

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA 3317/2013
MA 2499/2013

Reserved on: 13.02.2017
Pronounced on: 21.02.2017

Hon'ble Mr. V. Ajay Kumar, Member (J)
Hon'ble Mr. P.K. Basu, Member (A)

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3. Mr. Prakash Chandra Kandelwal,
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S/o Mr. Shiv Kumar Rastogi,
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7. Ms. Alka Suri,
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8. Ms. Anita Sehgal
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9. Mr. Babul Banerjee,
S/o Late Mr. Anil Chandra Banerjee,
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10. Mr. Ganga Prasad Rai,
S/o Late Mr. Jagdamba Rai
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11. Mr. Ram Bhushan Aggarwal,
S/o Dr. R.R. Aggarwal,
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.... Applicants

(By Advocate : Mr. Mukesh Kumar)

Versus

1. UNION OF INDIA
Through its Secretary,
Department of Personnel & Training,
Ministry of Personnel, Public Grievances
and Pensions, North Block,
NEW DELHI-110 011
2. Department of Defence Research & Development,
Ministry of Defence,
Through its Secretary, DG of DRDO &
Scientific Advisor to Raksha Mantri
DRDO Bhawan, Rajaji Marg,
NEW DELHI-110105

.... Respondents

(By Advocate: Mr. Subhash Gosain)

ORDER

Mr. P.K. Basu, Member (A)

The Department of Personnel and Training (DoP&T) vide OM dated 24.04.2009, based on the recommendations of the 6th Pay Commission, introduced Non-Functional Upgradation (NFU) for officers of the Organized Group 'A' Services in PB-3 and PB-4, the crux of which is as follows:

- “(i) Whenever an Indian Administrative Services Officer of the State of Joint Cadre is posted at the Centre to a particular grade carrying a specific grade pay in Pay Band 3 or Pay Band 4, the officers belong to batches of Organized Group A Services that are senior by two years or more and have not so far been promoted to that particular grade would be granted the same grade on non-functional basis from the date of posting of the Indian Administrative Service Officers in that particular grade at the Centre.
- (ii) Grant of higher scale would be governed by the terms and conditions given in Annex-I.”

Annexure – I to the aforementioned OM, inter alia, contains the following conditions:

- “10. Non-functional up-gradation to the next higher grade pay granted under the scheme is a fall back option only, to be applied in cases where officers of a particular Service have not been granted promotion to a particular grade in normal course according to the due procedure.
- 11. ILLUSTRATION :- If officers of 1987 batch of IAS are empanelled as Joint Secretary in the grade pay of Rs. 10,000/- in PB-4 and an officer of the batch gets posted in the Centre (under Central Staffing Scheme) on 15th January 2008, all the officers of the 1985 batch

of organized Gr. A Central Services who have not been promoted to the Joint Secretary or equivalent grade and who are eligible for the same on 1.01.2007 for the panel year 2007-08, would be appointed to the same grade on non-functional basis under these instructions w.e.f. 15.01.2008. Same would be the case in the event of posting of an officer of particular batch as Deputy Secretary/ Director under Central Staffing Scheme."

2. The question arose whether NFU to organized Group 'A' services would be applicable for services covered under other promotion schemes. The DoP&T clarified this issue vide OM dated 2.04.2012, the operative portion of which is as follows:

"3. Keeping in view that it would not be desirable to mix the provisions of one scheme with the other at different levels, it is clarified that the benefit of NFU to Organized Group 'A' Services shall not be applicable to the officers in those Organized Services where FCS and DACP Schemes are already operating and where officers are already separately covered by their own in-situ Career Progression Schemes."

