

(2011) 02 J&K CK 0021

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1216 of 2009 and CMP No. 2449 of 2009

Manzoor Qadir Keng (Dr.)

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2011) 2 JKJ 266

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hasnain Massodi, J.—On consideration, the petition is admitted to hearing and at the request of learned Counsel for the parties, taken up for final disposal.

2. Before going to the controversy involved, an overview of background facts.

3. The Petitioner claims to have been appointed as Assistant Professor, Ophthalmology, Government Medical College, Srinagar (in short ""GMC"")

on 23rd of May 1998 and thereafter vide Government Order No. 77-HME of 2004 dated 29th January 2004, promoted to the post of Associate

Professor in his own pay and grade against the available post of Professor in the Department of Microbiology, GMC, Srinagar. The Petitioner, it is

pleaded, continued to discharge his duties, as such, and was vide Government Order No. 44-HME of 2009 dated 22.01.2009, substantively

promoted as Associate Professor with effect from 30.03.2007. The Petitioner, insisting that he deserved to be promoted to the post of Associate

Professor Ophthalmology with effect from 30th January 2004 i.e., the date when

he was promoted vide Government Order No. 77-HME of 2004

dated 29.01.2004, in his own pay and grade, laid a claim for settlement of his seniority with effect from said date. The representation made is said

to be still under consideration of Respondents.

4. The Petitioner's case is that the Petitioner, having rendered more than five years service as Associate Professor, is eligible for promotion to the

post of Professor in terms of J & K Medical Education (Gazetted) Service Recruitment Rules 1979 (for short ""Recruitment Rules of 1979""). The

Petitioner's grievance is that the Petitioner, despite having attained eligibility in terms of the aforesaid Rules way back on 30.01.2009, is not being

considered for promotion to the post of Professor that fell vacant on 31st August 2009 on retirement of Dr. Tejti Singh, the then Professor

Ophthalmology, GMC, Srinagar. The Petitioner, on the strength of averments made, seeks a writ of mandamus directing Respondents to consider

Petitioner for promotion to the post of Professor Ophthalmology.

5. The writ petition is opposed on the grounds that the Petitioner having been promoted substantively to the post of Associate Professor with effect

from 30th March 2007, is not eligible for promotion to the post of Professor in terms of J & K Medical Education (Gazetted) Service Recruitment

Rules 1979 and that the Petitioner shall attain eligibility for promotion to the post of Professor on 30th March 2012 when Petitioner completes five

years as Associate Professor.

6. The other grounds taken up in the reply relate to promotion of Dr. Sabiya Rashid, who earlier joined Petitioner in throwing challenge to the

extension in service of Dr. Tejti Singh, ex-Professor, Department of Ophthalmology beyond the date of retirement, as also her promotion to the

post of Assistant Professor. Dr. Tejti Singh, having not availed benefit under extension orders, impugned in the petition, made in his favour and Dr.

Sabiya Rashid having been promoted as Associate Professor vide Government Order No. 380-HME of 2010 dated 14th January 2010, the

controversy as regards extension in service of Dr. Tejti Singh and promotion of Dr. Sabiya Rashid to the post of Assistant Registrar, no more

survives. It is pertinent to point out that Dr. Tejti Singh arrayed as Respondent No. 2 stands deleted from the array of Respondents.

7. I have heard learned Counsel for the parties and have gone through the

pleadings as also record available on the file.

8. There is a very little controversy between the parties as regards factual aspects of the case. It is admitted case of the parties that the Petitioner

was appointed as Assistant Professor Ophthalmology in GMC Srinagar on 23rd May 1998 and promoted in his own pay and grade as Associate

Professor vide Government Order No. 44-HME of 2004 dated 29th January 2004 and that the Petitioner was later vide Government Order No.

44-HME of 2009 dated 22nd January 2009, substantively promoted as Associate Professor with effect from 30.03.2007. It is also admitted that

the Petitioner's service conditions including promotion are governed by J & K Medical Education (Gazetted) Service Recruitment Rules 1979.

Schedule II to the Recruitment Rules 1979 tabulates the eligibility criteria for recruitment/promotion to a post in J & K Medical Education

(Gazetted) Service. Serial No. 23 relates to recruitment/appointment of Professor/Associate Professor and other cadres of Department of

Ophthalmology and deserves to be noticed. It reads:

S. Subject Designation Min. Minimum

No. of the post Qualificationteaching/research

experience

1 2 3 4 5

2 Ophthalmo(a)ProfessorM.S. logy As. Associate Professor

logy (USA) of Ophthalmology for

five years in a Medical

College or a recognized

teaching medical

institution such as

AIIMS New Delhi. PGI

Chandigarh, JIMER

Pondicherry or such

other institutions, as are

recognized by the

Medical Council of

India.

3 (b) Associate-do- As Assistant Professor

Professor of Ophthalmology for

five years in a Medical

College or a recognized

teaching medical

institution such as

AIIMS New Delhi. PGI

Chandigarh, JIMER

Pondicherry and such

other institutions as are

recognized by the

Medical Council of

India.

9. It is pertinent to point out that Government Order No. 77-HME of 2004 dated 29th January 2004, whereby the Petitioner and a number of

staff members of GMC Srinagar were promoted hi their own pay and grade against the vacancies indicated in the Government order, did not

direct promotions on stop gap against quota or ad hoc basis nor were promotion de hors Rules. The Petitioner continued to discharge his duties as

Associate Professor with effect from 30.01.2004 without interruption and without his having been at any point of time reverted to the post of

Assistant Professor till he was substantively promoted vide Government Order No. 44-HME of 2009 dated 22nd January 2009, to the post of

Associate Professor. It is nobody's case that the Petitioner did not possess necessary qualification and experience, for his promotion to the post of

Associate Professor, Ophthalmology, On 30th January 2004, when his promotion to the said post was ordered in his own pay and grade.

