

(2003) 09 PAT CK 0115
In the Patna High Court
Case No : C.W.J.C. No. 7424 of 2003

Awadhesh Kumar Upadhyay	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 26-09-2003

Acts Referred:

Bihar Intermediate Education Council Act, 1992 — Section 21, 21(6), 22(5), 24, 25
Bihar Intermediate Education Council Rules — Rule 3
Constitution of India, 1950 — Article 320

Citation : (2004) 1 PLJR 194

Hon'ble Judges : Chandramauli Kr. Prasad, J

Bench : Single Bench

Advocate : Vinod Kumar Kanth, Ashutosh Ranjan Pandey, Anshuman, Shashi Shekhar Tiwari, for the Appellant; S.N. Jha, Yugal Kishore and Birendra Narain Sharma for Respondent Nos. 3 to 5, for the Respondent

Final Decision : Dismissed

Judgement

Chandramauli Kr. Prasad, J.—This application has been filed for quashing the order dated 24.7.2003 (Annexure-19) whereby the order dated 21.6.1990 (Annexure-1) promoting the Petitioner as Statistical Officer with effect from 1.6.1990 has been cancelled and the Petitioner reverted to the original post of Assistant.

2. Facts giving rise to the present application are that Bihar Intermediate Education Council, hereinafter referred to as the Council, engaged the Petitioner on daily wages on 21.1.1983. While he was so engaged, he obtained Diploma in Computer Application and Certificate in Computer Programming. By order dated 1.6.1985, he was appointed as Assistant in the Council. It is the stand of the Petitioner that the Council felt the necessity of Statistical Officer, hence, created two posts of Senior Statistical Officer and empowered the Chairman of the Council to take appropriate steps for filling up the said posts. In view of the aforesaid, by order dated 21.6.1990 (Annexure-1), Petitioner was provisionally

promoted as Statistical Officer w.e.f. 1.6.1990 in anticipation of approval of the State Government. The order further indicated that the post of Statistical Officer is a post requiring technical qualification and on account of promotion to that post Petitioner shall not be entitled for promotion in the general cadre. Later on, by order dated 14.9.1994 (Annexure-3), Petitioner was admitted to the scale of pay of Rs. 2,200-4,000/- w.e.f. 1.6.1990, i.e. from the date of his promotion. Petitioner's assertion is that in the meeting of the Council held on 30.11.1994, the Council decided to post the Petitioner in the same scale of pay, as Senior Statistical Officer and accordingly by order dated 1.6.1994, he was posted as Senior Statistical Officer. According to the Petitioner, the scale of pay of the Senior Statistical Officer at the relevant time, was Rs. 3,000/- Rs. 4,500/- and when it was not given to him, he filed C.W.J.C. No. 11853 of 1996 (Awadhesh Kumar Upadhayay v. The State of Bihar and Ors.) before this Court, inter alia, praying for a direction to the Respondents to pay him the salary of the post of Senior Statistical Officer from 1.6.1994, the date from which he was promoted as such. During the pendency of the writ application, by order dated 16.5.1997 (Annexure-4), Petitioner's salary was fixed at the basic pay of Rs. 3,000/- in the scale of pay of Rs. 3,000/- 4,500/- w.e.f. 1.6.1994. However; when the matter was taken up on 12.2.1998, a plea was taken by the Respondents that the Petitioner was granted promotion wrongly and when the matter came to the notice of the Council, the order of fixation of salary was stayed. It was further pointed out to, the Court that the entire matter with regard to grant of promotion is under consideration of the Establishment Committee of the Council and final decision in this regard will be taken within a reasonable time. This Court, taking note of the aforesaid facts, by order dated 12.2.1998 (Annexure-5), disposed of the writ application with a direction to the Respondents to take final decision.

3. After the disposal of the writ application by this Court, the case of the Petitioner was considered in the meeting of the Council held on 22.8.1998 and in the light of the decision taken in the said meeting, Petitioner by order dated 16.9.1998 (Annexure-6) promoted as Senior Statistical Officer w.e.f. 1.6.1.995 in the scale of pay of Rs. 2,400-4,150/-. However, the aforesaid order dated 16.9.1998 was modified by order dated 30th of August, 1999 (Annexure-7) and in anticipation of the approval of the Council, Petitioner was admitted the Senior Selection Grade scale of Rs. 3,700-5,000/- w.e.f. 1.6.1990 in the Statistical Cadre. The order went to the extent of saying that the post of Senior Statistical Officer shall be equivalent to that of the Joint Director. The Council, by letter dated 29.12.1998 (Annexure-8), intimated to the State Government about its decision taken in the year 1981 to create two posts of Senior Statistical Officer in anticipation of the approval of the State Government and made grievance that till date, same has not been approved. In the said letter, it was further pointed out that the Petitioner is working on the post of Senior Statistical Officer from 1.6.1990, and the Council is meeting the expenses of the said post. The State Government was further informed that in the light of the order of the High Court dated 12.2.1998 (Annexure-5), the Council had taken the decision to take

