

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

(Reserved on 21.08.2015)

O.A No. 060/00930/2014

Date of decision - 2.9.2015

**CORAM: HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J)
HON'BLE MS. RAJWANT SANDHU, MEMBER (A)**

Dr. Narinder Singh Bhardwaj S/o Late Sh. Ram Saroop, R/o H.No. 2504, Sector 19-C, Chandigarh.

...APPLICANT

BY ADVOCATE: Sh. G.S. Sathi

VERSUS

1. Union Territory Chandigarh through its Administrator, U.T. Secretariat Building, Sector 9, Chandigarh.
2. Adviser to the Administrator, Chandigarh Administration, U.T. Secretariat Building, Sector 9, Chandigarh.
3. Home Secretary cum Secretary Health, Chandigarh Administration, U.T. Secretariat Building, Sector 9, Chandigarh.

...RESPONDENTS

BY ADVOCATE: Sh. K.K.Thakur

ORDER

HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J):-

The present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985 by the applicant seeks issuance of direction to the respondents to give effect to the recommendations made by the Departmental Promotion Committee (in short 'DPC') held on 10.02.2010 which found him fit and recommended him for promotion to the post of Deputy Director in the AYUSH Department, U.T. Chandigarh.

2. The facts which led to filing of the present case are that the applicant, Dr. Narinder Singh Bhardwaj, entered into service as Assistant Medical Officer (Ayurvedic) on 25.02.1992 with the Chandigarh Administration. He was promoted as Senior Ayurvedic Physician on 31.03.1999. He is senior most 'Senior Ayurvedic Physician' of the AYUSH Department in the Chandigarh Administration since Feb, 2010. The next higher post in the hierarchy is of Deputy Director (Ayurveda) in the AYUSH Department, Chandigarh. It is the case of the applicant that as per the notification dated 13.01.1992 issued by the Government of India, the service conditions of the employees working in the Chandigarh Administration are to be governed by the service rules/conditions as applicable to the corresponding category of posts in the State of Punjab unless the Administration has its own

rules for that particular category or posts. In state of Punjab, there is no post of Deputy Director (Ayurveda) under Punjab Ayurvedic (Group A) Service Rules, 2008. However, the post of Joint Director (Ayurveda) and District Ayurvedic & Unani Officer carry the same pay scale as that of the Deputy Director (Ayurveda) in the AYUSH Department. In the State of Punjab a District Ayurvedic and Unani officer becomes eligible for promotion to the post of Joint Director after the three years of minimum experience. Similarly, a Senior Ayurvedic Physician attains eligibility for promotion to the post of District Ayurvedic/Unani Officer after minimum experience of one year. In the light of these rules, the applicant became eligible for consideration for promotion to the post of Joint Director in March 2002 under the Punjab Rules.

3. The Chandigarh Administration framed draft Rules known as 'The Chandigarh Administration Ayurveda Physicians/Doctors (Group A posts) (Non-Ministerial) Recruitment Rules, 2010 (in short 'Draft Rules, 2010'). Under the said Rules, a Senior Ayurvedic Physician with five years of regular service in the grade, becomes eligible for promotion to the post of Deputy Director (Ayurveda). There is only one post of Deputy Director in AYUSH. The applicant became eligible in terms of the above rules in 2004 and his case was to be considered for the above post. On 04.07.2008 the post of Deputy Director (Ayurveda) fell vacant. The case of the applicant

was processed for consideration for promotion to the said post. The Director (AYUSH) certified the integrity of the applicant and also informed that no disciplinary proceedings or enquiry is pending against him. Vigilance clearance was also sought in his favour. Accordingly, case of the applicant was placed in the DPC meeting held on 10.02.2010 wherein he was found fit for promotion to the post of 'Deputy Director (Ayurveda)' in AYUSH, Chandigarh Administration, as reflected at Annexure A-2.

4. It is the case of the applicant that instead of giving effect to the recommendations made by the DPC, Administrator vide its order dated 31.12.2010 ordered that the applicant, who was working as Senior Ayurvedic Physician, shall be drawn against the post of Deputy Director Ayurveda in the Department. No order of his promotion was passed despite the above-said recommendations. After waiting for sufficient time, the applicant submitted a representation dated 04.02.2011 supplemented with various requests/representations for issuance of promotion order. The respondents did not pay any heed to the applicant's request and ultimately he moved an application under the RTI Act, 2005. In response to which, he was informed that despite the recommendations made by the DPC, his case was not forwarded to the concerned quarter and it is shifting between the respondents no. 2 and respondent no. 3. Vide order dated 14.09.2012, the

applicant was assigned the duty of In-charge (Ayurveda). Vide subsequent order dated 03.07.2013, the applicant was directed to work against the post of Deputy Director (Ayurvedic) with a rider that he will continue to work in the existing pay scale and no additional allowance/emoluments will be given to him.

