

(2013) 02 DEL CK 0271

In the Delhi High Court

Case No : Writ Petition (C) 1076 of 1998

Dr. Rabindra Nath Tripathy

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

Citation : (2013) 4 ILR Delhi 2944

Hon'ble Judges : Sudershan Kumar Misra, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Shekhar Kumar, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The writ petition seeks a directions to set aside the orders dated 27.07.1995 and 15.07.1997 of the respondents, whereby the demand for grant of (the then existing) pay-scale of Rs. 3700-5000/- per month applicable to the post of Chief Medical Officer (CMO), was denied to the petitioner, by the respondents. The brief facts are that the Petitioner joined the services of Central Reserve Police Force (CRPF) in 1971, as a Junior Medical Officer (then known as General Duty Officer Grade-II (GDO Gr-II). Promotion from that post is to the post and rank of General Duty Officer Grade-I (GDO Gr-I). The petitioner was previously aggrieved by the fact that his juniors were granted promotion while he was passed-over and denied that benefit. He then approached the Jammu and Kashmir High Court, which allowed his claim and directed that the promotion and pay-scale be permitted to him with effect from the date his juniors were so promoted, i.e. 20.03.1987. In this background, the Central Government (Ministry of Home Affairs), by letter dated 06.07.1994, directed restructuring of Medical Cadre of Central Police Organizations (CPOs), pursuant to the recommendations of the Tikku Committee. Para 3 of that letter, which is relevant for the controversy in question in the present case, reads as follows:

3. From 1.12.91 MO Gr. I (SMO) in the scale of Rs. 3000-4500 shall be

considered for promotion as Chief Medical Officer (CMO) in the scale of Rs. 3700-5000 on the basis of seniority-cum-fitness without linkage to vacancies. Medical Officer with 6 years of regular service as Senior Medical Officer or 10 years of total regular service including at least 2 years as SMO shall be eligible for promotion.

4. The strength of selection Gr. (Rs. 4500-5700) shall be 15% of the total number of Senior duty posts and CMO with 2 years of service will be eligible for appointment in this grade against available vacancies. This would be effective from 1-4-88.

2. It is evident that the intention of the Central Government was to grant the benefit of pay-scale admissible otherwise to the CMOs, to those who were deemed eligible on the basis of Para 3; on the basis of seniority-cum-fitness without linkage to vacancies. The eligibility prescribed for these was that a Medical Officer with 6 years of regular service as Senior Medical Officer or 10 years of total regular service, including at least 2 years, as Senior Medical Officer was eligible for promotion. The petitioner's claim for promotion or being treated as CMO and, therefore, being entitled to the benefit of pay-scales applicable to that post were, however, denied by the Departmental Promotion Committee (DPC), which considered the cases of eligible candidates, with effect from 01.12.1991. The ground on which this was done by the respondents, was that his Annual Confidential Report (ACR) contained "Average" grading, as on that date. However, with effect from 1-4-1993, he was cleared for grant of the benefit of pay-scale as CMO. Aggrieved, he made several representations to the respondents; these were rejected. Consequently, he has approached this court.

3. Mr. Shekhar Kumar, learned counsel for the petitioner, argues that the denial of promotion to the petitioner on the one hand, and its grant to those junior to him, in the cadre of SMO is arbitrary. He submits that the benefit claimed is not regular promotion under the recruitment rules, but the benefit of relief from stagnation. To support this submission, he relies on Para 3 of the letter dated 6-7-1994, which states that promotion is not linked to vacancies. Learned counsel argues that the beneficial intention of the policy makers to grant relief to officers whose careers were stagnating was rendered ineffective by the respondents, who interpreted the promotion conditional upon the incumbent possessing a minimum number of ACRs that were "Good". It was contended that the question of judging merit, or even comparative merit of candidates and officials, would justifiably arise when promotion is based on assessment of relative merit and performance. However, here the guidelines prescribe the guiding principle to be, "seniority cum fitness", which meant that seniority was the guiding principle, and the officer could be rejected only if he was unfit. Learned counsel relied on the decisions of the Supreme Court reported as *Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another*, , especially the following observations:

Selection implies the right of rejection depending upon the criteria prescribed.

Selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,

1. Seniority cum fitness,
2. Seniority cum merit,
3. Merit cum suitability with due regard to seniority.

12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

Learned counsel also relied on a Division Bench ruling of this Court, reported as Union of India (UOI) and Another Vs. Amit Shankar and Others, , in support of the proposition that the seniority cum fitness criteria always means seniority is the guiding principle, subject to the candidate not being unfit (to hold the post).

4. According to Ms. Barkha Babbar for the Respondents, the petitioner's claim for promotion in terms of the 6-7-1994 memorandum was considered for 1-12-1991 but he did not fulfil the eligibility criteria, i.e. seniority cum fitness (the non-selection method), as he did not possess "Good" grading in the ACR for a part of the relevant period. The petitioner had represented against that grading; the appeal was accepted in part; however his ACR could not be treated as "Good" and was "Average", which was below the bench mark prescribed by the Departmental Promotion Committee (DPC). It was submitted that even though the adverse remark "unfit for promotion" for the period 1-4-1987 to 31-3-1988 had been expunged after consideration of the petitioner's representation, yet his grading for that year was below the bench mark required for the five years in question, i.e. Good. As a result, the respondents acted within their rights in considering his case for the post, w.e.f. 1-4-1993 and not 1-12-1991. The respondents rely on a memorandum of 10-4-1989, issued by the Department of Personnel and Training (DOPT), especially para 2.1.4 thereof.

