

(1984) 10 DEL CK 0028

In the Delhi High Court

Case No : Civil Writ Appeal No. 1984 of 1983

M.K. Kulshreshtha

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-10-1984

Acts Referred:

defense Aeronautical Quality Assurance Service Rules, 1979 — Rule 4(2), 4(3), 6, 6(2), 8(1)

Citation : (1985) ILR Delhi 209

Hon'ble Judges : Rajinder Sachar, J; Leila Seth, J

Bench : Division Bench

Advocate : A.B. Saharia, P.K. Sinha, Deepak Nag, Keshav Dayal, G.R. Chopra and P.P. Juneja, for the Appellant;

Judgement

Leila Seth, J.

(1) This case appears to be a contest between the civilian and air-force officers of the Directorate of Technical Development and Production (Air) [to be referred to in brief as "DTD P(Air)"].

(2) The petitioner, Mr. M. K. Kulshreshtha, is a Principal Scientific Officer (to be referred to in brief as "P.Sc.O.") with the DTD&P (Air). He is a member of the defense Aeronautical Quality Assurance Service (to be referred to in brief as "DAQAS"). He claims he is eligible to be promoted to the post of Deputy Chief Scientific Officer (to be referred to in brief as "DCScO").

(3) In this writ petition he has made fourteen prayers. However, in essence they boil down to three, which again are overlapping. These are :

(I) The post in the grade of DCScOs be filled up only in accordance with the Daqas Rules, 1979.

(II) The office memorandum dated 18th February, 1975 be quashed.

(III) The post of air-force officers and/or their retention outside the ambit of the

Daqas Rules be prohibited.

(4) Mr. Sahariya, learned counsel for the petitioner contended that the manner, method and qualification for recruitment /appointment to the post of DCScO is provided in the Daqas Rules, 1979 (to be referred to in brief as "the Daqas Rules"). The said rules are statutory and any administrative instructions or executive decisions at variance with the said rules cannot regulate recruitment etc. The Government has power under rule 4(2) and (3) of the Daqas Rule,s to mate permanent and temporary additions to the authorised strength of the service. The two additional posts of DCSc.Os created -after the Rules came into existence, belong to the Daqas cadre and as such, these posts can be filled in, only in accordance with the said rules; especially as, Rules 6(2) and 8(I)(b) specifically provide for the recruitment, appointment of air force Officers. Further, the record indicates that the Government itself treated the two additional posts of DCSc.Os. as if they were for the DAQAS. In the circumstances, the administrative instructions executive decisions, such as the office memorandum dated 18th February, 1975 and its amendment on 8th March, 1984 have no force of law.

(5) In answer, learned counsel for the Union of India submitted that the office memorandum dated 18th February, 1975 pertains to permanent secondment of air-force officers to the DTD&P (Air), whereas rule 6(e) deals with the deputation on tenure basis, as such they deal with different situations. Further, the fallacy in the argument of the petitioner is apparent because he is confusing the DTD&P (Air) with the Daqas i.e. the Directorate with the Service. In any case, the authorised strength of the service only be added to temporarily or permanently, in the manner and in accordance with the procedural standards required. Since the Daqas Schedule of posts was never amended, till 8th May, 1984, the additional posts created could not be held to belong to DAQAS.

(6) In order to appreciate the rival contentions, it is necessary to set out a brief background of the development of the Directorate.

(7) Before 1953 there were two organisations, one known. as the defense Research and Development Organisation and the other as the Directorate General of Inspection both matter the Ministry of defense. They were manned by technical and non-technical staff. The non-technical staff was mainly civilian,- whereas the technical staff consisted of both civilian and air- force officers. On 11th April, 1953, the defense Science Service Rules were promulgated. These rules governed the Class-1 and Class-11 civilian officers of the two above noted organizations. These rules were subsequently revised in 1967 but still pertained only to the civilian officers.