5. It is the further case of the applicant that despite recommendation having been made by the committee in which Home Secretary, Chandigarh Administration was one of the member, his predecessor had raised certain query which could not be done as once the DPC had already approved his case for promotion under the Draft Rules, 2010, the applicant was entitled for promotion by issuance of order in that behalf from due date. The pendency of draft rules cannot be used as a ground to deny him promotion for which he has already been declared fit by the DPC. Hence, the present O.A.

6. The respondents have contested the claim of the applicant by filing a detailed written statement where in para 2 of the "Preliminary Submissions", they have stated that there is no post of 'Deputy Director' under the Punjab Rules in Ayurvedic (Clinical Side). Therefore, the applicant cannot be promoted. They have submitted that there is no post of Joint Director in the AYUSH Department, U.T. Chandigarh, therefore, he could not be considered for promotion under the Punjab Rules. The posts of Joint Director

and District Ayurvedic Unani Officer in the Punjab cannot be considered at par with the post of Deputy Director, Ayurveda in view of the different pay scale after revision w.e.f. 01.01.2006. The post of 'Deputy Director' existed in Punjab when this post was created in year 1998. The recruitment rules for the said post were under process with the Government of India, Ministry of Health and Family Welfare, Department of AYUSH. The case of the applicant was considered by the DPC under the Draft Rules, 2010 but recommendations were not acted upon in the absence of the notified recruitment rules. The sole ground, as gathered from the written statement, for denial of benefit of promotion to the applicant is that since the Draft Rules have not been finalized by the Government of India (competent authority), the same cannot be acted upon and in any case the applicant has been assigned the work of the post of Deputy Director, in his own pay scale.

7. The applicant has also filed rejoinder wherein apart from contradicting the averment made in the written statement, he submitted that lower officers of the Department are not putting his case before the Administrator as being the competent authority, only he can give effect to the DPC recommendations by application of mind at his own level. It is also averred that issue of promotion under Draft Rules has been considered by the Hon'ble Supreme Court in case of '**Chandigarh Administration through the**

Director Public Instructions (Colleges), Chandigarh Vs. Usha

Kheterpal Waie & Ors., 2011(9) SCC 645 and it has been held that the draft rules can be acted upon if intention is there to follow the same. It is submitted that in view of the settled law, he cannot be denied promotion merely because Draft Rules are pending consideration before Government of India and action of the respondents is totally illegal, arbitrary and discriminatory in nature. Administration is to make promotions in accordance with the Draft Rules in other cases as there is no bar in making promotion on the basis of a Draft Service Rules and as such denial of same to the applicant is discriminatory.

8. We have heard Sh. G.S. Sathi, learned counsel for the applicant and Sh. K.K. Thakur, learned counsel for the respondents.

9. Sh. G.S. Sathi, learned counsel for the applicant vehemently argued that action of the respondents in not giving effect to the recommendations of the DPC which found applicant fit for promotion to the post of Deputy Director in its meeting held on 10.02.2010 on the ground of non-finalization of draft rules is illegal arbitrary and in colourable exercise of powers. To substantiate his argument, he submitted that pendency of draft rules is not a bonafide reason for denial of promotion to the applicant. Moreover, there is no convincing ground forthcoming from the respondents as to why the Draft Rules have not been approved by the Government

93

of India till date. He also draws our attention to the various communications which are part of the O.A indicating that the case of the applicant was never put before the Administrator, who is competent authority, till date for according approval to his promotion. He also has produced the letter issued by the Finance Secretary, dated 26.11.199 where one Dr. Madan Gulati, Medical Officer (Ayurvedic) was promoted to Senior Medical Officer (Ayurvedic) in Group 'A' on adhoc basis subject to finalization of the Recruitment Rules. Based thereupon, he submitted that the respondents can also promote the applicant pending finalization of the recruitment rules. The plea raised on that basis is that the respondents are adopting the plea of pick and choose in dealing with cases of different officers/officials and as such their action based on whims and fancies cannot be approved by a court of law.

10. Per contra, Sh. K.K. Thakur, learned counsel for the respondents reiterated what has been stated in the written statement pleading that unless draft rules are approved by competent authority, the applicant cannot be promoted and in any case he has already been given charge of the promotional post.

