
(2011) 09 SHI CK 0337
In the High Court Of Himachal Pradesh
Case No : CWP No. 591 of 2009

Anant Ram Sharma

APPELLANT

Vs

State of H.P. and Another

RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2011) 09 SHI CK 0337

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—By means of this petition, the Petitioner, who is an Ex-Serviceman, submits that he should be considered eligible for promotion to the next higher post, i.e. Assistant Director Physical Education, since he has completed three years service as DPE.

2. The basic question which arises for decision in this case is with regard to the interpretation of Clause 11 of the Recruitment and Promotion Rules read with the instructions issued by the Government on 23.02.1989. It would be pertinent to mention that the Recruitment and Promotion Rules for promotion to the post of Assistant Director Physical Education were earlier notified in the year 1975 and thereafter they were repealed and replaced by the Rules of 1997. Rule 11, with which we are concerned, reads as follows:

11. In case of recruitment by By promotion from amongst the promotion, deputation, Assistant District Physical Education transfer, grade from which Officers who possess ten years" regular promotion/deputation/service or regular combined with transfer to be made, continuous adhoc (rendered upto 31.3.1991) service if any, in the grade.

Note (1) In all cases of promotion, the adhoc service rendered in the feeder post upto 31.3.1991, if any, prior to regular appointment to the post shall be taken

into account towards the length of service as prescribed in these Rules for promotion subject to the condition:

that in all cases where a junior person be come eligible for consideration by virtue of his to tallength of service (including the service rendered on adhoc basis upto 31.3.1991) in the feeder post in view of the provisions referred to above, all persons senior to him in the respective category/post/cadre shall be deemed to be eligible for consideration and placed above the junior person in the field of consideration.

Provided that all incumbents to be considered for promotion shall possess the minimum qualifying service of at least three years or that prescribed in the Recruitment and Promotion Rules for the post, whichever is less;

Provided further that where a person be come ineligible to be considered for promotion on account of the recruitment of the preceding proviso, the person(s) junior to him shall also be deemed to be ineligible for consideration for such promotion.

Explanation:

The last proviso shall not render the junior incumbents ineligible for consideration for promotion if the senior ineligible persons happened to be Ex-servicemen recruited under the provisions of Rules-3 of Demobilised Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services) Rules, 1972 and having been given the benefit of seniority there under of recruited under the provisions of Rule-3 of Ex-servicemen (Reservation of Vacancies in the Himachal Pradesh Technical Services)Rules, 1985 and having been given the benefits of seniority there under.

As per the Recruitment and Promotion Rules, a person becomes eligible for promotion as ADPEO only if he possesses ten years" service in the lower grade.

3. The first condition lays down that if a junior becomes eligible then the all seniors would be deemed to be eligible subject to the condition that even the senior should have at least three years" service in the grade or that prescribed in the Recruitment and Promotion Rules, whichever is less. The second proviso lays down that in case the senior person is ineligible on account of the fact that he does not have three years" service in the grade, then all the persons junior to him shall be deemed to be ineligible for consideration for such promotion.

4. The explanation to the second proviso carves out another scenario wherein when the senior person found to be ineligible is an Ex-serviceman recruited under the Demobilised Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services) Rules, 1972 and has been given the benefit of Rule 3 of the said Rules, then the juniors would not be debarred from promotion.

5. The instruction dated 23.02.1989, which has been circulatedby the

Government of Himachal Pradesh to all Secretaries, reads as follows:

Subject: Determination of seniority of re-employed Ex-Servicemen.

I am directed to say that it has been brought to the notice of the Government that the re-employed Ex-servicemen who have been allowed the benefit of military service for fixation of seniority in civil posts in accordance with the provisions of Rule 5.1 of the Demobilised Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services), Rules, 1972, and other corresponding Rules for Technical Services are not being considered for promotion to higher post/grade on uniform basis according to the provisions of Recruitment and Promotion Rules. This benefit of seniority is to be allowed against the post to which an ex-serviceman is initially appointed and in the matter of confirmation /further promotion, an ex-serviceman is required to put in actual service in post to which he is initially appointed. However, according to the provisions contained in provisos to Rule 11 of the R&P Rules, if a junior person becomes eligible for promotion, all his seniors shall also be deemed eligible for consideration and placed above the junior person in the field of consideration provided all incumbents to be considered shall possess the minimum qualifying service of at least three years or that prescribed in the R&P Rules whichever is less. Accordingly, the ex-Servicemen on completion of at least three years service in the civil post, are to be considered eligible for consideration for promotion to higher post if their juniors are eligible and also promoted subject to suitability and availability of posts.

