

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

O.A No.3091/2011

Order reserved on: 01.08.2018

Order pronounced on: 08.08.2018

Hon'ble Mr. V. Ajay Kumar, Member (J)

Hon'ble Mr. A.K. Bishnoi, Member (A)

Shri Om Prasad,
S/o Late Shri Devi Singh
R/o H. No.935, Sector-12, R.K. Puram,
New Delhi.

-Applicant

(By Advocate: Shri Yogesh Sharma)

Versus

1. Union of India through the Secretary,
Ministry of Statistics & Programme Implementation,
Sardar Patel Bhawan, Sansad Marg,
New Delhi.
2. The Deputy Director General,
Computer Centre,
Ministry of Statistics & Programme Implementation,
East Block-10, R.K. Puram,
New Delhi-110066.
3. The Administrative Office/Head of Office,
Computer Centre,
Ministry of Statistics & Programme Implementation,
East Block-10, R.K. Puram,
New Delhi-110066.

-Respondents

(By Advocate: Shri S.M. Arif)

ORDER

Mr. A.K. Bishnoi, Member (A):

The sequence of events in the present OA are as follows:

- i. The applicant filed the initial OA No.3091/2011 before this Tribunal seeking relief to grant him 1st financial upgradation under ACP Scheme w.e.f. 09.08.1999. This

Tribunal vide order dated 25.05.2012 allowed the OA and passed the following directions:-

- “i) The impugned order is quashed and set aside.
 - ii) The respondents are directed to issue the follow up order regarding grant of benefit of the first ACP.
 - iii) Further they are directed to consider the case of the applicant for the second ACP as per rules and instructions. In case found fit, the order for granting the ACP is to be issued. Even otherwise a speaking and reasoned order has to be issued and communicated to the applicant.
 - iv) The arrears of admissible difference of pay and allowances are to be paid to be applicant;
 - v) Our aforesaid directions are to be implemented within a period of three months from the date of receipt of a copy of this order.”
- ii. The respondents challenged the said order of the Tribunal before the Hon’ble High Court of Delhi in Writ Petition (C) No.8117/2012 –**Union of India & Ors vs. Om Prasad** decided on 02.01.2013, on the ground that Clarification No.35 to the ACP Scheme was not either urged in the pleadings or brought to the notice of the Tribunal.
- iii. The Hon’ble High Court of Delhi vide order dated 02.01.2013 allowed the Writ Petition to be withdrawn with liberty to seek a review before the Tribunal pointing out the clarificatory guideline/circular issued by the Government of India.
- iv. The respondents then filed RA No. 124/2013 in OA No. 3091/2011 before this Tribunal, which was allowed vide

order dated 23.05.2014. The relevant portion of this order is as given below:-

“7. The learned counsel for the review applicants mainly contends that the Order dated 25.05.2012 passed in OA No.3091/2011 is against the Clarification No.35 issued by the DoP&T in relation to the MACP Scheme, and the said clarification had already tested the waters by the Honble High Court of Delhi in its Judgement in **Dept. of Social Welfare, Women and Child Development, GNCTD & Ors. v. Supervisors Welfare Association & Others.**, WP(C) No.4907/2011 dated 29.02.2012. But the review applicants, in spite of due diligence, could not place either the said Clarification or the said Judgement before this Tribunal. Therefore, this Tribunal recorded a wrong finding that the benefit of Grade `B' granted to the review respondent on completion of 6 years of service by way of placement/upgradation was not in the nature of promotion. Hence, according to the review applicants, there is an error apparent on the face of the record.

8. Shri Yogesh Sharma, the learned counsel appearing for the review respondent, though prayed for dismissal of the RA on other grounds but not denied the fact that the existence and contents of the aforesaid Clarification No.35.

9. In view of the fact that the review applicants could not place the said Clarification, which is having a bearing on the subject matter of the OA, before this Tribunal at the time of disposal of the same, the present Review Application is allowed and the Order dated 25.05.2012 in OA 3091/2011 is set aside, and the Registry is directed to restore the OA to its original number.”

2. The OA accordingly has been taken up afresh. We have gone through the pleadings and have heard the arguments from the learned counsel of both sides.

3. The facts of the case as mentioned in the OA are briefly as follows:-

3.1 The applicant initially appointed as Punch Card Operator (PCO) on 13.07.1982. Govt. of India vide Circular dated 11.09.1989 introduced the new pay structure for Electronic Data Processing

(EDP) posts, which was implemented by the respondents vide order dated 27.08.1997. As a result, post of PCO was re-designated as Data Entry Operator (DEO) Grade-‘A’ w.e.f. 11.09.1989. As per this order, it was decided that PCO possessing a regular service of six years and above but less than nine years service in the grade as on 11.09.1989 should be re-designated as DEO Grade ‘B’ in the revised pay scale of Rs. 1350-2200/-.

