

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH

...

OA No.290/00524/2016

Pronounced on : 17.09.2019
(Reserved on : 28.08.2019)

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CORAM: HON'BLE SMT. HINA P. SHAH, MEMBER (J)
HON'BLE SMT. ARCHANA NIGAM, MEMBER (A)

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R.K. Kawatra S/o Late Shri Hans Raj Kawatra, aged about 61 years, R/o 957, Kailash Bhawan, 12th D Road, Sardarpura, Jodhpur. Retired from the post of EE in the office of Chief Engineer, Jodhpur Zone, Jodhpur.

...APPLICANT

BY ADVOCATE : Mr. S.K. Malik

VERSUS

1. Union of India, through the Secretary, Ministry of Defence, Raksha Bhawan, New Delhi.
2. Director General (Pers), Military Engineer Service E-in-C Branch IHQ of MOD (Army), Kashmir House, Rajaji Marg, New Delhi.
3. Chief Engineer, Jodhpur Zone, Jodhpur.

RESPONDENTS

BY ADVOCATE: Mr. B.L. Tiwari for R1 to R3

ORDER

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Hon'ble Smt. Archana Nigam, Member (A):-

1. The present Original Application (O.A.) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985, wherein the applicant is seeking the following reliefs:

"8(i). By an appropriate writ order or direction impugned order dated 02.09.2016 at Annexure A1 be declared illegal and be quashed and set aside.

- (ii) By an order or direction respondents may be directed to fix the date of promotion to EE with the respective years of vacancy in which applicant was promoted there by revising the date of NFSG & NFU along with direct recruit batch 1997 w.e.f. 01.07.2014 and make payment of arrears along with interest @ 12% per annum. Also accordingly revise PPO and make payment of difference of retiral benefits.*
- (iii) Exemplary cost be imposed on respondent no.3 for causing undue harassment to the applicant.*
- (iv) Any other relief which his found just and proper be passed in favour of the applicant in the interest of justice."*

2. The case of the applicant is that being a Graduate Engineer, he was appointed to the post of Superintendent B&R Grade I in the pay scale of Rs.550-750/- with effect from 06.04.1978. Thereafter, he was promoted to the post of Assistant Engineer (AE) B & R with effect from 21.06.1993 vide Part II order dated 21.06.1993 (Annexure A4). The applicant was declared fit for promotion to the post of Executive Engineer (EE) in the pay scale of Rs.1000-325-15200/- for the vacancies year 2004-2005 and promoted vide panel dated 11.08.2006. The name of the applicant is placed at Sr.No.26. The applicant assumed duty as EE on 25.09.2006. No pay enhancement was granted as applicant was already drawing the pay scale off EE (Rs.10000-325-15200 pre-revised) since 06.04.2002 due to grant of 2nd ACP.

3. After completion of 30 years of service as on 06.04.2008, the applicant was due for 3rd MACP but was not granted as the applicant was to be considered for pay parity being inducted into Group 'A' Officers category with let over service more than five years. 3rd MACP was granted to Group 'A' Officer whose left over service from retirement was less than five years. On completion of five years of service, the applicant as granted Non Functional Selection Grade (NFSG) with effect from 25.09.2011 in PB-

3 Rs.15600-39100+GP Rs.7600/- vide PTO dated 10.06.2013 (Annexure A5).

4. The applicant has made a detailed representation dated 22.04.2015 addressed to the respondents in which he has claimed that being a degree holder his eligibility for promotion to the EE Grade from the AE Grade is 8 years as per Recruitment Rules and by virtue of this he was eligible for promotion to EE Grade since 22.01.2001 having been promoted to the AE Grade on 01.06.1993. It is his contention that his name was not considered by the respondents who stated that no vacancies were available whereas, in fact, he states that the vacancies meant for the departmental AEs were transferred and direct recruits AEEs were promoted enbloc. He requested that this may be reviewed while conducting the Review DPC.

