

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A.No.1571/2014

Order reserved on 14th March 2017

Order pronounced on 30th March 2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K.N. Shrivastava, Member (A)**

S.L. Gupta, age 53 years (Joint Director)
s/o Mr. Ram Gopal
r/o 98, Om Vihar
Phases IA, Uttam Nagar
Delhi – 59

..Applicant

(Mr. Sachin Chauhan, Advocate)

Versus

1. Union of India through its Secretary
Ministry of Water Resources
Sharam Shakti Bhawan
New Delhi – 110 001
2. The Director
Central Soil & Materials Research
Station, Olof Palme Marg, Hauz Khas
New Delhi – 110 016
3. The Secretary
DOPT
Ministry of Personnel, Pension & Public Grievances
North Block, New Delhi
4. The Chairman
UPSC
Dholpur House
Shahjahan Road
New Delhi
5. The Under Secretary
Govt. of India
Ministry of Water Resources
Central Soil & Materials Research Station
Olof Palme Marg, Hauz Khas
New Delhi – 16

..Respondents

(Mr. R.K. Jain, Advocate)

O R D E R**Mr. K N Shrivastava:**

Through the medium of this O.A., filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for the following reliefs:-

“8.1 To quash and set aside the order dated 10.04.2012 to an extent whereby the applicant is being given In-situ promotion under FCS to the post of Joint Director (re-designated to Scientist ‘E’) w.e.f. 27.03.2012 instead of 01.07.2007 and order dated 03/04.03.2014 whereby the representation of the applicant has been rejected and to further direct the respondent to antedate the promotion of the applicant to the grade of Joint Director (re-designated to Scientist E) w.e.f. 01.07.2007 with all consequential benefits including seniority and promotion and pay and allowances.”

2. The brief facts of the case are under:-

2.1 The applicant is presently working as a Chief Research Officer (CRO) in the Central Soil & Materials Research Station (CSMRS), New Delhi (respondent No.2). CSMRS comes under the administrative control of Ministry of Water Resources (respondent No.1). The applicant joined CSMRS on 02.09.1986 as a Research Officer (RO).

2.2 The promotions of CSMRS officers were governed by the CSMRS, New Delhi (Group A) Posts Recruitment Rules, 1983 (for short “Rules 1983”). The channel for promotion is as under:-

Research Officer → Senior Research Officer

Senior Research Officer → Chief Research Officer

Chief Research Officer → Joint Director

2.3 The CSMRS was declared as Scientific & Technological Institution (STI) on 28.12.1983. Pursuant to the recommendations of 5th Central Pay Commission (CPC), the Central Government introduced Flexing Complementing Scheme (FCS). An Office Memorandum (OM) dated 09.11.1998 (pp 219 to 229) was promulgated by the DoPT to this effect.

2.4 The FCS was modified in the year 2010 on the basis of the recommendations of the 6th CPC. Accordingly, the DoPT issued OM dated 10.09.2010 (pp 180 to 218). The promotions of Scientists under FCS are done through the Departmental Promotion Committee (DPC) procedure, which is conducted by the Union Public Service Commission (UPSC).

2.5 The applicant's contention is that since he had joined as RO on 02.09.1986, therefore, in terms of the FCS, he should have been promoted as Senior Research Officer (SRO) in September 1991, but he was actually promoted by the respondents on 10.01.1994. He approached this Tribunal in O.A. No.1715/1995 seeking a direction to the respondents to promote him as SRO from the due date. The said O.A. was disposed of vide order dated 14.10.1999. As per Tribunal's directions, his promotion as SRO was antedated to September 1991 and he was also paid the arrears.

2.6 The applicant's further contention is that in terms of FCS, he was eligible for promotion as CRO on 10.01.1999 but was actually promoted on 11.10.2006. He again approached the Tribunal by filing O.A. No.1492/2010 seeking antedation of his promotion to the post of CRO. The said O.A. was also allowed vide order dated 01.11.2011. As per the directions of the Tribunal, his promotion as CRO was antedated w.e.f. 01.07.2002 and he

was also paid all the consequential benefits. His period from 01.07.2002 to 11.10.2006 was treated as 'non-functioning' under F.R.17. His claim is that he is in the pay scale of CRO since 01.07.2002 and hence in terms of the FCS, he has attained the eligibility for promotion as Joint Director on 01.07.2007 itself.

