

(9)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.59/2003

New Delhi, this the 3rd day of September, 2003

Hon'ble Shri Justice V.S. Aggarwal, Chairman
Hon'ble Shri S.K. Naik, Member(A)

Virendra Jain
5A/3, Ansari Road
Daryaganj, New Delhi

.. Applicant

(Shri R.L.Dhawan, Advocate)

versus

Union of India, through

1. Secretary
Department of Health
Ministry of Health & Family Welfare
Nirman Bhavan, New Delhi

2. Director
Central Govt. Health Scheme
Nirman Bhavan, New Delhi

3. Director
Central Health Service
Ministry of Health & Family Welfare
Nirman Bhavan, New Delhi

.. Respondents

(Shri Mohit Madan, Advocate)

ORDER(oral)

Justice V.S.Aggarwal

The two questions that came up for consideration before this Tribunal and agitated vehemently at the bar are - (a) whether this Tribunal should direct the respondents to consider the claim of the applicant for promotion as Senior Medical Officer with consequential benefits and (b) if a direction is required to be issued to pay full pay and allowances from 1.2.92 to 5.6.95.

2. The facts conjoled from the application relevant are that the applicant (Shri Virendra Jain) was appointed as Medical Officer (Grade-I Junior scale) in the Central Health Services under the Ministry of Health & Family Welfare in October, 1987. In July, 1988 he was selected

ls Agg

for appointment to a post in Special Protection Group of the Cabinet Secretariat. The applicant in October, 1988 was placed under suspension because he was arrested in a matter in FIR No.299/88 with respect to offences punishable under Section 304-B and 398-A Indian Penal Code. On 11.10.1991 the applicant was acquitted by the learned Additional Sessions Judge, New Delhi.

3. The contention of the applicant is that he became eligible for consideration for proforma promotion as Senior Medical Officer. He had intimated the Department about his having been acquitted but the suspension was revoked on 28.4.95 which was received by the applicant in June, 1995. The applicant has joined the service thereafter. He contends that he has not been paid full pay and allowances from the date of acquittal till June, 1995 when he came to know about his reinstatement. His further contention is that the claim of the applicant has not been considered for promotion. According to the applicant, ~~the~~ ^{the} subsequent confidential reports of the applicant could not be taken into account from the date he resumed duty but confidential report if any of the past year should have been taken into consideration which was not recorded for the fault of the respondents.

4. In the reply filed the application has been contested. Respondents say that there is no dispute about the main facts. It is also not disputed that before the joining of the applicant on 6.6.95 he was drawing subsistence allowance. He was given an opportunity to explain as to why the period from 1.2.92

As Ag

to 5.6.95 may not be treated as dies-non. After considering the relevant facts including the explanation submitted by the applicant and the fact that the order regarding revocation of suspension had not been received back undelivered, it was decided that the period of suspension from 1.2.92 to 5.6.95 may be treated as dies-non. It is also stated that the claim of the applicant has been considered taking into account the subsequent behaviour of the applicant but he was not found fit to be promoted.

5. Though the learned counsel for the applicant in a forthright manner put forward the claim of the applicant, we take both the contentions of the applicant one after the other.

6. On an earlier occasion, the applicant had preferred OA 648/2000 which came for consideration before this Tribunal on 24.7.2001. The Tribunal had disposed of the said application directing the respondents to pass an order in accordance with provisions of FR 54(B)(1) and also consider the claim of the applicant taking note of the decision of the Supreme Court in the case of K.V. Janakiraman Vs. UOI 1991(2) SCALE 423 and other rules in this regard. Tribunal's order reads -

- (1) As there is nothing to indicate that respondents have passed orders in accordance with the provisions of FR(B)(1) regarding the pay and allowances to be paid to applicant during the period of suspension ending with his reinstatement, they are called upon to pass such orders forthwith. While doing so, they shall also examine applicant's claim for grant of full pay and allowances for the aforesaid period in accordance with the provisions of FR 54(B)(3) and in the light of the fact that he was acquitted in the criminal case by the Additional District Judge who inter alia held that there was a total lack of evidence against the

ls Ag

applicant. These directions should be implemented within three months from the date of receipt of a copy of this order.