Needless to mention that the Petitioner, having been appointed as Assistant Professor on 23rd of May 1998, completed his five years as Assistant

Professor, Ophthalmology, GMC, Srinagar, on 31st May 2003 and thus in terms of Recruitment Rules of 1979, satisfied the eligibility criteria laid

down, for promotion to the post of Associate Professor, Ophthalmology. The

Petitioner, eligible for promotion to the post of Associate Professor, Ophthalmology on 30th January 2004 and post against which the Petitioner could have been promoted being available, the Petitioner cannot be deprived of his seniority as Associate Professor with effect from 30th January 2004, only because the Respondents, for one or other reason, slept over the matter and delayed consideration to the promotion of Petitioner on substantive basis to the post of Associate Professor. Pertinent to point out that the promotion, as is evident from Government Order No. 44-HME of 2009 dated 29.01.2009, and practice in vogue as also Recruitment Rules of 1979, could be considered against the post available in GMC irrespective of discipline. The Petitioner, in the circumstances, irrespective of the nomenclature used, worked and gained experience as Associate Professor, Ophthalmology, GMC, Srinagar, with effect from 31st January 2004 and' acquired eligibility for promotion to the post of Professor, Ophthalmology, with effect from 31st January 2009.

10. The case set up by the Respondents in opposition the Petitioner's claim for promotion to the post of Professor, Ophthalmology, to the effect that the Petitioner's experience as Associate Professor is to be reckoned from 30th March 2007 i.e., the date wherefrom the Petitioner was substantively promoted as Associate Professor and that the Petitioner would acquire requisite eligibility on 30th March 2012, is bereft of any merit.

11. In *A. Janardhana Vs. Union of India (UOI) and Others*, , Supreme Court, though in a different context, held that after a promotee is promoted, continuously renders service and is neither found wanting nor inefficient and discharges his duty to the satisfaction of all, his service so rendered cannot be ignored while reckoning his seniority.

12. In *Narender Chadha and Others Vs. Union of India and Others*, , the Court in the context of inter se seniority between promotees and direct recruits held that when an officer has worked for a long period, in a post, and had never been reverted, it cannot be held that the officer's continuous officiation was a mere temporary or local or stop gap arrangement, even though the order of appointment made states so. In such circumstances, the entire period of officiation has to be counted for seniority and that any other view would be arbitrary and violative of Articles 14 and 16 of the Constitution.

13. In the present case, as already pointed out, the Petitioner continuously discharged his duties as Associate Professor, Ophthalmology, with effect from 30th January 2004, without any interruption and without his having been reverted back to the position of Assistant Professor. The fact that the Petitioner was thereafter vide order No. 44-HME of 2009 dated 22.01.2009, promoted on substantive basis to the post of Associate Professor with effect from 30th March 2007, is itself indicative of the fact that the Petitioner was eligible for promotion, discharged his duties as Associate Professor efficiently and to the full {satisfaction of his superiors. The Petitioner's service as Associate Professor, Ophthalmology, with effect from 30th January 2004, is thus to be counted while computing/working out, his experience as Associate Professor, Ophthalmology in terms of J & K Medical Education (Gazetted) Service Recruitment Rules, 1979.

14. From the above discussion, it emerges that the Petitioner, though having a right to be considered for promotion to the post of Professor Ophthalmology immediately after such a post became available on retirement of Dr. Tejit Singh on 31st August 2009, was denied consideration without any lawful justification.

15. It is a sad state of affairs that the Respondents' inaction and indifference has compelled a senior Faculty member of a prestigious institution to resort to litigation to secure his Constitutional rights and divert his valuable time resource, in prosecuting such litigation, that otherwise, undoubtedly would have been spent on promoting academic excellence. Lackadaisical attitude on part of State functionaries in matters of promotion, leads to misallocation of time resources, kills initiative, dampens spirit and results in demoralisation in ranks. The State as an ideal employer would be well advised to accord consideration to promotion of an employee otherwise eligible, within a reasonable time and in no case later than three months from the date the post becomes available. This shall be not only in tune with its Constitutional obligation but enhance overall efficiency in an organisation/department and have a positive spill over for the public good - the ultimate aim of good governance.

16. It would be appropriate for the Respondent No. 1 to set up a Grievance Redressal Cell in its General Administration Department, which can be approached by an employee, denied promotion despite eligibility and

availability of the post, within aforesaid timeframe so that the aggrieved employee can voice his grievance before such Cell instead of rushing to the Court. Such a mechanism shall not only help the aggrieved employee not to be burdened with litigation charges but also rule out any additions to the mounting case pendency.

17. It needs no emphasis that right to be considered for promotion is an integral part of fundamental right, guaranteed under Article 16, Constitution of India.

18. The Apex Court in Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, , while dealing with the failure of State Government to accord consideration to the promotion, observed:

36. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

19. For the reasons discussed above, the writ petition is allowed and the Respondents are directed to consider the Petitioner for promotion to the post of Professor, Ophthalmology with effect from the date the post of Professor, Ophthalmology, became available. The Respondents, to rule out any further violation of Petitioner's fundamental rights, shall accord consideration to the Petitioner's promotion to the post of Professor, Ophthalmology, and take all consequential steps within four weeks from the date, copy of the order is served on the Respondents. Disposed of with connected CMP(s).