11. We have given our thoughtful consideration to the entire matter and perused the pleadings as available on record with the able assistance of the learned counsel for the parties.

12. So, the controversy boils down to this as to whether the applicant can be promoted on the basis of draft recruitment rules or not. It is undisputed factual position that vide notification dated 13.01.1992 issued by the Ministry of Home Affairs, Chandigarh Administration adopted corresponding service rules of Punjab w.e.f. 01.04.1991. Prior to it, there was no rule governing the matter. As gathered from the pleadings, there is no post of Deputy Director (Ayurveda) in the State of Punjab and Post of 'Joint Director' in AYUSH Department under Chandigarh Administration as there is a promotional post of 'Senior Ayurvedic Physician'. Admittedly, the case of the applicant for promotion to the post of Deputy Director (Ayurveda) was recommended and was placed before the DPC which held its meeting 10.02.2010 under the Chairmanship of Home Secretary, Chandigarh Administration which found him fit for promotion and made recommendations therefor. Perusal of Annexure A-1 makes it clear that proposal was placed before the Departmental Promotional Committee. It is clear that they have recorded that there is no post of Deputy Director (Ayurveda) in State of Punjab but the post of Joint Director Ayurveda and District Ayurvedic and Unani Officer exists which carries the pre revised pay scale of Rs. 13500-16800 and 10025-15100, respectively. A District Ayurvedic and Unani officer is eligible for promotion to the post of Joint Director if he has an experience. After considering the case of

the applicant, who was working as Senior Ayurvedic Physician, they have made recommendation for his promotion, pending draft service rules. There is no denial by the respondents in written statement that under Draft Service Rule, the applicant is not eligible for promotion to the post of Joint Director. Once the valid constituted DPC has considered the case of the applicant pending Draft Rules and as per the condition laid down in those rules, the applicant was found eligible and fit for promotion, therefore, the authorities cannot deny him promotion to the higher post on the pretext that rules have not been notified.

13. We are conscious of the fact that old rules governing a post hold the field unless the draft rules are approved and notified. Whereas if there is no rule governing the service condition of a post, then even executive instructions are issued and can be acted upon and made applicable governing a particular post. It has been held by the Courts of law that if Rules are silent on an issue, then executive instructions can fill up the gap. The moot point involved in this case is as to whether the draft rules can be acted upon or not. The Hon'ble Apex Court on more than one occasion has crystallized the law that the draft rules can be acted upon by the competent authority if the intention is there to follow the same. It has been held by Hon'ble Apex Court in **Abraham Jacob and Others Vs. Union of India** [(1998) 4 SCC 65] and **Vimal Kumari**

Vs. State of Haryana and Others [(1998) 4 SCC 114], that the draft rules can be acted upon to meet urgent situations when no rule is operating. In **High Court of Gujarat and Another Vs. Gujarat Kishan Mazdoor Panchayat and Others** [(2003) 4 SCC 712], it was observed as under :-

"27. It is now trite that draft rules which are made to lie in a nascent state for a long time cannot be the basis for making appointment or recommendation. Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future."

While elaborating the law, their Lordships of Hon'ble Apex Court in the case of **Usha Kheterpal (supra)** have held that if rules are not there, then draft rules pending consideration at the hands of the Government of India for notification can be acted upon. The relevant paras are reproduced below:-

"17. In Abraham Jacob vs. Union of India [1998 (4) SCC 65], this Court held that where draft rules have been made, an administrative decision taken to make promotions in accordance with the draft rules which were to be finalized later on, was valid. In Vimal Kumari vs. State of Haryana [1998 (4) SCC 114], this Court held that it is open to the Government to regulate the service conditions of the employees for whom the rules were made, even if they were in their draft stage, provided there is a clear intention on the part of the Government to enforce those rules in the near future.

18. In this case, the High Court however rejected the advertisement on the ground that the regular rules were not notified by the President of India even after five years, when the High Court decided the matter. But what is relevant to

test the validity of the advertisement, was the intention of the appellant when the advertisement was issued. At that time, the appellant had the clear intention to enforce the Recruitment Rules in future as they had been made in consultation with UPSC, in accordance with the UGC guidelines and the Rules had been sent to the Central Government for being notified by the President and the matter was pending consideration for a few months when the advertisement was issued. The appellant at that time had no inkling that there would be inordinate delay or the Rules may not be notified by the President. Therefore, the advertisement in terms of the 2000 Recruitment rules was valid.