5. At the threshold, it would be essential to extract some of the conditions spelt out in the DOPT memorandum of 10-4-1989. They are as follows:

2.1.4. Government also desires to clear the misconception about "Average" performance. While "Average" may not be taken as adverse remark in respect of an officer, at the same time, it cannot be regarded as complimentary to the officer, as "Average" performance should be regarded as routine and

undistinguished. It is only performance that is above average and performance that is really noteworthy which should entitle an officer to recognition and suitable rewards in the matter of promotion.

....

2.2.2 In the case of each officer, an overall grading should be given. The grading shall be one among (i) Outstanding (ii) Very Good (iii) Good (iv) Average (v) Unfit.

....

2.2.3. Before making the overall grading after considering the CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.

....

3. NON SELECTION METHOD:

Where the promotions are to be made on "non-Selection" basis according to Recruitment Rules, the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as "fit" or "not yet fit" for promotion on the basis of the assessment of their record of service. While considering an officer "fit" guidelines in para 2.1.4 should be borne in mind. The Officers categorized as "fit" should be placed in the panel in the order of their seniority in the grade from which promotions are to be made.

6. In this case, for the relevant period, i.e. 1987-88, the petitioner had been communicated with an adverse remark. His representation succeeded, and the remark that he was unfit for promotion, was expunged. The issue therefore is whether in such circumstances, the DPC could have yet insisted that he did not possess the minimum benchmark.

7. The basic document, i.e. the letter of 6-7-1994, no doubt talks of "promotion" to the position of CMO; yet Para 3 makes it clear that it is not based on or linked with availability of vacancies. The overall intention of the policy makers was apparently to relieve stagnation amongst officers. The eligibility prescribed appears to be that even Medical Officers with 10 years service (of which at least 2 years have to be as SMOs) can be considered; or else, SMOs with 6 years' service can be considered. The petitioner had 20 years' service; 16 of those were as GDMO-Gr-II and 4 years, as SMO. He was clearly eligible. Significantly, the respondents do not urge that the Recruitment Rules required that the candidate should possess five "Good" gradings, or even that the post of CMO is a Selection post, or that promotions are based on merit. In any case, the present case pertains to grant of promotion on the basis of minimum eligibility. The letter of 6-7-1994 itself is silent about the criterion to be adopted by the authorities.

They however, urge that some of the principles prescribed in a memorandum issued by the DOPT dated 10-04-1989 apply to the facts of the present case.

8. A close analysis of the said Memorandum of 10-4-1989 reveals that while Para 2.1.4 no doubt says that an "Average" grading is uncomplimentary and that ""Average" performance should be regarded as routine and undistinguished" and further that performance which is "noteworthy" which has to be taken into account, it does not altogether forbid consideration of those who secure "Average" grading. This is for the simple reason that Para 2.2.2 says that there are five possible gradings; the last two being "Average" and "Unfit". Para 3 provides that while filling non-Selection posts, "the DPC need not make a comparative assessment of the records of officers and it should categorise the officers as "fit" or "not yet fit" for promotion on the basis of the assessment of their record of service. While considering an officer "fit" guidelines in para 2.1.4 should be borne in mind."

9. Apart from Kadyan's case (supra), the Supreme Court had occasion to deal with the content of what constitutes "seniority cum fitness" in several decisions. In State of Mysore and Another Vs. Syed Mahmood and Others, , it ruled that in such cases a senior can be overlooked only when he is found unfit for the higher post. In other words, the criterion means that seniority of the official becomes a decisive factor, subject to fitness of the candidate to discharge the duties of the post. Similar observations were made in Haryana State Warehousing Corporation Vs. Jagat Ram and Another, and Bhagwandas Tiwari and Others Vs. Dewas Shajapur Kshetriya Gramin Bank and Others, . This Court's decision in Amit Shankar's case (supra) is clear that where promotion is based on the seniority cum fitness criteria, "....the promotion is to be made on the basis of seniority and only an "unfit" person is to be excluded."

10. In the present case, the petitioner's representation for expunction of the adverse remark for the concerned year, especially the remark "You are not fit to be retained in service and also not fit for promotion" was accepted on 15-1-1991. The effect of this was that the concerned authority's opinion that he was not fit for promotion, stood expunged. No doubt his overall ACR for that year was not "Good". Yet, it cannot be said that for earning what clearly was a stagnation benefit, and not a regular line, vacancy based promotion (for which possibly the competent authority had prescribed a higher standard)- as the "promotion" benefit conferred by the letter dated 6-7-1994 undeniably was- his "Average" grading could have been a barrier, justifying denial of that benefit as on 1-12-1991, when officials junior to him were extended the benefit of CMO's post. This Court, even while holding that the denial of the CMO grade to the petitioner in terms of the 6-7-1994 letter, cannot be understood to have ruled a broad proposition that "Average" gradings in ACRs would entitle all personnel for promotion whenever seniority cum fitness is prescribed as the guiding principle. Much would depend on several factors, such as nature of the post, the clarity of the rules, whether promotion to the post also requires consideration from among

a specific zone of consideration, etc. All that the court finds in this case, based on an appreciation of circumstances, is that denial of the benefit of "promotion" to the petitioner as on 1-12-1991, was unjustified. The respondents are directed to grant him the said benefit w.e.f. 1-12-1991. The respondents are also directed to consider the Petitioner's claim for further promotion or benefit of any higher scale based on the letter dated 6-7-1994, or any other guideline or recruitment rule, as if he had been granted the grade of CMO with effect from 1-12-1991. The petitioner's pay, pension and consequential increase in terminal benefits, (if any) shall be fixed afresh, in the light of the above discussion, within four weeks. Arrears if any shall be given to the petitioner within eight weeks from today. His case for any further promotion too, shall be considered and decision communicated to him, within six weeks from today. In the light of the above discussion, the writ Petition has to, and is accordingly allowed in the light of the above directions. There shall be no order as to costs.