immediate steps for approval of the post of Senior Statistical Officer. In the aforesaid premises, the State Government was re-requested to approve two posts of Senior Statistical Officer. When nothing was done, the Council sent a reminder dated 21.7.2001 (Annexure-9).

4. It is the Petitioner that Request of the Council was considered by the State Government and by letter dated 1st of March, 2002 (Annexure-10), communicated its decision that the proposal of the Council for creation of one post of Senior Statistical Officer has been approved were (sic) 1.6.1990 and in the said letter, it has been further noted that the said post is being held by the Petitioner since 1.6.1990. Further, the Director of Secondary Education, by letter dated 18.6.2002 (Annexure-11) sought information from the Council for creation of the second post of the Senior Statistical Officer.

5. It is here to state that by order dated 24.6.2003 (Annexure-12), the Petitioner was assigned the work of Statistics and Computer and his name finds place at Serial No. 2. Petitioner had a smooth sailing till then but by order dated 26.6.2003 (Annexure-13), Petitioner, was deprived of the charge of the Statistics and Computer Cell and same were put under the charge of the Assistant Secretary. Further, by order dated 28.6.2003 (Annexure-14), a show cause notice was given to the Petitioner intimating that his promotions to the post of Statistical Officer and Senior Statistical Officer are wrong, as the Petitioner does not possess the prescribed qualification for appointment to the said post. It was pointed out that for appointment to the post of Statistical Officer, a candidate is required to be a Graduate with Mathematics or Statistics, but the Petitioner does not possess the same. Further, by letter dated 9.7.2003 (Annexure-7), Petitioner was, informed that he is a Science Graduate, but he did not had Mathematics at the Matriculation stage and hence, does not possess qualification for appointment/ promotion to the post of Senior Statistical Officer. Petitioner was asked to show cause that as to why he be not reverted to the original post of Assistant for not possessing the required qualification. Petitioner submitted his reply dated 12.7.2003 (Annexure-18) justifying his promotion.

6. It is also relevant here to state that the State Government, by its letter dated 25.9.1997 (Annexure-15) wrote to the Council that the post of Statistical Officer is filled by promotion from the Statistical Assistant/Supervisor and the post of Statistical Assistant/Supervisor are filled by direct recruitment on the recommendation of the Bihar Service Commission, for short "BPSC and the minimum qualification for appointment is B.Sc., B.Com, or B.A. (Economics, Mathematics) but Mathematics is must at the Matriculation stage. The Petitioner claims to be eligible for promotion on the ground that he is Science graduate and had Mathematics at the Matriculation stage. It is not in dispute that in the Matriculation stage, the subject which the Petitioner studied was Elementary Mathematics.

7. The council considered the reply of the Petitioner and finding that the promotion was given to the Petitioner on misrepresentation of the office of the

Council and the State Government cancelled the promotion and reverted the Petitioner to the post of Assistant. While doing so, it has been observed that the post of Statistical Officer/Senior Statistical Officer is a non cadre post for the Assistant and the Petitioner was promoted as such without following any procedure. It was further observed that the post of Statistical Officer/Senior Statistical Officer ought to have been filled by appointment.

8. Counter affidavit has been filed on behalf of Respondent Nos. 3 to 5 and their plea, is that the Petitioner was promoted to the post of Statistical Officer but the said post was neither created nor sanctioned either by the Council or by the State Government. It is the stand of the answering Respondents that the power to create posts in the Council is vested in the State Government at all times and the post of Statistical Officer or the Senior Statistical Officer has not been declared to be the post in the category of "Officer" as required u/s 21 of the Bihar Intermediate Education Council Act, hereinafter referred to as the "Act". It has also been pointed out that the qualification for appointment to the post of Junior Statistical Supervisor/Block Statistical Supervisor is Bachelors' Degree in Statistics, Economics, Mathematics or Commerce and as such, Petitioner does not possess the requisite qualification. Further the post of Statistical Officer is required to be filled-up on the recommendation of the "BPSC" but the Petitioner was promoted without its recommendation. The claim of the Petitioner that he is eligible on account of the fact that he had Mathematics at the Matriculation stage, has also been denied and it has been pointed out that the Petitioner had Elementary Mathematics at the Matriculation stage which can not be equated with Mathematics. Their further stand is that the post of Statistical Officer is not in the promotional avenue of the cadre post of Assistant and as such, the Petitioner was illegally promoted and when it came to the notice of the Chairman of the Council, he, in exercise of its power u/s 22(5) of the Act, reverted the Petitioner to the cadre post of Assistant.