5. Applicant has also raised the grievance of delay in promotion due to Non conducting of year wise DPC for AE which resulted in non grant of NFU in the PB-4 to the AEs whereas the direct recruit AEE were getting timely promotion/NFU without any delay. He has pointed out that the DPC was finalized and implemented for AEE vide order dated 02.12.2004 and the promotion was implemented on the very same date. Whereas the DPC for AE was finalized vide order dated 13.07.2006 and panel for promotion from AE to EE circulated on 11.08.2006. The delay of 21 months from 02.12.2004 to 13.07.2006 for conducting the DPC for AEs is unacceptable and amounts to discrimination vis-à-vis direct recruits AEEs.

6. During the final hearing, learned counsel for the applicant reiterated the facts as above and also argued that the non grant of NFU vide the impugned order dated 02.09.2016 (Annexure A1) was illegal as the

applicant was entitled to the grant of NFU with effect from 01.07.2014 and not 01.04.2016. Applicant claims parity for grant of NFU with the two other Officers namely Shri G. Krishnamurthy and Shri A.K. Rajvanshi, who have been stated to have been completed the eligibility criteria. The reason given for non grant of NFU to the applicant as stated in the impugned order dated 02.09.2016 is as follows:-

"Since your date of birth being 24 Apr 1955, you got superannuated on 30 Apr 2015 i.e. prior to the effective date of NFU (01 Apr 2016) for grant of NFU to Director level, as such your name could not be proposed for grant of NFU to Director level."

7. During the course of final hearing, the learned counsel for the applicant Shri S.K. Malik, drew our attention to the DOPT OM dated 25.09.2009 which provides clarifications for Non Functional upgradation for Officers of Organized Group 'A' Services in PB-3 and PB-4. In particular he referred to the clarification which provides as follows:-

Sr.No.	Point of doubt	Clarification
1.	This office Memo refers to the term 'Batch'. In Central Civil Services and Indian Engineering Services, the definition of a batch is, the year in which the exam is conducted. In some other services, the recruitment is done through interview only. Where recruitment is done through interview only, the Batch is the year in which the Advertisement is issued by the UPSC or the year of interview for recruitment.	Since different services have different criteria for defining 'Batch', the term 'Batch' in the OM refers to the year of joining the service.
2.	In some services, there is induction of Group 'B' officers into the organized Group 'A' service. Whether these officers will be eligible for the benefits under this OM. If so how the criteria of batch will be decided in their case.	Officers inducted into Group 'A' organized service will also be eligible for the benefit of Non functional upgradation. They shall be assigned the benefit of 'Batch' corresponding to the batch of the 'direct recruit' officers with whom their seniority is clubbed.

8. During the hearing, learned counsel for the applicant Shri S.K. Malik, drew our attention to the delay in the holding of the DPC by the respondent department and the fact that it was not conducted on regular yearly basis as stipulated in the DOPT OM on the subject. Had it been cleared in 2004 along with direct recruit AEE, applicant would have also assumed position as EE on promotion along with batch 1997. Not conducting of timely DPC has deprived the applicant to work as EE along with other promoted 1997 AEE batch EEs. Applicant has been denied promotion due to fault of department clearly attributed in conducting delayed DPC as such respondents are responsible for delay which has resulted the applicant to get NFU with effect from 01.07.2014 along with direct recruit (AEE 1997 batch).

9. Concluding his submission applicants counsel said that the case was made out for the promotion of the applicant to the NFU in 2014 as per the discussions during the submissions. The plea taken by the respondent department that the applicant was entitled to NFU only in 2016 is not as per the rules on the subject and this denied him the benefits of the NFU as applicant retired on 30.04.2015.

10. Learned counsel for the applicant has filed rejoinder to the reply filed by the respondents has submitted the following:-

- i) OM referred to by respondents stands amended vide OM dated 06.06.2000 which specifies for grant of financial up gradation on completion of 13 years of regular service and not physical service as interpreted by the respondents. In the case of direct recruit officers the NFU has been granted on 13 years of service from the date of recruitment and not from the date of joining the

department; However, in the case of departmental promotes the regular service is being considered from the date of physical joining as EE irrespective of drawing of pay in the scale of EE or the fact of delay by the respondents in conducting DPC for the promote AE.