3. All the applicants are Scientists belonging to respondent no.2 i.e. Defence Research and Development Organization (DRDO) under the Department of Defence Research and Development, Ministry of Defence. According to the applicants, they belong to Organized Group 'A' Service (Annexure P-5/ Table 4.1), in which DRDO is shown qualifying as Organized Group 'A' Service. In OA 1169/2010 titled **Joint Action Council of Service Doctors Organization Vs. Ministry of Personnel, Public Grievances & Pensions and others**, the issue before the Tribunal was whether the doctors belonging to the Central Health Service (CHS), who were covered by the

Dynamic Assured Career Progression (DACP) Scheme, could be denied the benefit of NFU. The observations of the Tribunal dated 11.11.2010, in para 6, are quoted below:

"6. We do not find the explanation satisfactory at all. The intention of the NFU scheme seems to remove the disparity between the IAS and other organised Group 'A' services. No facts have been given to substantiate the statement that promotions under the DACP Scheme are faster than under the NFU. Even if that be so, it would not exclude the CHS from the NFU Scheme, first, because the said scheme does not apply to HAG level and second, because if any batch of the CHS has already been promoted to PB-3 or PB-4, as the case may be, before an IAS officer posted at the Centre gets the same pay band, the NFU Scheme would not apply to CHS, but in case it is not so, the scheme would apply to them. The first Respondent-DOP&T has, it is clear, not thought through its response properly. The rejection seems to be without any application of mind."

The OA was disposed of with direction to the respondents to reconsider the matter and pass a fresh order. According to the applicants, by this order, the Tribunal has held that doctors who are beneficiaries of DACP Scheme, are also entitled to benefits of NFU Scheme.

4. The Hon'ble High Court in W.P. (C) 4067/2014, **Joint Action Council of Service Doctors Organization Vs. Ministry of Personnel, Public Grievances & Pensions and others** had considered the question of grant of benefit of NFU to the members of Service Doctors Association and Delhi Administration Doctors Welfare Association and after examining all the issues had quashed the OM dated 2.04.2012. The relevant part of the order is quoted below:

"19. Since we do not find any substance in the reasons given by the respondents to deny the benefit of NFU Scheme to the officers of the petitioners associations, we have no hesitation in quashing the said decision of the respondents contained in the office memorandum dated 2.04.2012 which we hereby do."

5. Vide OM dated 10.09.2010, it was clarified that the 6th Pay Commission had recommended that the existing Flexible Complementing Scheme (FCS) had to be continued with necessary modifications for R&D personnel in all S&T organizations and the merit based promotion scheme in the Departments of Atomic Energy, Space and DRDO would also need to be persisted with. The Commission had, however, recommended certain features to be incorporated in the existing schemes of FCS and merit based promotion scheme so as to make them more relevant to the context. Through this OM, DoP&T instructed all the ministries to initiate action for review of the provisions of the FCS and amend the provisions of relevant Recruitment Rules (RRs) so that the scheme is brought in conformity with the decision conveyed vide this OM.

6. In support of their claim, the applicants arguments are briefly as follows:

- (i) Since the applicants belong to Organized Group 'A' Service, the OM dated 24.04.2009 entitles them to the benefit of NFU;
- (ii) The NFU Scheme is merely a financial upgradation scheme as personal to the beneficiary without

promotion whereas FCS is a policy for promotion of the applicants under DRDS Rules 1979. It is stated that both the Schemes are exclusive to each other and, therefore, denial of NFU Scheme benefits to the applicants governed under FCS is arbitrary and illegal;

- (iii) Since the Tribunal in OA 1169/2010 (supra) has already held that doctors are eligible under NFU though they are covered by DACP Scheme and the Hon'ble High Court in W.P. (C) 4067/2014 (supra) has quashed the OM dated 2.04.2012, the respondents have to give the benefit of NFU to the applicants.

7. The OA has been filed seeking the following reliefs:

- (a) To set aside the impugned Office Memorandum dated 2.04.2012 issued by the Respondent No.1 (DoPT), the copy thereof is placed as Annexure P-1;
- (b) To pass an order or necessary directions to the Respondent No.2 to grant the benefit of NFU Scheme to the Applicants herein with retrospective effect from 1.01.2006, as per the Office Memorandum dated 24.04.2009 issued by the Respondent No.1 (DoPT), copy placed as Annexure P-2.