9. Mr. V.K. Kanth, Senior Advocate appearing on behalf of the Petitioner submits that the counter affidavit filed on behalf of Respondent Nos. 3 to 5 is fit to be rejected as the same has been sworn by a Joint Secretary and in fact, he has already been removed from the service. However, it is not in dispute that at the time the said Joint Secretary filed the counter affidavit, he was in employment of the Council. In the counter affidavit, he has also stated that he was authorized by Respondent Nos. 3 to 5 to swear the counter affidavit. This fact has not been disputed by the Petitioner and hence, the submission to reject the counter affidavit has no legs to stand and accordingly, same is rejected.

10. Mr. Kanth submits that the post of Senior Statistical Officer has been sanctioned by the State Government which would be evident from letter dated 1st of March, 2002 (Annexure-10) addressed to the Secretary of the Council by the Secretary of the department of Secondary Education. Dr. S.N. Jha, however, submits that the Petitioner is working on a non-existent post and as such the Council did not err in reverting the Petitioner to the original post.

11. Letter dated 1st of March, 2002 (Annexure-10) of the State Government do state that the proposal of the Council for creation of a post of Senior Statistical Officer has been approved by the State Government w.e.f. 1.6.1990. The letter went on to say that the said post is being occupied by the Petitioner. In that view of the matter, the plea of the Respondents that the post was not sanctioned by the State Government, does not seem to be correct. It is relevant here to state that by Resolution No. 10 dated 31.3.1980, the Council had created two posts of Senior Statistical Officer. Thus, the post of Senior Statistical Officer has been created by the Council and one of them has been approved by the State Government.

12. It is relevant here to state that the Petitioner's promotion has been found to be illegal on the ground that the post of Statistical Officer/Senior Statistical Officer is a non cadre post and it does not fall in the channel of promotion of the Assistant which post the Petitioner was holding. Mr. Kanth submits that the Council needed a Statistical Officer/Senior Statistical Officer for carrying out its function and seeing the Petitioner's qualification, he was promoted as the Statistical Officer and thereafter, Senior Statistical Officer. He points out that while promoting the Petitioner by order dated Statistical Officer, it was made clear that the Petitioner shall not be eligible for promotion in the general cadre. Mr. Kanth submits that there is no legal bar of an employee of one cadre to be promoted in the other cadre. Dr. Jha, however, submits that promotion from one cadre to another is not possible and it can be only by way of appointment.

13. The post of Statistical Officer is not in the channel of promotion of the Assistant has not been questioned by Mr. Kanth and would be apparent also from the fact that while promoting the Petitioner to the post of Statistical Officer, it was made clear that he shall not be eligible for promotion in the general cadre. In normal circumstance, while making promotion in a different cadre, application ought to have been invited for filling up of the post, which it seems, has not been done in the present case and the Petitioner was picked up for promotion as Statistical Officer. The manner in which Petitioner was chosen for promotion as the Statistical Officer, is not in conformity with the requirement of law but nobody eligible for promotion has chosen to question that and hence at such a distance of time it will be unjust to hold the promotion of the Petitioner to be illegal on that account.

14. Another ground to hold the promotion of the Petitioner illegal is his lack of educational qualification. Dr. Jha refers to the report of the Fitment cum Pay Revision Committee of August, 1989 and submits that for the post of Block Statistical Officer, the Committee had recommended the qualification of Graduation in Mathematics or Statistics or Economics provided the Economics Graduates have Mathematics/Statistics as a paper in Graduation course. He has also referred to a letter dated 3.4.1993 (Annexure-B) which shows that the qualification for the post of Junior Statistical Assistant in Graduation in Statistics or Mathematics or Economics and Mathematics at Matriculation stage. Mr. Jha

highlights that the Petitioner does not possess the qualification even for appointment as a Junior Statistical Assistant but he has been promoted as Senior Statistical Officer.