- ii) Applicant also submitted that Para 6 of the said OM had directed controlling authorities to take immediate steps to restructure the cadres, redistribute posts in the applicable revised scales of pay and to amend appropriately the relevant service/recruitment rules. This exercise was to be completed within a period of two months which was not done till 2016.
- iii) For promotion of the promote AEs to EEs, requirement is 8 years of regular service and from EE to SE the requirement is 9 years of regular service, hence it implies that from AEE to SE the requirement works out to be $4+9=13$ years of regular service. Similarly in the case of promote from AE to EE requirement is 8 years of regular service and from EE to SE the requirement works out to $8+9=17$ years of regular service. Applicant completed 17 year of regular service on 21.06.2010.
- iv) The intention of the respondents that 9 years regular service required for promotion to SE is not fulfilled by the applicant on the date of DPC/Screening Committee held for grant of NFU for bath of 19997 is not correct in terms of various court judgments wherein definition of regular service and actual service is clearly defined.
- v) Reliance was placed by the applicant's counsel on the Supreme Court Judgment in the case of **UOI Vs. K. B. Rajoria** (Civil Appeal No.2272/2000), decided on 28.03.2000 which held that

for determining qualifying service, regular service did not mean actual service only. Eligibility could be determined with reference to notional promotion also.

11. In support of the grievance regarding delay in holding of DPC, learned counsel for the applicant has placed reliance on the judgment delivered by the Coordinate Bench of Central Administrative Tribunal, PB, New Delhi in the case of **K.C. Chauhan Vs. Sujeet S. Priyadarshini**, in MA No.1656/2011 with OA No.280/2008 decided on 07.03.2012. In this OA, Group 'B' officers substantively appointed to Group 'A' junior scale of the IRSE were aggrieved by the delayed induction from Group B to Group A. Being dissatisfied they approached the Tribunal, in OA No.280/2008 for setting aside the notification issued by the respondents inducting the applicants with effect from 14.01.2005 instead of from 2002-2003 when the vacancies were arose.

12. The Hon'ble Principal Bench in this judgment, has emphasized upon the need for respondent Department to comply with the instructions of Govt. of India with regard to Constitution and functioning of DPC and stated that the emphasis in all the instructions issued is that Ministries / Departments should take timely action to fill up posts in time so as to ensure that there is no delay and that the DPC panel should be available in advance for vacancies arising over a year.

13. This was emphasized even at the level of the Prime Minister as it would be seen from the DOPT OM No.23036/3/77-Esttb.(D) dated 07.10.1977 (Annexure P2), the relevant portion of which is extracted below:-

"The Prime Minister has noted that in a number of cases appointments are made adhoc either because Recruitment Rules

have not been finalized or there has been delay in the filling up of the posts in a regular manner. The Prime Minister has, therefore, desired that Ministries/Departments should take action to fill up the posts in good time before vacancies actually occur in order to avoid adhoc appointment. In case where there is unjustifiable delay, responsibility for the delay should be assigned and those responsible should be suitably dealt with it."

14. Per Contra, the learned Counsel for the Respondents submitted that this Original Application is barred by Limitation period prescribed under the provision of the AT Act, 1985. As per the respondents, the cause of action for the Applicant arose within six months after 12 July 2013 as on that date applicant filed his representation. They relied upon the decision of the Apex court in the case of **Ramesh Chand Sharma Vs. Udham Singh Kamal & Ors. Reported in AIR 1999 Supreme Court 3837**. The case was dismissed on grounds of Limitation on the grounds that the Appellant had filed after three years and was barred by limitation particularly in the absence of any application for condonation of delay as permissible under Section 21 of the Administrative Tribunals Act. However, In the rejoinder learned counsel for Applicant has countered this ground stating that the Preliminary objection is wrong as the applicant's case for Non grant of NFU has been rejected vide impugned order dated 2nd September 2016. Hence the Limitation will start from 2-9-2016 onwards.