I am, therefore, to request that this position regarding rules be observed in all departments and be also brought to the notice of all concerned for compliance.

6. Mr. Onkar Jairath, Learned Counsel appearing for the Petitioner, contends that the case of the Petitioner is covered under the instructions and as per these instructions, since the Petitioner has completed three years' service in the grade in the year 1998, he should be considered eligible for promotion from the said date. On the other hand, the stand of the State is that the juniors, who were promoted, have completed more than ten years and since the Petitioner had not completed ten years in the lower grade, he could not be considered eligible for promotion to the post of Assistant Director Physical Education and as such, he was not even considered for promotion.

7. According to the State, the Rules clearly provide that the minimum eligibility criteria is ten years' service (regular combined with continuous adhoc) and therefore, the period of three years as mentioned in the instructions is contrary to the Rules and hence, the Rules must prevail and the Petitioner cannot get the benefit of the instructions. In support of the contention of the State, Mr. Vivek Singh Thakur, learned Additional Advocate General, relies upon the judgments of the Apex Court in C.L. Verma Vs. State of M.P. and another, ; Ex. Capt. K. Balasubramanian and Others Vs. State of Tamil Nadu and Another, ; Union of India Vs. Madras Tele S.C. and S.T. Social Welfare Association, and Union of India

(UOI) and Others Vs. Alok Kumar, . There can be no quarrel with the proposition of law that statutory rules must prevail over the instructions. In case there is inconsistency between these two, then it is the Rules which will prevail and the instructions must give way to the rules. The rules framed under Article 309 of the Constitution of India are statutory in nature and any instructions to the contrary cannot take precedence over the rules.

8. Mr. Vivek Singh Thakur, learned Additional Advocate General, further contends that in the present case, the rules were framed after the promulgation of the instructions and, therefore, the instructions are deemed to have been superseded. On the other hand, Mr. Onkar Jairath, Advocate, contends that the instructions are not contrary to the rules and if the two are read together, it is obvious that senior ex-servicemen are being treated at par with other senior officials who are in service.

9. An in depth analysis of Rule 11 of the Rules quoted hereinabove, shows that as per the Rules, ten years" service in the grade is necessary for being considered for promotion to the post of Assistant Director Physical Education. The first condition to the Rules itself, however, provides that where a junior person has ten years" service and is eligible, all persons senior to him shall be deemed to be eligible for consideration and placement above the juniors in the field of consideration. There is no distinction between ex-servicemen or servicemen, as far as this condition is concerned.

10. That brings us to the first proviso which clearly lays down that all the incumbents to be considered for promotion must possess minimum qualifying service of at least three years Therefore, if the junior becomes eligible and the senior is not having the requisite qualifying service of ten years, then if the senior has put in more than three years of service, he will be deemed to be eligible. The only interpretation which can be given to the second proviso is that if the senior does not even have three years" service in the grade then even if the junior has put in more than ten years" service, he shall be deemed to be ineligible. The explanation to the proviso further carves out another exception and that exception that if the senior is an ex-serviceman, who has been given the benefit of the Demobilised Armed Forces Personnel (Reservation of Vacancies in Himachal State Non-Technical Services) Rules, 1972, then the junior will be deemed to be eligible.

11. In my view, the contention of the State cannot be accepted. The reason is that even a senior non-ex-serviceman , if he has put in more than three years" service in grade, becomes eligible for promotion, if his juniors are eligible because they have put in ten years" service in the grade. The explanation to the second proviso has to be read with the second proviso itself and cannot be read with the first condition or the proviso to the first condition. Therefore, if this interpretation is given, there is no conflict between the instructions and the rules. Even the rules make a senior person eligible as long as he has completed three years" service in the grade. The instructions only clarify this aspect. Therefore,

the senior employee, who has been granted benefit of seniority under the Demobilised Armed Forces Personnel Rules, has completed three years" service in the lower grade, he would be eligible for promotion, in case his juniors are found to be eligible.

12. In view of the above discussion, the petition is allowed and the Respondent-State is directed to consider the Petitioner for promotion to the post of Assistant Director Physical Education from the date when his juniors were considered and when he had completed three years" service with all consequential benefits. Needful be done by 31st December, 2011. No costs.