2.7 After coming into being of the modified FCS vide DoPT OM dated 10.09.2010, with a view to align the Rules 1983, the Ministry of Water Resources (respondent No.1) amended the Rules 1983 and brought out the CSMRS, New Delhi, Group 'A' Posts Recruitment Rules, 2010 (for short "Rules 2010"), which was published on 23.11.2010. In the Rules 2010, existing posts were rechristened and were also given the new pay scales as indicated in the table below:-

Sl.No.	Existing Designation	New Designation
(1)	(2)	(3)
(i)	Joint Director	Scientist E
(ii)	Chief Research Officer	Scientist D
(iii)	Senior Research Officer	Scientist C
(iv)	Research Officer (Engineering)	Scientist B
(v)	Research Officer (Scientific)	

2.8 The applicant was promoted to the post of Scientist E (erstwhile Joint Director) vide Annexure A-1 order dated 10.04.2012 w.e.f. 27.03.2012. His claim is that his promotion as Scientist E should be antedated w.e.f. 01.07.2007 instead of 27.03.2012. He made representation dated 14.02.2014 to the respondents in this regard, which was turned down by the respondents vide Annexure A-2 letter dated 03.03.2014.

As his claim has not been considered by the respondents, the applicant has filed the present O.A. praying for the reliefs indicated in paragraph (1) *ibid.*

3. Pursuant to the notices issued, the respondents entered appearance and filed reply, followed by two additional affidavits dated 22.05.2015 and 22.12.2015. Thereafter the applicant filed his rejoinder.

4. The important points pleaded in the reply filed by the respondents are as under:-

i) As per paragraph 5 (3) of the Rules 1983, at any given point of time, the number of posts in the grade of Joint Director (Scientist E) and CRO (Scientist D) shall not exceed 30% of the total number of posts in the grades of RO, SRO, CRO and Joint Director put together. It further provided that the number of posts in the grade of Joint Director shall not exceed 30% of the total number of posts in the grades of CRO & Joint Director put together and also to the condition that the total number of posts taken together shall not exceed the strength. This would indicate that the promotions to all grades from SRO onwards, viz. SRO to CRO & CRO to Joint Director, are vacancy based. The only exception to this Rule being that of promotions from RO (lowest rung) to SRO where there is 100% flexibility and thus promotions from RO to SRO are not vacancy based.

ii) Although *in situ* promotions under FCS are personal to the officers concerned, yet a specific proportion of posts have been fixed in the grades of CRO & Joint Director, and hence an officer can only be considered for promotion to these grades as and when a vacancy arises in such grades.

iii) The applicant was promoted to the post of CRO along with others vide order dated 11.10.2006 (Annexure R-II). Not satisfied with the promotion order, the applicant approached this Tribunal in O.A. No.1492/2010 seeking antedation of his promotion immediately after completion of eligibility period, i.e., with effect from September 1996. In pursuance of the judgment of the Tribunal dated 01.11.2011 in the *ibid* O.A., the applicant's promotion was antedated w.e.f. 01.07.2002 with all consequential benefits. However, the period from 01.07.2002 (effective date of antedation) to 11.10.2006 (when the antedation order was issued) was treated as 'non-functioning' under F.R. 17.

iv) The applicant had assumed the charge of CRO on 10.10.2006 and he completed the requisite residency period of five years in the grade of SRO on 10.10.2011 and thus became eligible for consideration for promotion to the grade of Joint Director (Scientist E) w.e.f. 10.10.2011 and not 01.07.2007. He has, however, been promoted to the grade of Scientist E vide Annexure A-1 order w.e.f. 27.03.2012 in terms of Rule 6 (9) of the Rules 2010.

v) The Tribunal, in its judgment dated 05.03.2012 in O.A.No.1861/2010 **titled Nakul Dev & another v. Union of India & others**, has acknowledged the fact regarding an incumbent officer having not performed the function of higher post between the period of date of promotion and date of antedation of promotion (for whatever reasons).

vi) Although in compliance with the Tribunal's order dated 01.11.2011 in O.A. No.1492/2010 antedating the promotion of the applicant as CRO w.e.f.

01.07.2002, his pay was re-fixed under F.R. 22 (1) (a) (i), but the period from 01.07.2002 to 11.10.2006 cannot be counted for promotion under F.R. 17, as the applicant had not discharged the duties of CRO during this period.

vii) The applicant has been assessed for promotion to Scientist E (Joint Director) by Board of Assessment (BoA) in UPSC on the basis of Rules 2010 and has been granted such promotion w.e.f. 27.03.2012 (Annexure A-1). In this regard, reference is made to paragraph 6 (9) of the Rules 2010, which contains a provision reading as under:-

“6. (9) The effective date of promotion of officers those found eligible for promotion under the Flexible Complementing Scheme shall be the date of approval of the promotion proposals by the Approving Authority of Assessment Board’s recommendations but retrospective promotion shall not be admissible in any case.”

5. On completion of the pleadings, the case was taken up for hearing the arguments of the parties on 14.03.2017. Arguments of Mr. Sachin Chauhan, learned counsel for applicant and Mr. R K Jain, learned counsel for respondents were heard.