19. Even in the absence of valid rules, it cannot be said that the advertisement was invalid. In exercise of its executive power, the appellant could issue administrative instructions from time to time in regard to all matters which were not governed by any statute or rules made under the Constitution or a statute. In fact it is the case of the respondents that the appellant had issued such instructions on 20.8.1987 directing that the lecturers from UT cadre should be promoted as principals. In fact, the administrator of appellant had issued a notification on 13.1.1992 adopting the corresponding Punjab Rules to govern the service conditions of its employees. If so, the administrator of appellant could issue fresh directions in regard to qualifications for recruitment.

20. The Recruitment Rules made by the Administrator were duly notified. Though they were not rules under Article 309, they were nevertheless valid as administrative instructions issued in exercise of executive power, in the absence of any other Rules governing the matter. Once the recruitment rules, made by the Administrator, were notified, they became binding executive instructions which would hold good till the rules were made under Article 309. Therefore, the advertisement issued in terms of the said Recruitment Rules was valid."

14. While allowing the appeal filed at the hands of the Chandigarh Administration in the above case, their lordships have also reiterated the principles laid down in Abraham Jacob and Vimar Kumari (supra) holding that draft rules can be treated as

✓ administrative instructions issued in exercise of executive power, in the absence of any other rules governing the matter. Once the Recruitment Rules are notified, they become binding executive instructions which would hold good till the rules are made under Article 309. The case in hand is on better footing inasmuch as the applicant has been given charge of the promotional post in his own pay scale. He has been found fit and recommendation has been made for his promotion. The rules are in the process of being approved at the hands of the competent authority. Thus, it would not be proper for the authorities to deny him promotion to the higher post. It is the admitted case of the respondents that the post of Deputy Director (Ayurveda) does not exist in Punjab Rules and there are no rules to govern the same. The only rules governing the field are the Draft Rules. There is no plea taken by authorities that they do not intend to follow the draft recruitment rules. In fact their aim and intention is apparent from the documentation on record to follow the draft rules and the case of the applicant has been considered for promotion under the draft rules itself, though reference was also made to Punjab Rules. The noting portion clearly indicates that the draft rules were sent to the GOI in the year 2007 for approval. However, on 24.6.2009, draft rules, as corrected by DOPT were received from the Ministry of Health and Family Welfare, Govt., of India and the proposal was

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again sent on 30.9.2009. Reminders have also been sent from time to time. In fact the noting at page 37 also takes notice of judicial pronouncements by this Tribunal dated 13.10.2003 in O.A.No.1122-CH-200, 1120-HR-2002 and 1279-CH-2002 titled Dr. Nalini Agnihotri, Dr. Manjula Mehta and Dr. Mini Verma Vs. UOI etc. in which the Tribunal had held that the UPSC could go ahead with the process of recruitment as per draft rules even if the same had not been notified and draft rules could be utilized for making selection. Thus, approval was sought for promotion of the applicant for adhoc basis. However, the officers are romancing with the pending draft recruitment rules to deny promotion to the applicant, ignoring the fact that the applicant is suffering in matter of promotion despite having been found eligible and fit therefor. No doubt they have taken steps by sending letters to the competent authorities for expediting the finalization of the rules but the fact remains that if such notification does not take place soon as it is pending since 2009, the applicant cannot be made to suffer.

15. In the light of the above discussion, it can safely be concluded that if there are no rules framed under Article 309, Draft Service Rules and even executive instruction can govern the service condition of a particular post. Merely because, rules are pending consideration for approval, right of an employee for promotion cannot be defeated more so when he has already been

recommended for such promotion. Following the ratio laid down in aforesaid cases, we are left with no other option but hold that the applicant is entitled for promotion on the basis of recommendation made by the DPC in his favour and denial cannot be made on the premise that rules are pending approval at the level of competent authority. In that view of the matter, we direct the respondents to give effect to the recommendation made by the DPC by placing the matter before the Administrator, who is competent authority as per the pleadings, to approve and issue promotion orders, in terms of the Draft Service Rules, which are pending consideration with the Government of India. As there is no objection raised by the respondents in the written statement nor suggested at the time of the arguments that the applicant is not eligible under 2010 Draft Rules, hence, his eligibility is not an issue. Needful be done within a period of two months from the date of receipt of certified copy of the order.

16. No costs.

**(SANJEEV KAUSHIK)
MEMBER (J)**

**(RAJWANT SANDHU)
MEMBER (A)**

Dated: 2.9.2015

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