3.2 The applicant having completed six years service as on 11.09.1989, was re-designated as DEO Grade ‘B’ in the pay scale of Rs.1350-2200/- solely on the basis of cadre re-structuring and that it was not a promotion but only a fitment since no DPC was conducted and even the service records/ACR of the applicant were considered. Some similarly placed persons including the applicant filed OAs No. 1299/2006, 1301/2006 & 1363/2006 seeking relief that the revised restructuring should be granted w.e.f. 01.01.1986 as the same was in compliance of the recommendation of 4th Central Pay Commission. The OAs were allowed by this Tribunal vide judgment dated 29.11.2006 and the benefits of cadre restructuring were extended w.e.f. 01.01.1986 instead of 11.09.1989 and the applicant was re-designated as DEO Grade ‘B’ w.e.f. 13.07.1988 on completion of six years of service.

3.3 In the year 1999, Govt. of India introduced the ACP Scheme for granting the financial upgradation on completion of 12/24 years of

service to the next higher promotional pay scale. The applicant has submitted extracts of Govt. of India OM dated 10.02.2000 to support his contention that he was granted revised pay scale on completion of particular years of service as fitment under restructuring of the posts, which cannot be treated as promotion. He has made number of representations to the respondents seeking 1st financial upgradation from 09.08.1999 but the respondents have rejected the same vide order dated 26.08.2010, after which he had represented to higher authorities on 30.08.2010, 29.09.2010, 30.11.2010, 25.04.2011 to which no reply was received. Meanwhile, the applicant was granted 2nd financial upgradation on completion of 24 years of service w.e.f. 13.07.2006.

3.4 The applicant claims the relief on the following grounds that:-

- i) His case is fully covered by the judgment of the Tribunal in the case of **G. Madhava Rao and etc. vs. Union of India & Ors.** [2003 (2) ATJ 532], an extract of which has been filed in the O.A.
- ii) It is well settled principle of law laid down by the Full Bench of the Tribunal in the case of **D.C. Mishra & 23 Ors. vs. Union of India & Ors.** [2005 (2) ATJ 196, held that “it is obvious that when there is a financial upgradation of pay without changing the status, it would not be a promotion in strict sense used in terms of the Recruitment Rules”, and in the present case there is no change of status, no change of

duties and responsibilities, no promotion norms have been adopted, no promotional benefits have been granted and simply the posts were re-designated and, therefore, this was not a promotion in the eyes of law;

iii) It is well settled principle of law that classification of post or cadre restructuring is not a promotion;

iv) For promotion to a particular post, procedure has to be followed by way of conducting DPC and if a person has not fulfilled, the benchmark for a particular post, he shall not be entitled for promotion. In the present case, no such procedure was followed.

v) Respondents vide Office Memorandum dated 04.06.2007 have admitted that this was fitment and not a promotion.

3.5 The applicant has sought the following reliefs:-

“(i) That the Hon’ble Tribunal may graciously be pleased to pass an order of quashing the impugned order dated 26.8.2010 (A/1) declaring to the effect that the same is illegal, arbitrary and consequently, pass an order directing the respondents to grant the two financial upgradation to the applicant under ACP Scheme w.e.f. 9.8.99.

(ii) That the Hon’ble Tribunal may further graciously be pleased to pass an order directing the respondents to grant first financial upgradation under ACP scheme w.e.f. 9.8.99, after not treating the redesignation of post as a promotion, with all the consequential benefits including arrears of difference of pay and allowances.”

4. Counter affidavit has been filed on behalf of the respondents in which they have made the following submissions:

4.1 The applicant was appointed as PCO on 13.07.1982 and possessed the requisite qualification of high school, which was equivalent to Matric.

4.2 As per Recruitment Rules, 1980, PCOs were promoted to the next higher post of Punch Card Supervisor in the pre-revised pay scale of Rs.330-480 after rendering 4 years of service as PCO subject to availability of vacancy.

4.3 In pursuance of Ministry of Finance OM dated 11.09.1989, Department of Statistics issued an order dated 02.07.1990 revising the designations and scales of pay of Electronic Data Processing posts in the offices under its administrative control w.e.f. 11.09.1989. Consequently, the pay of the applicant was fixed in DEO Grade 'A' w.e.f. 11.09.1989 vide order dated 12.04.1991.