6. Mr. Sachin Chauhan, learned counsel for applicant, reiterating the averments made in the O.A., submitted that the applicant was denied promotions to higher posts from the date of his eligibility by the respondents time and again. He, however, has been getting the promotions from the eligibility date with judicial intervention of this Tribunal. The applicant’s promotion to the post of CRO (now called Scientist D) had been antedated w.e.f. 01.07.2002 and hence he acquired eligibility for promotion as Joint Director (now called Scientist E) w.e.f. 01.07.2007. The

respondents have promoted the applicant to the post of Scientist E vide Annexure A- 1 office order dated 10.04.2012 w.e.f. 27.03.2012, whereas his promotion should have been effective from 01.07.2007. His representation dated 14.02.2014 in regard to his claim has also been turned down by the respondents vide Annexure A-2 letter dated 03.03.2014. Under these circumstances, the applicant approached this Tribunal for claiming his legitimate right for promotion from due date.

7. In support of his claim, the learned counsel relied upon the following judgments of the Tribunal:

- i) **Mr. Hasan Abdullah & others v. Union of India & others** (O.A. No.1810/2007) decided on 09.07.2009;
- ii) **Dr. Rajbal Singh v. Union of India & others** (O.A. No.143/2008) decided on 19.12.2010; and
- iii) **Babu Nair & others v. Union of India & others** (O.A. No.806/2016) decided on 07.10.2016

8. *Per contra*, Mr. R K Jain, learned counsel for respondents, reiterating the averments made in the reply and the additional affidavits, submitted that promotions under the Rules 1983 were indeed vacancy based. In this regard, the provisions of Rule 5 (3) of the Rules 1983 have already been mentioned in the reply. He further argued that admittedly the applicant assumed the charge of the post of CRO on 10.10.2006, *albeit* on the judicial intervention of this Tribunal. The said promotion has been antedated w.e.f. 01.07.2002, but then the fact remains that the applicant did not work as

CRO during the period from 01.07.2002 to 11.10.2006. Under the FCS, the residency period is to be strictly enforced. Since the applicant acquired the 5 years residency period on 10.10.2011, he became eligible for consideration to the post of Scientist E (Joint Director) only from 10.10.2011 and not 01.07.2007. He has been promoted as Scientist E vide Annexure A-1 office order dated 10.04.2012 w.e.f. 27.03.2012.

9. Mr. Jain further submitted that this Tribunal in **Nakul Dev's case** (supra) has acknowledged that five years of regular service in the grade of CRO is required for an officer to be considered for *in situ* promotion to the grade of Joint Director in terms of Rules 1983. Considering the peculiarity of the applicants therein, the Tribunal chose to prescribe a method to resolve the controversy. However, the Tribunal hastened to record in the said order that the method adopted is only *qua* the applicants therein and should not be treated as judicial precedent.

10. To buttress his arguments, the learned counsel relied on the judgment of the Hon'ble Supreme Court in **State of Maharashtra & another v. Tara Ashwin Patel & others**, 2015 (10) SCALE 57 wherein it has been held as follows:-

“We find from a bare reading of the two Resolutions dated 25th October, 1977 and 27th February, 1989 that for the purposes of career advancement the appellants had upgraded the post of Demonstrator/Tutor to the post of Lecturer and it appears that the respondents were also getting wages for the period of upgradation, i.e., from 1st July, 1975 to 25th October, 1977. However, for the purposes of grant of Senior Scale and, subsequently, for the grant of Selection Grade, what was required in terms of the aforesaid Resolutions was actual service or regular appointment in the post of Lecturer. Thus, the respondents did not have and they cannot get the benefit of the deemed status of upgradation from 1st July, 1975 to 25th October, 1977. The deemed status was apparently for the purposes of pay and other allowances

and cannot be counted towards actual physical service rendered by the respondents in the post of Lecturer.”

11. We have given our thoughtful consideration to the rival arguments of the parties and have also perused the pleadings and documents annexed thereto.

12. Admittedly, Rules 1983 were controlling the field of promotions of officers of CSMRS from the dates of its promulgation, i.e., 09.11.1998 to 23.11.2010 when the amended Rules 2010 came into existence. As submitted by the learned counsel for respondents, Rule 5 (3) of the Rules 1983 makes it clear that promotions under it were indeed vacancy based. For clarity, we reproduce Rule 5 (3) below:-

“(3) Subject to the conditions that any given point of time, the number of posts in the grade of Joint Director and Chief Research Officer shall not exceed 30 per cent of the total number of posts in the grades of Research Officers, Senior Research Officer, Chief Research Officer and Joint Director put together and provided further that the number of posts in the grade of Joint Director shall not exceed 30 per cent of total number of posts in the grade of Chief Research Officer and Joint Director put together and to the condition that the total number of posts taken together shall not be exceeded, there shall be complete flexibility in the number of posts in relation to the respective grades.”