(2) Thereafter respondents will also consider applicant's claim for time bound promotion in accordance with rules instructions and judicial pronouncements, including the Hon'ble Supreme Court's ruling in K.V.Janakiraman case 1991(2) SCALE 423 within the period of three months from the date of receipt of a copy of this order. Respondents will also pass appropriate order on applicant's prayer for release of car allowance, PG allowance and leave salary in respect of which he had entrusted applicant earlier."

7. It is in pursuance of the said directions that the impugned order dated 23.5.2002 has been passed. That order reads -

5. As per the provisions of CHS Rules, 1982 (as then applicable), the eligibility for promotion of Medical Officer to Senior Medical Officer in General Duty Sub-Cadre of CHS was 4 years of regular service in the grade on seniority-cum-fitness basis without linkage to vacancies. Senior Medical Officer in the General Duty sub-cadre with 6 years regular service in the grade or on completion of ten years as Medical Officer and Senior Medical Officer of which two years shall be as Senior Medical Officer are to be considered for promotion to the rank of CMO on the basis of seniority-cum-fitness subject to the availability of vacancies.

6. A meeting of DPC to consider the promotion of Dr. Jain, Medical Officer in the scale of pay of Rs.2200-4000 (pre-revised) Rs.8000-13500 (revised) to the grade of Senior Medical Officer Rs.3000-4500 (pre-revised) Rs.10000-15200 (revised) was held on 15.03.02 under the Chairmanship of Additional Secretary(P), Ministry of Health & Family Welfare.

7. The DPC noted the order of CAT, Principal Bench, New Delhi and considered the case of Dr. Jain, Medical Officer for promotion to the grade of Senior Medical Officer with reference to the date of his immediate junior, Dr. Harjit Kaur Grewal who was promoted with effect from 04.08.91.

8. The DPC observed that this was a peculiar case where no ACRs were available for the relevant period and there were no guidelines for assessing such cases as even other relevant records such as Assessment Report for promotion etc. also were not available to assess the suitability. The DPC therefore assessed the case of promotion of Dr. Virendra Jain to the rank of Senior Medical Officer on the basis of his performance during the subsequent years.

LS Ag e

9. The DPC took note of the fact that even after his suspension was revoked on 31.01.92, Dr. Jain failed to join his duties and remained on unauthorised absence upto 05.06.95. This period has been treated as dies-non. Dr. Jain further absented from duty from 19.06.95 to 07.08.96, which period has also been treated as dies-non. The DPC also noted that Dr. Jain is again continuing on unauthorised absence w.e.f. 20.11.99 till date. The DPC after assessing the his available ACRs for the periods from 96-97, 97-98, 98-99 and 1.4.99 to 16.12.99 and his conduct in remaining on authorised absence for long durations, assessed him as "Unfit" for promotion as SMO as on date and recommended accordingly.

10. The above recommendations of the DPC have been accepted by the Competent Authority. Dr. Virendra Jain on his promotion as Senior Medical Officer will be further considered for promotion as Chief Medical Officer."

Aggrieved by the said order, the present application has been filed.

8. Regarding the claim of the applicant that his previous record should have been considered while considering the claim of the applicant for promotion, we do not dispute the broad principle in law that when a person is to be promoted, his record of the past year has to be considered. The same is the effect of the instructions of Departmental of Personnel & Training OM dated 16th June, 2000, the relevant portion of which reads -

"2. In regard to operation of the Model Calendar for DPCs, a doubt has been raised by certain quarters as to the question of the relevant year upto which ACRs are required to be considered by the DPCs. In this connection it is once again clarified that only such ACRs should be considered which became available during the year immediately preceding the vacancy/panel years even if DPCs are held later than the schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of the date of convening DPC."

LS Ag

Based on the strength of these instructions the aforesaid argument has been made.

9. However, the peculiar situation that has arisen in the present matter is that the applicant had joined service in the year 1987. In the subsequent year he was arrested in a criminal case referred to above with respect to offences punishable under section 304-B and 398-A of Indian Penal Code. For the one year that the applicant had served the department, admittedly confidential report of the applicant had not been recorded. At this stage, after a lapse of 16 years, such an order even cannot be passed and directing recording of the confidential report later on ~~and in compliance~~. In this process the claim of the applicant was considered for promotion and there was no confidential report of the past year pertaining to the applicant.