4.4 Following the observations of DoP&T and Department of Expenditure, the order dated 02.07.1990 issued by Department of Statistics was not in consonance with the OM of Department of Expenditure dated 11.09.1989. The OM of Department of Statistics dated 02.07.1990 was reviewed and another OM dated 29.01.1997 was issued revising the structure of EDP posts. Details from the modified order have been submitted by the respondents in the counter affidavit and the order dated 27.08.1997 has been annexed

at Annexure R-4. The applicant was placed in DEO Grade 'B' since he had completed more than six years of service as PCO w.e.f. 11.09.1989. Subsequently, as per directions of the Tribunal dated 29.11.2006 and in pursuance of Ministry of Statistics and Programme Implementation dated 20.01.2009, the date of placement of the applicant in the DEO Grade 'B' was antedated to 13.07.1988, the date when he completed six years of regular service as PCO, which was re-designated as DEO Grade 'A' vide Computer Centre's order dated 04.03.2009 (Annexure R-5).

4.5 On acceptance of recommendations of the 5th CPC w.e.f. 01.01.1996, DEO Grade 'A' were placed in the corresponding pay scales of Rs.4000-6000 and DEO Grade 'B' Rs.4500-7000. The 1st ACP was not granted to the applicant after completion of 12 years of service because he was already upgraded from the entry grade of PCO in the pay scale of Rs.4000-6000 in the next higher grade of DEO Grade 'B' in the pay scale of Rs.4500-7000. Since the applicant is not graduate, DEO Grade 'B' cannot be treated as entry grade in the service in terms of Department of Expenditure's OM dated 11.09.1989. After completion of 24 years of his regular service, the applicant was granted 2nd financial upgradation under the ACP Scheme w.e.f. 13.07.2006 from PB-I, i.e., from Rs.5200-20200 + Grade Pay of Rs.2800/- to Rs. 9300-34800 + Grade Pay of Rs.4200/-.

4.6 Since there were posts of EDP in most of the Ministries/Departments in Govt. of India, which necessitated setting up of a Committee to decide uniform pay structure, which was accordingly decided. The applicant has already been placed in the next higher grade in DEO Grade 'B' w.e.f. 13.07.1988 and he has also accepted the pay fixation in both the grades, he is not entitled for grant of 1st ACP in terms of DoP&T's order No. 35034/1/97-Estt (D) dated 9.8.1999.

5. During the course of arguments, learned counsel for the respondents submitted the decision of the Hon'ble High Court of Delhi in Writ Petition No.8117/2012 (supra), in which it was observed as under:-

"1. Learned counsel for the writ petitioner would concede that the ground on which the writ petition is rested while laying a challenge to the impugned order dated May 25, 2012 passed by the Central Administrative Tribunal was not raised before the Tribunal.

2. Clarification No.35 to the ACP Scheme, reference whereof has been made in paragraph 20 of the writ petition is fairly conceded not to have been either urged in the pleadings or brought to the notice of the Tribunal.

3. Under the circumstances learned counsel for the petitioner seeks leave to withdraw the writ petition with liberty to seek a review before the Central Administrative Tribunal pointing out to the clarificatory guideline/circular issued by the Government of India. The petition is accordingly dismissed as withdrawn with liberty granted as prayed for.

4. Needless to state if review is sought before the Tribunal, the same would be decided by the Tribunal as per its review jurisdiction.

Dismissed as infructuous."

6. Learned counsel for the respondents submitted before the Tribunal Clarification No.35 of the OM dated July 18, 2001 issued by DoP&T with respect to the ACP Scheme which reads as under:-

Point of doubt	Clarification
Whether placement/appointment in higher scales of pay based on the recommendations of the Pay Commissions or Committees set up to rationalize the cadres is to be reckoned as promotion /financial upgradation and offset against the two financial upgradation applicable under the ACP Scheme?	<p>Where all the posts are placed in a higher scale of pay, with or without a change in the designation; without requirement of any new qualification for holding the post in the higher grade, not specified in the Recruitment Rules for the existing post, and without involving any change in responsibilities and duties, then placement of all the incumbents against such upgraded posts is not be treated as promotion /upgradation.</p> <p>Where, however, rationalization /restructuring involves creation of a number of new hierarchical grades in the rationalised set up and some of the incumbents in the pre-rationalised set up are placed in the hierarchy of the restructured set up in a grade higher than the normal corresponding level taking into consideration their length of service in existing pre - structured/pre -rationalised grade, then this will be taken as promotion/upgradation.</p> <p>If the rationalised/restructured grades require possession of a specific nature of qualification and experience, not specified for the existing posts in pre -rationlised set up, and existing incumbents in pre - rationalised scales/pre - structured grades, who are in possession of the required qualification/ experience are placed directly in the rationalised upgraded post, such placement will also not be viewed as promotion/upgradation. However, if existing incumbents in the pre - rationalised grades who do not possess the said qualification/ experience are considered for placement in the corresponding rationalised grade only after</p>