15. Further the learned Counsel for the Respondents also submitted that no prejudice has been caused to the applicant as he has been granted the benefits of NFU from the date when it became due to him. Relief cannot be granted unless there is enforceable legal right in favour of the applicant. A right arises by conferment, not by comparison and broad notions of equity cannot be equated or assimilated to legal rights.

16. They reiterated the requirement of completion of regular service of 9 years which the applicant according to them completed only in 2016, and as he retired in the year 2015, he could not benefit by grant of NFU by the respondents.

17. Reliance was also placed by respondents counsel upon decision in the case of **Union of India & Ors. Vs. Chaman Rana**, reported **AIR 2018 SC 1478**, by the respondent it has been clearly held that retrospective promotions of employees after passage of 17 to 20 years – would result in financial implications for Govt. and administrative chaos – High Court giving directions to consider candidature with retrospective effect at belated stage, erroneous.

18. **The matter in hand is different inasmuch as it is not a matter of promotion but of fixing interse seniority between direct recruits and Group B officers. The judgment quoted is thus not relevant.**

19. It is quite clear from the submissions made by the learned counsels during the final hearing and also the arguments advanced by both the parties in the pleadings and documents placed on record that the relief sought by the applicant cannot be denied.

20. Admittedly there has been delay in holding of DPC and the fact that it was not conducted on regular yearly basis as stipulated in the DOPT OM on the subject. Had it been cleared in 2004 along with direct recruit AEE, applicant would have also assumed position as EE on promotion along with batch 1997. Not conducting of timely DPC has deprived the applicant to work as EE along with other promoted 1997 AEE batch EEs. Applicant has been denied promotion due to fault of department clearly attributed in

conducting delayed DPC as such respondents are responsible for delay which has resulted the applicant to get NFU with effect from 01.07.2014 along with direct recruit (AEE 1997 batch).

21. The issue of delay in holding DPC has not been clarified satisfactorily by the Respondent neither in the pleadings nor even during final hearing.

22. The stand of the Respondent that "relief cannot be granted unless there is a enforceable legal right in favour of the applicant" is not tenable. Again the respondent statement in the pleading that "a right arises by conferment, not by comparison and broad notions of equity cannot be equated or assimilated to legal rights" is patently absurd when examined in the context of principles of natural justice.

23. To conclude after considering the pro and cons the balance clearly tilts in favour of the applicant. This is the case where it appears that the respondent department did not apply principles of due diligence in the matter of promotions at the level of AEs/EEs. The DPC were not held in time. The reasons given by the respondents for not convening the DPC are not found to be justified when put under judicial scrutiny. The delay in the holding the DPC led to avoidable delay in the grant of NFU to the applicant. It cannot be stated that such factors are "not attributable to the respondents or "beyond their control". Such unjustified delay has not been adequately explained by the respondents and is not warranted.

24. In view of the above discussions and particularly in the context of the Apex Court judgment in K.B. Rajoria (supra) as well as the order of the Coordinate Bench of this Tribunal in the case of K.C. Chauhan Vs. Sujeet S. Priyadarshi (supra) decided on 07.03.2012, the OA is allowed. The respondents are directed to conduct a review DPC to consider the

promotion of the applicant to EE afresh with the respective years of vacancy. The respondents are also directed to review the date of grant of NFSG & NFU based on the reviewed qualifying service of the applicant. PPO may also be revised accordingly and payment of difference of retiral benefits be made as per rules. Action as above may be taken within a period of three months from the date of receipt of a certified copy of this order.

25. Accordingly, the OA is allowed as above. No order as to costs.

(ARCHANA NIGAM)
MEMBER (A)

(HINA P. SHAH)
MEMBER (J)

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