

Central Administrative Tribunal Principal Bench, New Delhi

O.A. No.1268/2014

Friday, this the 18th day of September, 2015

Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Dr. B. K. Sinha, Member (A)

S S Mahlawat, Deputy Secretary (Retd.)
Group 'A', Aged 60 years
s/o late Shiv Lal
r/o 168, Sector-15, Part I
Gurgaon, Haryana

..Applicant

(Mr. Ashish Nischal, Advocate)

Versus

1. Union of India through its Secretary
Department of Personnel & Training
Ministry of Personnel, Public Grievances & Pensions
North Block, New Delhi-1
2. Union of India through its Secretary
Ministry of Heavy Industries
Udyog Bhawan
New Delhi-8

..Respondents

(Mr. Rajeev Kumar, Advocate)

O R D E R (ORAL)

Mr. A.K. Bhardwaj:

In the present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has sought issuance of directions to the respondents to promote him to the next grade of Director on notional basis, with consequential retiral benefits. Indubitably, by now, the applicant has retired from service. The date of his retirement is 31.3.2014. It is also the admitted case of the parties that no junior of the

applicant was promoted to the post of Director from the date when he was in service.

2. In terms of the O.M. No. 22011/4/98-Estt.(D) dated 12.10.1998 issued by the Department of Personnel & Training, though the retired government servant may be considered for promotion to determine the correct zone of consideration but unless any of his junior is promoted from the date when he was in service, no actual benefits should be given to him.

Relevant excerpt of the said O.M. reads thus:-

“Procedure to be followed by the Departmental Promotion Committee in regard to retired employees.-

2. Doubts have been expressed in this regard as to the consideration of employees who have since retired but would also have been considered for promotion, if the DPC(s) for the relevant year(s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs). It may be pointed out in this regard that there is no specific bar in the aforesaid Office Memorandum, dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing yearwise panel(s), who were within the zone of consideration I the relevant year(s). According to legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered while preparing yearwise zone of consideration/panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration, if the DPC(s) had been held in time. This is considered imperative to identify the correct zone of consideration for relevant year(s). Names of the retired officials may also be included in the panel(s). Such retired officials would, however, have no right for actual promotion. The DPC(s), may, it need be, prepare extended panel(s) following the principles prescribed in the Department of Personnel and Training, OM No. 22011/8/87-Estt. (D) dated 9.4.1996 (copy enclosed).

4. Ministries/Departments are requested to bring these instructions to the notice of all concerned including their Attached and Subordinate Offices.”

3. Besides in **Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur & another**, 1988 SCC (L&S) 1754, the Hon'ble Supreme Court categorically viewed that there is no such law, which provides retrospective promotion or the promotion from the date of availability of the vacancies and the promotion can be made effective either from the date of Departmental Promotion Committee or assuming the charge of promotion, whichever is earlier. Relevant excerpt of the judgment reads thus:-

“8. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. It is not the case here. From the promotional quota, four promotions were made only on 30.12.1996 i.e., after the appellant had retired. Those promoted were given promotions from the dates the orders of their promotions were issued and not from the dates the posts had fallen vacant. It is also the contention of the High Court that these four officers, who were promoted to RHJS, were senior to the appellant as per the seniority list. The question which falls for consideration is very narrow and that is if under the Rules applicable to the appellant promotion was to be given to him from the date the post fell vacant or from the date when order for promotion is made. We have not been shown any rule which could help the appellant. No officer in RJS has been promoted to RHJS prior to 31.05.1996 who is junior to the appellant. Further decision by Rajasthan High Court has been taken to restore the imbalance between the direct recruits and the promotees which, of course, as noted above, is beyond challenge.

9. In *Union of India and Ors. v. K K Vadera and Ors.*, AIR 1990 SC 442 this Court with reference to Defence Research and Development Service Rules, 1970, held that promotion would be effective from the date of the order and not from the date when promotional posts were created. Rule 8 of those Rules did not specify any date from which the promotion would be effective. This Court said as under:-

"There is no statutory provision that the promotion to the post of Scientist 'B' should take effect from 1st July of the year in which the promotion is granted. It may be that rightly, or wrongly, for some reason or the other, the promotions were granted from 1st July, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientists 'B' should be with effect from the date of the creation of these promotional posts. **We do not know of any law or any rule under which a**

promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

(emphasis supplied)

4. A view similar to the view taken in **Baij Nath Sharma's** case (supra) was also taken by the Apex Court in **State of Uttaranchal & another v. Dinesh Kumar Sharma**, 2006 (13) SCALE 246. Relevant excerpt of said judgment reads thus:-

"18. With regard to the issue as to whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether seniority will be reckoned from the date of substantive appointment which is 1999, it can be observed that an employee will be considered member of a cadre from the date of his/her substantive appointment in the cadre after selection. Substantive appointment is defined under Rule 3 (k) of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 where:

Substantive appointment" means the appointment not being an ad-hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and if there are no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government.

Therefore it is clear that unless a selection is made in accordance with the rules and in the absence of rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government and there can be no automatic promotion or appointment to any post on the recommendation of the Public Service Commission, unless the government sanctions such promotion and appointment.

XXX

XXX

XXX

XXX

23. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of Jagdish Ch. Patnaik and Ors. v. :State of Orissa and Ors. [1998]2SCR676 .

24. Coming to the question of whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rule s, 1991 and grant a relief in favour of the respondents, it will be helpful to reproduce the High Court's order:

From the perusal of the aforesaid order, it is clear that the authority has not applied its mind on the facts of the case as stated by the petitioner, in the representation, and has rejected the representation on the ground that since the appointment letter was issued to the petitioner on 19.11.1999, therefore he is entitled to his seniority from that date. Even if the recruitment year is changed the order of appointment cannot be made with retrospective effect. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999. Therefore, this could have consequently affected the consequential benefits available to the petitioner had his promotion being made w.e.f. the date of promotion of falling of vacancy. Therefore, the order dated 1st October, 2002 suffers from non application of mind and is hereby liable to be ignored.

The fact that the vacancy had fallen on 1st May, 1996 and 1st June, 1996 in the recruitment year 1995-96 are not disputed by the respondents. The petitioner cannot be made to suffer on account of delay in recommendation by the Director of Agriculture for promotion of the petitioner. The petitioner cannot be held responsible and cannot be made to suffer as such became entitled to be considered for promotion on 1st May, 1996. Therefore, the government is directed to reconsider the matter and send it back to the Commission for appropriate orders suitable in the facts and circumstances of the case. Subject to the above, the writ petition is disposed off finally.

This observation of the High Court in our view is erroneous. The High Court while observing that, "the appellants rejected the representation of the respondents on the ground that since the appointment letter was issued to the respondent on 19.11.1999, he is entitled to his seniority from that date. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999", has committed an error in understanding and appreciating Rule 17 and 21 of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, which categorically states that the date of 'substantive appointment' will be the date that shall be taken for determining promotion, seniority and other benefits."

5. In view of the aforementioned, the Original Application is devoid of merit and is accordingly dismissed. No costs.

(Dr. B.K. Sinha)
Member (A)

(A.K. Bhardwaj)
Member (J)

September 18, 2015
 /sunil/