8. Learned counsel for the respondents, first of all, raised the preliminary objection that the applicants have sought the benefit of OM dated 24.04.2009 after nearly four years and hence this

OA is barred by limitation. On the substantive issue, the learned counsel argued that in accordance with Government of India Allocation of Business Rules, 1961, the DRDO is exempt from the purview of DoP&T in regard to matters related to recruitment and promotion etc. In this regard, the respondents have filed copy of Government of India Allocation of Business Rules (Annexure R-2) and under the heading "Department of Personnel and Training", the following entries are made:

"I. Recruitment, Promotion and Morale of Services

1. Reservation of posts in Services for certain classes of citizens.
2. General questions relating to recruitment, promotion and seniority pertaining to Central Services except Railway Services and services under the control of the Department of Atomic Energy, the erstwhile Department of Electronics, the Department of Space and the Scientific and Technical Services under the Department of Defence Research and Development."

IV. Service Conditions

21. General questions (other than those which have a financial bearing including Conduct Rules relating to All India and Union Public Services except in regard to services under the control of the Department of Railways, the Department of Atomic Energy, the erstwhile Department of Electronics and the Department of Space.
22. Conditions of service of Central Government employees (excluding those under the control of the Department of Railways, the Department of Atomic Energy, the erstwhile Department of Electronics, the Department of Space and the Scientific and Technical personnel under the Department of Defence Research and Development, other than those

having a financial bearing and in so far as they raise points of general service interests.”

9. It is argued that recruitment, promotion, morale of services and general questions, other than those which have a financial bearing, are within the purview of DoP&T, however, DRDO is exempt. Therefore, it is argued by the learned counsel for the respondents that DoP&T OM dated 24.04.2009 itself is not applicable in case of Scientists of DRDO. Thus, there is no question of granting benefit of this OM to the applicants. Since the original Scheme itself is not relevant for the applicants, the subsequent clarification dated 2.04.2012 also is not applicable for DRDO. It is further argued that DRDO promotions are under the FCS and promotion from Scientist 'F' is made on the basis of evaluation of Annual Performance Appraisal Reports (APARs) and assessment interview and for Scientist 'F' to 'G' and Scientist 'G' to 'H' (Outstanding Scientist) or Distinguished Scientist on the basis of evaluation of APARs and assessment by a Peer Committee. It is further clarified that for promotion under FCS, there is no restriction of number of available vacancies for promotion to the next higher level. The sole criterion for promotion to the Scientists is eligibility and merit. All eligible Scientists based on their merit and performance are recommended for promotion and on promotion their posts stand automatically upgraded. It is further stated that NFU Scheme was introduced keeping in view wide spread stagnation in various organized Group 'A' linked to empanelment/appointment of IAS officers at the centre.

10. It is further argued that the 6th Pay Commission vide para 3.5.6 of its report had recommended that "the existing scheme of FCS with necessary modifications has to be continued for R&D professionals in all S&T organizations. Merit based promotion scheme in the Department of Atomic Energy, Space and DRDO would also need to be persisted with".

11. Lastly, it is stated that the 6th CPC had specifically recommended separate schemes at various levels after detailed deliberations and the same are required to be followed in `toto'. The attributes of one scheme cannot be transposed on another and two schemes cannot run concurrently for a cadre as it would be against the spirit of 6th CPC recommendations.

12. Learned counsel for the respondents also drew our attention to the following judgments:

- (i) **Union of India Vs. P.V. Hariharan**, 1997 (3) SCC 568; and
- (ii) **P.U. Joshi Vs. Accountant General, Ahmedabad**, 2003 (2) SCC 632

to emphasize the fact that the Tribunal should take note that entering into prescribed pay scales is a serious matter and it should be left to be decided by the government, which normally acts on the recommendations of the Pay Commissions and that it is within the competence of the State to change the rules relating to a service and alter or amend and vary by addition/ subtraction the qualifications, eligibility criteria and other

conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. It is thus argued that in view of the law settled by the Hon'ble Supreme Court above, the OA deserves to be dismissed.

