

(2011) 04 SHI CK 0073
In the High Court Of Himachal Pradesh
Case No : CWP (T) No. 12586 of 2008

Bichittar Singh

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2011) 04 SHI CK 0073

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Judgement

V.K. Sharma, J.—The petition has been filed on the following prayer:

That the impugned promotion order dated 26.10.04 may be quashed and set aside and applicant may be given the promotion along with other similar situated persons retrospectively.

2. In reply the Respondents have taken the following stand vide para 3:

That in reply to this para, it is submitted that as is evident from a mere perusal of the order of promotion dated October 26, 2004, Annexure PA, the name of the Applicant does not figure in the list of Pharmacists promoted as Chief Pharmacists. This is because of a bonafide reason that the applicant, Shri Bachhitar Singh, Pharmacist, had retired on September 30, 2004 and at that stage recommendation of Departmental Promotion Committee had not attained its finality as posting of various Pharmacists/Chief Pharmacists had to be sorted out and thereafter approved by the Chairman of the Departmental Promotion Committee keeping in view various administrative aspects and public interest at large. The promotion of the applicant and other similarly situate Pharmacists to the post of Chief Pharmacists could / cannot be made to his and their suitability as before promoting persons, a long process had to be carried out, and this is, any doubt, is a time consuming process. It is not denied that the process for requisitioning Annual Confidential Reports was started and undertaken by the

Respondents on December 2, 2003, but the same was not with respect to applicant only. To the contrary, it was with respect to all other Pharmacists also, who were to be taken in the zone of consideration by the Departmental Promotion Committee according to the vacancies available in the Respondent Department. Hence, the pleas taken by the applicant with regard to requisitions of Confidential Reports vide letter dated December 2, 2003 and that with regard to availability of vacancy at Sunder Nagar for the Applicant, do not themselves constitute a legally enforceable right upon him till promotion order is finally issued in his favour during the period of his service career withy the Respondents, as a retrospective promotion with promotional benefits is not sanctioned in Law and Rules. It is, pertinent to submit and state here that if according to the pleas of the Applicant, promotions are to be given effect to from the retrospective date(s) of personal suitabilities, then there is another Senior Pharmacist to the Applicant who in that eventuality will also be required to be promoted in order of preference to the Applicant, who is junior to him, as during the period starting from December w2, 2003 till the date of issuance of order of promotion dated 26, 2004 (Annexure PA to Original Application), a Senior Pharmacist namely; Shri Duni Chand has been retired from Government services on January 312, 2004. Since orders of promotion as per Rules and procedure existing , can be issued only on completion of necessary and required process of Departmental Promotion Committee, there is no place in Law for promotions to be given on supposition and to the suitability of a particular Government employee. The Respondents had no malafides in the case of the promotion of the Applicant and similarly situate Pharmacist, who retired from Government service in between the period of starting the process of promotion on December 2, 2003 and issuance of Office Order of promotion on October 26, 2004 (Annexure PA). In so far as Annexure PB to the Original Application i.e the representation of the Applicant dated November 20, 2004 is concerned, a reference with regard to the subject matter contained in the said letter of the Applicant in this behalf was earlier received by the present replying Respondent through the Government. The same was duly replied to and position clarified to the Government vide letter dated December 21, 2004 with a copy endorsed also to the Applicant for his information. In view of above, the allegation that though the posts were lying vacant for the last one year but knowingly⁶ and willingly no promotion before September, 2004 was made by the Department, is not at all sustainable in the eye of Law and facts on record. It is added that promotions of 29 persons were ordered because none of them stood already retired from Government service on October 26, 2004 i.e. the date of order of promotion, Annexure PA to the Original Application. Therefore, no action of the Respondents is wrong, illegal, ultravires and against the principles of natural justice as being alleged by the Applicant, but the same in all is within the Rules and the well established and adopted procedures being carried out and undertaken in the Department from time to time in the matters of promotions and that being so, there remains nothing to survive in the present application.

3. Rejoinder refuting the stand on behalf of the Respondents and reiterating the averments set up in the petition, has been filed.

4. Admittedly, the Petitioner who was working as Pharmacist in the Respondent-department had retired from the said service on attaining the age of superannuation on 30.9.2004. Indisputably, promotional posts of Chief Pharmacist were filled in soon thereafter in the month of October, 2004. The case of the Petitioner is that these posts had become available much prior to his retirement and he was entitled for being considered for promotion as Chief Pharmacist against one of these posts.

5. The stand on behalf of the Respondents is that process for making promotions to the post of Chief Pharmacist was though initiated in December, 2003, but could not be taken to the logical conclusion for one reasons or the other and in the meantime the Petitioner retired from service.

6. It is by now fairly settled that the right for consideration for promotion is a fundamental right. The incumbent is legally entitled to assert such right even in an eventuality of his retiring from service in the meanwhile. To this effect is the law laid down by a Division Bench of Hon'ble Punjab and Haryana High Court in Chaman Lal Lakhanpal v. Unio Public Service Commission and Ors. 1999 (1) SLR 670, vide paras 7, 9, 10 and 11, which read as under:

7. The right to equality of opportunity in matters of promotion is guaranteed under Article 16 of the Constitution. This cannot be stifled by an arbitrary failure to perform the duty imposed by statutory regulations. By merely choosing to avoid the meeting, a citizen cannot be denied the right to be considered.

9. We are unable to accept this contention. The Respondent cannot be permitted to take advantage of its own wrong. It is the Commission's own case that the committee could not meeting during the year 1994-95, 1995-96 and 1996-97 on account of the interim order of stay granted by the Tribunal in S.P. Gupta's case. "After the stay was vacated on December 3, 1996, the Commission took no steps for the meeting of the committee immediately. If it had performed its duty and nominated a member for the committee as constituted under the regulations, the Petitioner's rights as guaranteed to him under the rules would not have been violated. By merely failing to nominate a member and not allowing the committee to meet, the Commission can't be permitted to defeat the rights of the Petitioner.

10. It was then urged that the Petitioner ahs since retired from service. Even this cannot be a ground for refusing to consider his claim. The right to be considered had accrued in the year 1994-95. The Respondents had failed to consider his claim. They had not discharged their duty as enjoined upon them by law. The wrong done to the Petitioner can only be remedied by one method viz. directing the Respondents to do the needful on the hypothesis that he was in service at the relevant time. If the Petitioner is found suitable for inclusion in the select list and if his turn for appointment comes against an available post in the promotion

quota, he will be deemed to have been promoted with effect from the due date. Consequential relief's shall ensure in accordance with the rules.

11. In view of the above, we allow the writ petition. The order of the Tribunal is set aside. It is directed that the Petitioner's claim shall be considered with effect from the due date for each of the years. The right shall be considered in respect of the vacancies which have occurred year wise viz. 1994-95, 1995-96 and so on. The needful shall be done within three months from the date of receipt of copy of this order. The Petitioner is also entitled to his costs which are assessed at Rs. 5000/-. Ordered accordingly.

7. In view of the above, the petition is allowed with a direction to Respondents No. 1 and 2/competent authority to consider the case of the Petitioner for promotion to the post of Chief Pharmacist, if otherwise eligible, from the post became available in the first instance before retirement of the Petitioner, by holding a review DPC within three months from the date of production of copy of this judgment by the Petitioner. Needless to say that consequential benefits, if any, would ensue the outcome of the proceedings of the DPC.

8. The petition as also pending CMP(s), if any, stand disposed of in the above terms.