(8) On 1st April, 1954, the DTD&P (Air) was formed. It was intended to function on the same pattern as the two existing organizations. Only the post of the Director was sanctioned and Group Captain Hickey was appointed Thereafter, certain posts were sanctioned from time to time and officers appointee. On 31st

August, 1954, four stroke posts were created by cancelling four air-force posts. As a result ,the DTD&P (Air) consisted of both civilian and air force officers.

(9) In 1958 a decision was taken that the civilian officers of the DTD&P (Air) would be borne on the cadre of the defense Science Service, which already bore the civilian officers of the other sister organizations of the DTD&P (Air). As a result from 1958 onwards, the DTD&P (Air) was composed of civilian officers belonging to defense Science Service and air-force officers who were subject to the Air Force Act and Rules. On 18th February, 1975 an office memorandum was issued detailing the procedure for the intake of air-force officers and their permanent secondment to the DTD&P(Air).

(10) Soon after 18th February, 1975, the position that emerged was that there were three organisations under the Ministry of defense. These were defense Research and Development Organization (DR&DO), Director General of Inspection (DGI) and Directorate of Technical Development and Production [(Air) (DTD&P(A."r)1. The non-technical officers of these organisations were all civilians. Some of the technical posts were held by civilians and some by the armed forces including the air-force officers. The armed forces officers who manned the technical stroke posts were either on tenure basis or had been permanently seconded. The civilian officers, Class I and Ii who manned the technical posts belonged to the defense Science Service.

(11) On 17th July, 1976, a decision was taken to abolish the defense Science Service and split the officers into six cadres, depending on which of the three organizations he was working in. As a result six sets of service rules had to be formulated. Three. for group A (earlier Class 1) and three for Group B (earlier Class II).

(12) On the same day a decision was taken also to bifurcate the combined cadre of armed force officers permanently seconded to the DR&DO and Dgi depending on which organisation, they were working with. As such, a fresh office memorandum was issued dated 28th October, 1978, pertaining to the procedure for intake and permanent secondment of armed forces officers in the DGI; similarly, a fresh office memorandum was issued, dated 23rd November, 1979 pertaining to the DR&DO. Both these office memoranda are similar to the office memorandum, dated 18th February, 1975, providing for the intake permanent secondment of air-force officers to DTD&P(Air).

(13) On 24th February, 1979 the defense Science Service was bifurcated and the Daqas rules were promulgated. By virtue of rule 7, all Group A officers, of the defense Science Service. who were working in the DTD&P(Air), en a regular basis, immediately before the promulgation of the rules, were deemed to have been appointed to the DAQAS. The schedule to the Daqas rules indicated that there were 222 sanctioned posts. Though, in fact, the aggregate number of posts on that date in the DTD&P(Air) were 235. Separate rules were also framed for the officers working in the similar organisations i.e. Dgi ally to DCScOs posts and

a Group Captains were equivalent to

(14) Since the controversy in the present case pertains basically to DCSO's posts and as Group Captains were equivalent to DCSOs, the factual position with regard to DCSO Group Captains' posts is set out:

On 18th February, 1975, there were five civilian posts and two stroke posts. The stroke posts could be manned by either civilian officers or by air-force officers depending upon the availability of the personnel and the task to be performed. Stroke posts were sanctioned almost from the inception of the Dtd &P(Air). On 18th February, 1975 four of these seven posts were vacant-

On 24th February, 1979 when the Daqas Rules, 1970 were promulgated, there were eight civilian posts and three stroke posts; a total of eleven posts. All the three stroke posts were manned by Group Captains who had been permanently seconded. The eight civilian posts were also filled in.

On 27th December 1979, 10th June, 1980 and 16th April, 1981, three additional posts of DCSOs I Group Captains were sanctioned. The second additional post of 10th June, 1980 was a "stroke" post and the third was a Group Captain post sanctioned till 15th October, 1983. As such, in September, 1983 when the writ petition was filed, there were nine civilian posts, four stroke posts and one Group Captain post sanctioned only till 15th October, 1983. At that stage four of the total 14 posts, i.e. including the post of Group Captain sanctioned till 15th October, 1983, were vacant.