13. In his reply, the learned counsel for the applicants states that OM dated 2.04.2012 was challenged through representation of the applicants herein during 11.07.2012 to 29.08.2013 and, therefore, the OA should not be considered as time barred. It is further argued that instructions issued by the respondent-DoP&T on policy matters are equally applicable to the respondent-DRDO, whereas general questions arising out of day to day implementations such as clarifications, advices etc. are exempt from the purview of the respondent-DoP&T.

14. DoP&T has also issued order dated 24.01.2012 which is under the directions of the Tribunal in OA 1139/2011 and after detailed discussion of the 6th CPC recommendations i.e. separate in-situ promotion under FCS for Scientists upto SAG level and clarifying that extending the benefit of NFU to doctors of CHS who are covered by DACP, being not in conformity with the provisions contained in the Scheme of NFU, the demand of the doctors was not agreed to.

15. We have heard the learned counsel for the parties, gone through the pleadings available on record and perused the judgments cited.

16. From the narration of facts, it would be clear that the 6th CPC while recommending introduction of NFU also simultaneously recommended that DRDO Scientists should continue to be governed by FCS in which certain amendments were recommended. It is necessary to understand NFU clearly. From what has been quoted above from the NFU Scheme, it would be clear that it is meant for other Group 'A' officers, who are posted under the Central Staffing Scheme(CSS) and who are senior by two years or more to an IAS officer, who has been posted at the Centre under CSS. The genesis is that several times in some cadres, promotions are slow and when these officers get posted at the Centre, IAS officers of the same batch get a higher pay scale, say Joint Secretary, whereas these officers still are in the Director's scale. The Government, through NFU, decided to lessen this gap through order dated 24.04.2009 to a two years batch difference.

17. The Scientific department of DRDO is a completely different organization. Therefore, on the recommendations of the 6th CPC, DRDO continued with the FCS for the Scientists in the Organization. Therefore, to this extent, there is strength in the argument of the learned counsel for the respondents that NFU OM dated 24.04.2009 is not applicable to DRDO Scientists as DRDO is exempt from DoP&T instructions on service conditions, which includes any upgradation Scheme etc. However, a complication arises because the doctors who are governed by DACP Scheme, approached the Hon'ble High Court seeking quashing of OM dated 2.04.2012. The wording of OM dated

2.04.2012 would show that the question before the Government was whether the benefit of NFU to officers included in organized group 'A' services and who are covered by their own Schemes, would be granted or not. Through this OM, the DoP&T clarified that benefit of NFU would not be applicable to other organized group 'A' services where FCS, DACP Scheme etc. are already operating. The Hon'ble High Court's quashing of this OM vide its order dated 13.10.2014 in WP (C) 4067/2014 (supra) does not ipso facto imply that NFU should apply to DRDO Scientists especially because OM dated 24.04.2009 is not at all applicable to the Scientists. Hence the clarification dated 2.04.2012 also never applied to DRDO. The OA, therefore, does not succeed and is accordingly dismissed.

18. Similar issue came to be decided by the Principal Bench of the Central Administrative Tribunal in OA 942/2014 and OA 1514/2013 and the Tribunal held therein that benefit of NFU shall be admissible to **only those who are on deputation at the Centre on Central Staffing Scheme**. However, from the applicant's pleadings it appears that there is some misunderstanding regarding this issue. It is their understanding that once an IAS officer gets posted at the Centre on CSS, Scientists of DRDO senior to this IAS officer by two years or more but not on CSS but working in DRDO will get the benefit. Apart from the fact that OM dated 24.04.2009 does not apply to DRDO Scientists, as stated above, this interpretation of the applicants is erroneous. Therefore, let a copy of this order be

issued to Secretary, DoP&T to issue necessary clarification in this regard. No costs.

(P.K. Basu)
Member (A)

(V. Ajay Kumar)
Member (J)

/dkm/