daman and Diu v. R.D. Valand* this Court while setting aside an order of the Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned counsel for the appellant that the difference in back wages should be paid right from the year 1971. At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in back wages by one year."

9. Thus, prayer for arrears of pay and allowance for the period from 22-12-1998 to 14-07-1999 is rejected.

10. In so far as promotion along with respondent No. 5 and 6 in the grade of NFSG is concerned, the applicant has relied upon in addition to his original contention, SRO published as recently as in March, 2005. However, in their counter to the



rejoinder, the respondents have contended that the same cannot be given retrospective effect. It is trite law that when a junior is considered, the senior should also be considered and save where certain requisite qualifications are lacking, senior cannot be ignored. In the instant case, as five years service in the grade of 10000-15200 was not available with the applicant, he was not considered. But what is to be seen is whether the applicant was at mistake or the department in his not having been considered for promotion in the above grade in 1998, when he had already passed the examination and had duly intimated the same to the respondents. A clear mistake having been committed by the respondents, on the representation preferred by the applicant the respondents had held review DPC to right the wrong. Having found fit for promotion, the date of promotion of the applicant, as held by us hereinabove, should be from the date the juniors were promoted. Thus, the applicant is deemed to have been promoted w.e.f. 22-12-1998. For promotion to NFSG, what is required is five years regular service and not actual service. In this regard reference is invited to the decision of the Apex Court in the case of *Union of India v. K.B. Rajoria*, (2000) 3 SCC 562 wherein the Apex Court has held as under:-

"11. The word "regular" therefore does not mean "actual" and the first question the High Court should have considered was whether the appointment of Krishnamoorti was regular and in accordance with the Rules or it was irregular in the sense that it was contrary to any principle of law."

11. It is, therefore, held that the applicant is eligible to be considered for promotion to the level of NFSG at par with his immediate junior during the year 2004 itself. It has been stated by the applicant in his rejoinder that though the order



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impugned specified that he would be considered for NFSG, till now he has not been promoted. In case the applicant has not been considered, he should now be considered and if found fit, his promotion should be with retrospective effect from June, 2004 i.e. from the date his immediate junior has been promoted. In that event, the applicant is also entitled to arrears of pay and allowances. If the DPC has already been held (after the date of filing by the applicant of the rejoinder) and the applicant was found fit, his promotion be advanced as stated above i.e. from the date his immediate junior was promoted. Arrears of pay and allowances accruing on account of such advancement of promotion should also be granted to the applicant.

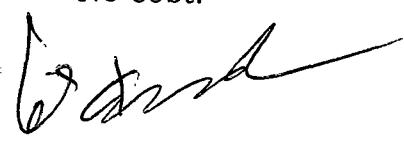
12. In view of the above, the OA is allowed to the following extent:-

The applicant shall be considered for promotion to NFSG and if found fit his date of promotion shall be w.e.f.. the date his juniors i.e. Respondent No. 5 and 6 have been promoted (i.e. June, 2004).

Arrears of pay and allowances accrued thereof should be paid to the applicant.

This order shall be complied with within a period of three months from the date of communication of this order.

No cost.


(K.B.S. RAJAN)
MEMBER (J)


(Dr. G.C. SRIVASTAVA)
VICE CHAIRMAN