(15) The office memorandum dated 18th February, 1975 provided for 27 air-force officers to be permanently seconded to the DTD &P(Air). The break-up was as follows: one Group Captain, six Wing Commanders, eight Squadron Leaders and twelve Flight Lieutenants. This office memorandum was not amended till 8th March, 1984, nor was Schedule I to the Daqas Rules amended till 8th May, 1984. As such, till that date, it showed only eleven DCSO's posts.

(16) By virtue of the amendment, dated 8th March, 1984, to the office memorandum dated 18th February, 1975, the quantum of air-force officers to be permanently seconded to the OTD &P(Air) is reduced to 24. The break-up is as follows : Three Group Captains, six Wing Commanders, fifteen Squadron Leaders and no Flight Lieutenants. The concept of stroke posts, which had continued to exist, was laid to rest, by the said order dated 8th March 1984. The President sanctioned two additional posts of Group Captain, i.e. in addition to the one already sanctioned on 18th February, 1975. The result is, as on 8th March, 1984, there are fifteen posts of DCSOs! Group Captain level in the DTD &P(Air). Out of these, three are identified as Group Captain posts. All three of them are at Head Quarters. The number of officers, of the Daqas at the DCSO level, which was eleven in Schedule I has not been disturbed in any manner. No incumbent has been adversely affected; on the other hand, one DCSO's post has been increased. As a result, on 8th May, 1984, the Schedule to the Daqas Rules was amended, for the first time, and now shows twelve posts, instead of eleven, at

the DCScO level.

(17) It is in this background that the entire controversy has to be examined. It cannot be limited to only looking at the posts sanctioned on 27th December, 1979 and 10th June, 1980, which is what the petitioner wants. For it is pertinent to re- member, that Schedule I to the I^AAOAS Rules was not amended till 8th May, 1984 and as such, before that date, the petitioner could not claim, as of right, that the said posts had come within the ambit of the Daqas Rules. The subsequent development and the action of the government in including only one additional DCSeO's post in Schedule I to the Daqas Rules, is a clear expression of its intention. As such ii is not necessary, in the facts of this case, to go into the question whether the " posts sanctioned on 27th December, 1979 and 10th June, 1980 were to be included in the ambit of Daqas Rules.

(18) The basic contention of the petitioner, that the office memorandum dated 18th February, 1975 was superseded by the Daqas Rules does not appear to be correct. The Daqas Rules relate to the terms and conditions regarding a particular category of officers of the Dtd & P (Air). These Rules do not govern the category of air-force officers of the Dtd & P (Air) who are outside Schedule I and the ambit of the Daqas Rules. The fallacy in the petitioner's intention is that he is equating the Daqas with the Dtd & P (Air) i.e., the Service with the Directorate. The fact that Schedule I to the Daqas Rules promulgated in February 1979, included some of the posts. contained in the office memorandum dated 18th February, 1975 was due to inadvertence which was recognised and corrected by amending the schedule of posts to the Daqas Rules on 8th May, 1984. No incumbents at the DCScO's level were disturbed nor were any posts at that level cut down. In fact a post of DCScO was added to Schedule I, taking the number of posts to twelve from eleven.

(19) In any case, the promulgation of the Daqas Rule's did not effect the office memorandum dated 18th February, 1975. The sanction letters were not amended and the air-force officers continued to serve in the Dtd & P (Air). A number of them" had been permanently seconded to the said department of the Government of India known as the Directorate of Technical Development and Production (Air). The department has a clear and distinct identity and is separates from the services by which it is manned, l)e they the DAQAS. the Indian Air Force, and! or the Central Administrative Officers Cadre.

(20) The Central Government in exercise of its executive powers sanctions posts and persons are recruited to the Said posts from the service such as Daqas, Iaf and Cao cadre. The mere fact that a post is offered. occupied by a person belonging to a particular service at the time does not give that service a right to that post. In this connection, the observations of the Supreme Court in Wing Commander J. Kumar Vs. Union of India (UOI) and Others, . while dealing with the question of lateral induction:, in a sister organization, i.e. the defense Research and Development Organization, are relevant.