13. Further, it is pertinent to note that although the old FCS came into existence in the year 1998 when DoPT issued O.M. dated 09.11.1998. Likewise, the modified FCS came into existence in the year 2010 after issuance of O.M. dated 23.11.2010 by the Ministry of Water Resources (respondent No.1). Legally speaking, promotions under FCS could be granted only after the Recruitment Rules were amended and aligned with the FCS. In the case of CSMRS, this exercise was accomplished on 23.11.2010 when the

modified Rules 2010 in conjunction with the modified FCS were promulgated. Thus the benefits of FCS, in true sense, became applicable to the Scientists of CSMRS w.e.f. 23.11.2010.

14. The applicant was promoted as CRO on 11.10.2006. His promotion, however, was antedated w.e.f. 01.07.2002 as per the directions of this Tribunal in O.A. No.1492/2010. Admittedly, the applicant did not work as CRO from 01.07.2002 to 11.10.2006. The respondents have, however, treated this period as 'non-functioning'. The applicant worked substantively as CRO and thus acquired the residency period of five years only on 10.10.2011. In terms of Rules 2010, he became eligible for consideration for *in situ* promotion to the grade of Scientist E on 10.10.2011. The Tribunal in **Nakul Dev's** case (supra) also observed that non-functioning period cannot be counted towards residency period. Otherwise also, the basic objective of *in situ* promotion under FCS is that a Scientist ought to have gained sufficient experience, published research papers and only after assessing his performance as a Scientist, his case for *in situ* promotion could be considered. This view is supported by the judgment of the Hon'ble Supreme Court in **Tara Ashwin Patel's** case (supra).

15. Rules 2010 clearly stipulate that a Scientist can be considered for *in situ* promotion for next scale only after putting the requisite length of regular service in the grade. Hon'ble High Court in the case of **K.B. Rajoria v. Union of India & others**, 82 (1999) DLT 666, taking into consideration the judgment of Hon'ble Supreme Court in **S Ramaswamy v. Union of India**, has observed as under:-

“18. Regular service cannot be equated with qualifying service. If contention of Mr. Aggarwal is accepted it would result in inequity of treatment. It would amount to discrimination and offence to rules. Both Mr. G.K. Aggarwal as well as Mr. Mukul Rohtagi had during the course of arguments, fairly conceded that ad hoc service rendered by any of the parties would not count towards eligibility. If ad hoc service cannot be counted, then there is no reason why deemed promotion should count. Because in a deemed promotion the officer has not performed any functions in the service during that period. It is by fiction he is placed there. Whereas in ad hoc he actually performed still it has not to count towards regular service. In similar situation the observation of Supreme Court in S. Ramaswamy Vs. Union of India, aptly apply. Therein the Apex Court held that five years regular service in the grade does not include ad hoc service. In other words “regular service” must mean “regular service” and not ad hoc, let alone notional service. If that be so then there cannot be any valid reason to contend that the notional promotion or deemed promotion be counted towards putting up of service or experience in the grade. That will tantamount to creating two classes of officers amongst the same group. For example if a person has spent three years as ADG on ad hoc basis and applies for being considered for the post of DG, he will not be considered eligible whereas a person who has not rendered any service but by fiction placed there will be considered. By fiction or by deeming provision, the requirement of the statutory rules to put in two years service or experience cannot be scuttled. If “regular” has no meaning or relevance and the note appendixes to the rule has to be only considered as the guiding factor of eligibility then the substantive rule will become redundant. That could not have been the intention of the rule making authority. The word “regular service” has a significance. It stands for experience in service. Since the promotion to a selection post of Director General has primarily to be on merit then filling up of such a post has to be when a person actually fulfills the requirement of the rules and not notionally.”

16. The applicant admittedly did not put regular service in the grade of CRO from 01.07.2002 to 11.10.2006 and hence this period cannot be reckoned for determining the residency period of the applicant for *in situ* promotion to the next grade of Joint Director (Scientist E).

17. In the conspectus of the discussions in the foregoing paragraphs, we are of the view that the applicant acquired eligibility for promotion to the grade of Scientist E (Joint Director) on *in situ* basis under the Rules 2010 on 10.10.2011, and, therefore, we do not find any infirmity in the

respondents' impugned Annexure A-1 office order dated 10.04.2012 promoting him to the post of Scientist E (Joint Director) w.e.f. 28.03.2012. Hence, we do not find any merit in this O.A.

18. The O.A. is accordingly dismissed. No order as to costs.

(K.N. Shrivastava)
Member (A)

(Justice Permod Kohli)
Chairman

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