	<p>completion of specified length of service in the existing grade, then such a placement will be taken as promotion/upgradation.</p> <p>Where placement in a higher grade involves assumption of higher responsibilities and duties, then such upgradation will be viewed as promotion/upgradation.</p> <p>Where only a part of the posts are placed in a higher scale and rest are retained in the existing grade, thereby involving redistribution of posts, then it involves creation of another grade in the hierarchy requiring framing of separate recruitment rules for the upgraded posts. Placement of existing incumbents to the extent of upgradations involved, in the upgraded post will also be treated as promotion/upgradation and offset against entitlements under the ACPS.</p>
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7. The only point of determination in the present case is whether the placement of the applicant as DEO Grade 'B' amounts to promotion or not?

8. In this regard he has been brought to our notice the judgment of the Hon'ble High of Delhi in W.P. (C) No. 4907/2011-**Department of Social Welfare & Women & Child Development, GNCTD & Ors. vs. Supervisor's Welfare Assn. & Ors.** dated 29.02.2012 in which an identical issue with regard to grant of financial upgradation has been decided on the basis of the Clarification No.35 issued by the Government of India. The relevant part of the judgment reads as under:-

"9. In the case before us, since no element of selection was involved in placing 52 Supervisor (Woman) in the higher pay

scale of Rs 1640-2900, such upgradation would in common parlance, not amount to promotion to a higher post or to a higher pay scale. But, if we have to apply Clarification 35 issued by DOP&T, there is no escape from holding that such financial upgradation would be deemed to be promotion for the purpose of ACP Scheme, as far as the persons who are posted against upgraded posts are concerned and it would be offset against their entitlement under the ACP. We have no hesitation in saying that in terms of service jurisprudence, this kind of financial upgradation does not constitute promotion to a higher post or to a higher pay scale such as selection grade since it does not have an element of selection, which requires evaluation of comparative merit and the financial upgradation is not given only on the basis of seniority alone. **But, in order to get benefit of financial upgradation, the respondents have to bring their case within the four corners of the ACP Scheme, which, on account of Clarification No. 35, provides for treating such upgradation as promotion, for the purpose of Scheme, by virtue of a deeming provision, which by virtue of this clarification, now forms part of the ACP Scheme.**

(Emphasis supplied).

10.....Therefore, it cannot be said that clarification 35 issued by DoPT runs contrary to the objective of ACP scheme of the government.

For the reasons stated hereinabove, we are of the view that the upgradation of 52 Supervisor (Woman) from the pre-revised pay scale of 1400-2300 to the pre revised scale of Rs 1640-2900 amounts to promotion for the purpose of ACP W.P(C) 4907/2011 Page 18 of 18 Scheme and consequently, the respondents were not entitled to the benefit of the first financial upgradation under the ACP Scheme. The impugned order dated 20.09.2010 passed by the Tribunal is, therefore, set aside.”

9. The learned counsel for the respondents during the course of the arguments has primarily relied on the relevant part of the OM dated 18.07.2001 wherein it has been clearly mentioned that

“where, however, rationalization/restructuring involves creation of a number of new hierarchical grades in the rationalised set up and some of the incumbents in the pre-rationalised set up are placed in the hierarchy of the restructured set up in a grade higher than the normal corresponding level taking into consideration their length of

service in existing pre-structured/pre-rationalised grade, then this will be taken as promotion/upgradation.”

10. There is no doubt that the case of the applicant falls squarely in this category and is fully covered by this Clarification. There is thus no requirement of going into the general issues of principle raised by the applicant in his pleading. The judgments produced by the learned counsel for the applicant neither relate to the subject matter in the present case nor do they deal with Clarification No.35 of ACP Scheme issued by the DoP&T.

11. Thus, we are satisfied that in view of the decision of the Hon'ble High Court of Delhi in the case of **Department of Social Welfare & Women & Child Development, GNCTD & Ors.** (supra) and Clarification No.35 of OM dated 18.07.2001, the applicant is not entitled to any relief. The OA, therefore, fails and hence dismissed. No order as to costs.

(A.K. BISHNOI)
MEMBER (A)

(V. AJAY KUMAR)
MEMBER (J)

cc.