(21) The DTD&P(Air) was promoted by the Government of India specifically to look after the indigenization in the field of aeronautics, avionics, air armaments and in particular to meet the flight safety requirements of the Indian Air Force. Thus the personnel which were posted from the air-force to Qtd & P (Air) were specially selected with a view to achieve the object of indigenous production, technical development and supervision of the aircraft and allied equipment, being the actual users thereof.

(22) The exigencies of the work resulted in the sanction of certain posts and the nature of this work determined the personnel required. The Government is free to indicate the type of personnel and the source of recruitment for such posts and neither the Indian Air Force nor the Daqas can lay any claim to such sanctioned posts. The proper procedure for the selection of personnel, to these posts in the Dtd & P (Air) is within the administrative policy of the Government. If the objective can be fulfilled by more than one constitutionally valid method, the selection must be left to administrative choice. The courts are generally concerned only with the legal validity of the choice made. See : Sunian Gupta and others v. State of J & K and others Air 1983 Sc 1335(2).

(23) These two posts which are the subject matter of claim by the petitioner had not been brought into the ambit of the Daqas Rules. Rule 4(1) therein provides that the authorized strength of the service on the date of the constitution of the service is as given in Schedule 1. Sub-rule 2 of Rule 4 gives the Government power to add to or delete the authorized permanent strength of the various grades. Rule 4(3) provides that the Government may make temporary additions or deletions to the strength of the various grades as it may deem necessary from time to time. It is not disputed that Schedule I was not amended at any time before 8th May, 1984. As such, it is clear that the posts sanctioned on 27th December, 1979 and 10th June, 1980 (loosely referred to in arguments as the 12th and 13th post) did not strictly come within the ambit of the Daqas Rules. There was no amendment in accordance with the procedure required. In the circumstances, it is clear, that the petitioner has no right to these posts and he must perish by "the procedural sword" in the words of Mr. Justice Frankfurter.

(24) Rule 6(e) of the Daqas Rules provides that recruitment to the service shall be made, inter alia, "by deputation on tenure basis of suitable service Officers from the Indian Air Force in the grade of Senior Scientific Officer, Principal Scientific Officer and the Deputy Chief Scientific Officer."

(25) Rule 8(l)(b) which deals with future maintenance of the service, provides for the manner in which the vacancies are to be filled; "Senior Scientific Officer, Grade I, Principal Scientific Officer, Deputy Chief Scientific Officer and Additional Director and Director. The posts in these grades shall be filled by departmental promotion on the basis of selection on merit from officers holding the next lower grade, or by any other method specified at (b) to (e) of rule 6, the method of recruitment being decided in each case by the Government in consultation with Commission depending on specific requirements and in the light of the

qualifications required for the particular post and the availability of suitable and Competent Officers with the requisite qualifications within the service or outside."

(26) Learned counsel for the petitioner contends that air- force officers can be appointed to the two posts created on 27th December, 1979 and 10th June, 1980 only if Rule 6(e) read with Rule 8(l)(b) is followed and they can be taken only on deputation or tenure basis and cannot be permanently seconded. Further, on a perusal of the Government files it would be clear that these posts were treated as posts for the DAQAS.

(27) The argument, as already observed, appears to be based on a fallacy, whereby the petitioner is equating the Service with the Directorate. Admittedly, the DTD&P (Air) is manned by both civilian and air-force officers. Admittedly, at the time of filing of the writ petition there were only eleven posts of DCScOs indicated in Schedule 1 to the Daqas Rules. As such, the authorised strength of the service in this grade was eleven. Admittedly, the scheduled strength was never formally amended till 8th May, 1984. On that date an additional post of Deputy Chief Scientific Officer was added to the authorized strength. It was specifically provided that this was in terms of Rule 4(3). It is also not in dispute that these twelve posts are held by personnel in accordance with the Daqas Rules.