Mr. Kanth, however, submits that the Petitioner is a Graduate in Science and had Mathematics at the Matriculation stage and as such, eligible for promotion as a Senior Statistical officer. In this connection, he has referred to the letter dated 25.9.1997 (Annexure-15) in which the Director of Secondary Education has informed to the Council that the minimum qualification for appointment to the post of Statistical Officer is B.Sc., B.Com., or B.A. (Economics or Mathematics) and Mathematics at the Matriculation stage.

15. It is common ground that the Council itself has not prescribed any qualification for appointment to the post of Statistical/Senior Statistical Officer and the qualification prescribed by the State Government in respect of such posts are taken into consideration. The Pay Revision Committee for appointment to the post of Junior Statistical Supervisor/Block Statistical Supervisor had recommended Graduation in Mathematics or Statistics with further stipulation that the Economics Graduate should have Mathematics/Statistics as a paper in the Graduation course. Letter dated 3.4.1993 is in relation to qualification of a Junior Statistical Assistant and for that the qualification required is Bachelor's Degree in Statistics or Mathematics or Economics with further requirement of Mathematics at the Matriculation stage. It is not the assertion of the Petitioner that he had obtained the Bachelor Degree either in Statistics, Mathematics or Economics but his contention is that he had passed B.Sc. examination with Elementary Mathematics at the Matriculation stage and thus, he fulfils the qualification as provided in letter dated 25.9.1997 (Annexure-15) of the Director of Secondary Education addressed to the Council. By the said letter, the Council was informed that the post of Statistical Officer is filled up by promotion and the feeder cadre of the said post is the cadre of Statistical, Assistant/Supervisor and on those posts, appointment is made on the recommendation of the BPSC. For the post of Statistical Assistant/Supervisor, according to the said letter, the minimum qualification is B.Sc., B.Com., or B.A. (Economics Mathematics) with Mathematics at the Matriculation stage. Petitioner possesses the Bachelor's Degree in Science and had Elementary Mathematics at the Matriculation stage. The question is as to whether Elementary Mathematics will meet the requirement. It is common ground that there are two subjects of Mathematics at the Matriculation stage, one is called the Elementary Mathematics and the other Advance Mathematics. In the absence of any stipulation, I am of the opinion that Elementary Mathematics at the Matriculation stage would not be sufficient to make a person eligible for appointment as Statistical Assistant/Supervisor.

16. Even if I assume in favour of the Petitioner that Petitioner having passed the B.Sc. examination with Elementary Mathematics, is eligible for the post of Statistical Assistant/Supervisor, but the question is as to whether the same qualification is sufficient for appointment to the post of Statistical Officer. It has

to be borne in mind that the Petitioner has been directly promoted to the post of Statistical Officer from the post of Assistant and never worked as Statistical Assistant or Supervisor. One may consider a person appointed as Statistical Assistant/Supervisor with the qualification B.Sc. degree with Mathematics at Matriculation stage for promotion to the post of Statistical Officer on account of experience gained on the earlier post. In my opinion, a person cannot be directly recruited as Statistical Officer with the qualification of B.Sc. with Elementary Mathematics at the Matriculation stage without any experience either as Statistical Assistant or Supervisor. It is relevant here to state that the Pay Revision Committee, while considering the qualification for appointment to the post of Junior Statistical Supervisor/Block Statistical Supervisor, recommended that for the said post, qualification should be Graduation in Mathematics or Statistics provided further that Economics Graduates should have Mathematics/Statistics as paper in the Graduation Course. The recommendation of the Pay Revision Committee has been accepted by the State Government. Further, according to the letter dated 3.4.1993 of the Director of Statistics and Evaluation Directorate, addressed to the Director, Employment and Training, the minimum qualification for the post of Junior Statistical Assistant is Bachelor's Degree in Statistics, Mathematics or Economics with Mathematics at the Matriculation stage. Petitioner does not possess the qualification either for the post of Block Statistical Supervisor or the Junior Statistical Assistant and hence, it is difficult to hold that the Petitioner possesses the qualification for promotion to the post of Statistical Officer and Senior Statistical Officer. Thus, I hold that the Petitioner was promoted to the post of Statistical/Senior Statistical Officer, although he did not possess the requisite qualification.

17. It is relevant here to state that the Petitioner was promoted to the post of Statistical/Senior Statistical Officer without the recommendation of the BPSC. Dr. Jha submits that in the light of the provisions of Section 21 of the Act, the Council has not declared the post of Senior Statistical Officer as "Officer" of the Council and no Gazette notification having been issued declaring the post of Statistical Officer/Senior Statistical Officer as an "Officer" of the Council, the promotion of the Petitioner to such post is illegal. Dr. Jha points out that in case the post of Senior Statistical Officer is treated as an officer under 21 of the Act, for filling up the said post, recommendation of BPSC is must u/s 48(2) of the Act.