10. Respondents' learned counsel has drawn our attention to the instructions of the Government of India, Department of Personnel & Training dated 20.6.89 as reproduced in Swamy's Manual on Establishment & Administration and the same read -

- (c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available, the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per (b) above. If this also not possible, all the available CRs should be taken into account.
- (d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and

ls Ag e

performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

- (c) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes."

Indeed it deals with such a situation that may arise because it is specifically provided that when the confidential reports are not recorded, the confidential reports of the preceding years have to be considered. When it is also not possible, all the available confidential reports have to be taken note of. If for the preceding years no confidential reports were available, necessarily then confidential report for the subsequent year can be considered and the view to be formulated. Therefore, this particular plea of the applicant must fail.

11. Another limb of the argument was that sealed cover procedure should have been adopted. It is true that in terms of the decision in the case of K.V. Janakiraman (supra) when the applicant was under suspension such a procedure should have been adopted. Unfortunately it was not adopted but in the peculiar situation in which we are presently placed, reference to which has already been made, it might not have been so done because there was no report about the performance and conduct of the applicant.

As Ag ————— e

12. Confronted with this situation, when the second plea of the applicant pertaining to the salary for the period from 1.2.82 to 5.6.85 was pressed, learned counsel for the applicant contended that the applicant only came to know of revocation of suspension after he received the order and thereafter he joined service. According to the learned counsel, the applicant had visited the office of the respondents and he was never informed that any such order has been passed. This plea is being controverted vehemently.

13. Our attention was drawn towards the letter written from the office of respondents dated 28.4.85 addressed to the applicant, which reads -

Virendra Jain
5-A3, Ansari Road
Daryaganj
Delhi

Sub: Revocation of suspension order in r/o
Dr.Virendra Jain, MO

Sir,

I am directed to send herewith another copy of revocation order in r/o Dr.Virendra Jain, with the request to join your duty immediately.

Yours faithfully,

Sd/- X X
(D. Toppe)
Admn Officer, C2

On the strength of the same the above said argument of the applicant's counsel has been deprecated.

14. If the matter had ended here, the contention could be accepted but it is not so. The applicant was

ls Ag _____

acquitted by the learned Addl. Sessions Judge, New Delhi on 17.10.1991. The order reinstating the applicant and revocation of suspension was passed on 31.1.92, which reads -

ORDER

"WHEREAS an order placing Dr. Virendra Jain, Medical Officer, CGHS Wing, Safdarjung Hospital, New Delhi, under suspension was made by the President on 20th January, 1989,

NOW, THEREFORE, the President, in exercise of the powers conferred by clause (c) of sub-rule (5) of Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, hereby revokes the said order of suspension with immediate effect.

By order and in the name of the President,

Sd/-

(S. Hariharan)

Deputy Secretary to the Govt. of India

Perusal of the revocation of suspension order reveals that it was addressed to the applicant at the address 5/A, Ansari Road, Daryaganj, New Delhi. Even later on the applicant had stated that he had received the letter addressed to him in the above address.

15. The position in law is well settled that correctly addressed letter would ordinarily be delivered to the addressee. Unless there is extraordinary happening shown, ordinary course of events would follow. In terms of Section 114 of the Indian Evidence Act read with Section 27 of the General Clauses Act, a presumption would be drawn that the letter had been delivered to the

ls Ag _____

addressee, particularly when the letter is said to have ^{not} been received back undelivered. Thus we have no hesitation in drawing the present presumption.

18. The contention of the applicant that he has not received the revocation order is otherwise also totally unconvincing. If the applicant has not received the same, for all these years he would not have waited. He would have taken the matter on the judicial side or urged seriously in this regard. Thus for purpose of the present application, we hold that the applicant was aware of the revocation order and if he did not join duty till June, 1995, he is not entitled to pay and allowances.

19. No other plea has been raised. Resultantly, the OA being without merit must fail and is dismissed.



(S.K. Naik)
Member(A)



(V.S. Aggarwal)
Chairman

/gtv/