(28) The stand of the petitioner that all posts created sanctioned by the Government for the DTD&P (Air), must be held to have been included in the Daqas Schedule appears to be without force. The power of the Government to create additional posts is not in dispute. The authorized strength of the service can be amended only in the manner provided in the. Rules. Prior to 8th May, 1984 there was no amendment to Schedule I of the Daqas Rules. Schedule I was amended for the first time on the 8th May, 1984. How can it then lie in the petitioner's mouth to assert that the additional posts are part of the DAQAS. The files pertaining to the two posts created on 27th December, 1979 and 10th June, 1980, loosely referred to as 12th and 13th post, have been pursued by us. Whether on an interpretation of all the correspondence etc., they should be deemed to be treated as the Daqas posts, is now academic. No clear intention of the Government as required by Rule 4(3) of the Daqas Rules had been indicated. On 8th May, 1984, this has now been done. Schedule I has been amended and one more post of DCScO has been added as from that date.

(29) Counsel for the Union of India conceded that if the post, created on 27th December, 1979 (loosely referred to as the 12th post) which has now been brought into Schedule. I of the Daqas Rules, is to be filled by an air-force officer, it can only be done in accordance with the procedure prescribed in the Daqas Rules i.e. 6(e) read with 8(b). As such, it is clear that the posts within the ambit of the Daqas Rules must be filled in the manner provided therein, whether they be filled by civilians or air-force officers. However the posts outside Schedule I to the Daqas Rules are to be filled by air- force officers in accordance with the office memorandum dated 18th February, 1975 read with the office memorandum of

8th March, 1984.

(30) In this connection it is pertinent to mention that the office memorandum, dated 18th February, 1975, regarding procedure for intake of air-force "officers in the DTD&P (Air) and their terms for permanent secondment, states therein, to be a decision of the President. The relevant words are "The President is pleased to decide.....".

(31) There is a similar office memorandum dated 28th October, 1978 pertaining to the intake of service officers to a sister organisation, referred to earlier, i.e. the inspection organisation of the Ministry of defense known as the Directorate General of Inspection (DOT). The words therein also are, "The President is pleased to decide.....". The said office memorandum was challenged in the Supreme Court on similar grounds as in the present case in writ petition Nos. 9743-45182. *Pb Rao and others v. Union of India and others*, and was dismissed on merits on 27th October, 1983 (3). As such, the validity of the said office memorandum dated 28th October, 1978 was upheld. This has been so stated on affidavit by Mr. S. K. Bhatia, Under Secretary, Ministry of defense, Department of defense Production on 9th December, 1983.

(32) The recruitment of air-force personnel to the DTD&P (Air) is regulated by the rules and procedure made by the President of India and contained in the office memorandum of the Government of India dated 19th February, 1975. The said rules and regulations contained in this memorandum have been acted upon since 1975 without challenge.

(33) Further, nothing has been shown to controvert the statement in the office memorandum, dated 18th February, 1975:

"THE President is pleased to decide that the procedure and terms and conditions of service of the officers in question will be as under:"

This statement would have to be accepted as correct in view of the observations in *Wing Commander J. Kumar v. Union of India and others*, (supra).

(34) If that is so, then this office memorandum is in the nature of rules of statutory origin under Art 309 as was held pertaining to the similar office memorandum dated 23rd November, 1979, in abovementioned case of *Wing Commander J. Kumar*. There, while dealing with the procedure for the intake of service officers in the Research and Development Organisation of the Ministry of defense and terms and conditions of service of those permanently seconded, the words also are "The President is pleased to decide".

(35) Finally, it is clear that though there were 222 posts in the Directorate in 1976 when the decision to bifurcate was taken, at the time of promulgation of the Daqas Rules in February, 1979, there were 235 posts. So in any case, 13 posts remained outside Schedule I to the Daqas Rules. Further on 9th May, 1984 there are 250 posts in the Directorate whereas only 223 are included even in the amended Schedule I to Daqas Rules. As such, it is clear that there are posts in

DTD&P (Air) which are outside the ambit of Daqas and are so intended to remain.

(36) In the circumstances and for the reason outlined above, the writ petition is dismissed. However, we make no order as to costs.