18. Mr. Kanth, however, submits that the post of Senior Statistical Officer has been declared to be equivalent to that of the Joint Director by order dated 30.8.1999 (Annexure-7) and as such, post of Senior Statistical Officer comes within the category of "Officers" as provided u/s 21 of the Act. He submits that for such an appointment, recommendation of the BPSC is not necessary.

19. Having appreciated the rival submission, I am of the opinion that on either contingency, the promotion of the Petitioner cannot be held to be legal. Section 21 of the Act which is relevant for the purpose, reads, as, follows:

21. Officers of the Council.-The following shall be the officers of the Council-

- (1) The Chairman
- (2) The Vice-Chairman
- (3) The Secretary
- (4) The Joint Secretary
- (5) The Finance Officer, and
- (6) Such other persons who may on the recommendation of the Council or otherwise be declared by the State Government by notification published in the Official Gazette to be officers of the Council.

From a plain reading of the aforesaid provision, it is evident that besides the five officers enumerated above, other persons can be declared to be "officer" of the Council by the State Government by publication of notification in the official Gazette. There is nothing on the record to show that the post of Senior Statistical Officer has been declared as such in my opinion, incorporation of the said post in Rule 3 of the Bihar Intermediate Shiksha Parishad Padadshikari and Karamchhari Seva Shart Niyamavali, 2000 shall have no bearing at all as Petitioner was promoted to the post of Senior Statistical Officer prior to coming into force of the aforesaid Rule. Thus, the Petitioner was promoted without the post being declared to be in the category of the "officers" in the Council.

20. Even if, I assume in favour of the Petitioner that the post of Senior Statistical Officer comes within the category of the Officer of the Council, same shall not advance the case of the Petitioner. It is relevant here to state that Section 48(2) of the Act, contemplates requirement of recommendation for appointment to the post of Officer in the Council. Section 48 of the Act which is relevant for the purpose, reads as follows:

48. Recommendation of the State Public Service Commission/College Service Commission in the appointment of officers of the Council and teachers of recognized Institution. Subject to provisions in the Act and Rules and Regulations framed there under the Public Service Commission/College Service Commission shall perform the same function as are entrusted to it under Article 320 of the Constitution India in relation to the service of the State.

(2) The Bihar Public Service Commission shall abide by the conditions laid down in Section 48 of this Act in recommending appointment to every post of Officer of the Council.

(3) Appointment of such teachers for whom no separate provisions have been made in this Act, shall be made on the recommendation of College Service Commission.

From a plain reading of the aforesaid provision, it is evident that for appointment to the post coming within the category of the Officers of the Council, u/s 21(6) of the Act, recommendation of the BPSC u/s 48(2) of the Act is sine qua non.

Undisputedly, the promotion of the Petitioner was made without the recommendation of the BPSC and as such, same is illegal.

21. To overcome this, Mr. Kanth submits that the post of Statistical Officer does not come within the purview of Section 48 of the Act and it is in relation to teachers only. I do not find any substance in the submission of Shri Kanth. Sections 24, 25 and 26 of the Act contemplate appointment to the post of Secretary, Joint Secretary and Finance Officer respectively and in view of the stipulation in those provisions recommendation of the BPSC is not necessary but Section 48(2) of the Act in no certain term provides that for appointment in the category of the officer of the Council, recommendation of the BPSC is must.

22. Mr. Kanth lastly submits that once the Petitioner has been promoted, he cannot be reverted to the post of Assistant on the principles of promissory estoppel. He submits that the Petitioner had worked on the post of Senior Statistical Officer for such a long time, he does not deserve to be reverted to the post of Assistant. This argument has been noted only for the purpose of keeping the record straight. In my opinion, the principle of promissory estoppel is not remotely attracted in the facts of the present case. Petitioner entered into the service of the Council as a daily-wage employee. Thereafter absorbed as an Assistant and promoted as Statistical/Senior Statistical Officer without undergoing any selection process whatsoever. When the illegality in his promotion surfaced a show cause notice was given and reverted to his original post of Assistant. The principle of promissory estoppel is invoked to do justice and not to perpetuate illegality. It is a doctrine based on equity. Here allowing the Petitioner to continue on the promoted post of Senior Statistical Officer shall amount to giving premium on favouritism.

23. In the result, I do not find any merit in this application and it is dismissed accordingly. No costs.