

(2011) 07 DEL CK 0183

In the Delhi High Court

Case No : Writ Petition (C) 4545 of 2000

Nishit Kumar Jain

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Constitution of India, 1950 — Article 309

Defence Research and Development Service Rules, 1979 — Rule 1(2), 6, 7, 8, 8(2)

Citation : (2011) 5 AD 752

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

**Advocate : Sarvesh Bisaria and Prakash Chandra Sharma, for the Appellant;
H.K. Gangwani, for the Respondent**

Judgement

A.K. Sikri, J.—The Petitioner herein is an employee in the Defence Research and Development Organization (DRDO) which comes under the Ministry of Defence. He joined as Scientist grade "B" in DRDO w.e.f. 24th April, 1987. The Petitioner was promoted as Scientist grade "C" w.e.f. 1st July, 1993. Next promotion is to the post of Scientist grade "D". These promotions are governed by the recruitment rules called "Defence Research and Development Service Rules, 1979". Rule 6 of these Rules deals with the method of recruitment and, inter alia, stipulates the method of promotion as well as direct recruitment. Rule 7 of the aforesaid Rules deals with the initial constitution of service. We are here concerned with Rule 8. Before the amendment to this Rule in 1996, the relevant portion of the same read as under:

8. Future maintenance of the service:

(1) After the initial constitution of the Service has been completed by the appointment of officers in accordance with Rule 7, vacancies shall be filled in the manner as hereinafter provided:

(a)...

(b)...

2(a) Promotion from one grade to the next higher grade in the service shall be made under the Flexible Complementing Scheme from amongst the officers possessing the broad educational qualifications as given in Schedule III. Promotion up to the level of Scientist "F" shall be made on the basis of evaluation of confidential performance appraisal reports and assessment interview and for Scientist "F" to "G" on the basis of the evaluation of confidential performance appraisal reports and assessment by a Peer Committee. The internal Screening Committees constituted as specified in Schedule 1A and 1B, shall review the confidential performance appraisal reports of Scientists "B" on completion of minimum residency period of three years and of Scientists "C", "D" and "E" on completion of minimum residency period of four years and of Scientists "F" on completion of minimum residency period of five years as on 30th June of the year to which the assessment boards pertain. The Internal Screening Committees shall evolve its own criteria for deciding the eligibility of scientists for consideration by the Assessment Boards and award average marks for the scientists, while deciding eligibility of scientists for assessment, the Internal Screening Committee shall follow the criteria enumerated below:

(i) Internal Screening shall be based on not more than last five years' confidential performance appraisal reports in the grade and scientists securing less than 60% average marks in the confidential performance appraisal reports shall not be eligible for assessment.

(ii) Relaxation up to three months in the qualifying service for eligibility for assessment shall be given to direct recruits or promotes who join after 1st July for reasons beyond their control.

(iii) All kinds of leave availed except extra ordinary leave on personal grounds shall count as qualifying service for eligibility for promotion.

(iv) In case of permanent absorption of a scientist on deputation in the same grade in Defence Research and Development Service from other Scientific Departments where Flexible Complementing Scheme is applicable, the entire service of that scientist in the same grade including in the parent department shall be counted towards residency period. If an officer comes on deputation on a higher grade into the service and later permanently absorbed in the same grade in the service, the period spent on deputation shall be counted for residency period for consideration for promotion to next higher grade

(v) On regular appointment in the service of a scientist in continuation of adhoc appointment, the period of service rendered in adhoc capacity in the grade shall count towards residency period provided that the officer is selected for regular appointment at the first attempt.

(vi) Notwithstanding anything contained in these rules, a relaxation of one year in the minimum residency period can be granted to a scientist "C"/"D"/"E"

provided that he earns consistently 90% and above marks in three successive confidential performance appraisal reports in the grade.

(vii) Notwithstanding anything contained in these rules, a relaxation of one year in the minimum residency period can be granted to a scientist "F" provided that he earns consistently 90% or above marks in four successive confidential performance appraisal reports in the grade.

(viii) Relaxation in the minimum prescribed residency period in terms of clauses 9vi) and (vii) above shall be limited to two times in the entire career of any scientist in the service.

This Rule introduces Flexible Complementing Scheme for promotion from one grade to next higher grade in the service. The necessary qualifications prescribed for such promotions are given in Schedule-III. It further provides that promotion up to the level of Scientist "F" shall be made on the basis of evaluation of confidential performance appraisal reports and assessment in future. For this purpose, the Internal Screening Committee is to be constituted which is to review the confidential performance appraisal reports of Scientists "B" on completion of minimum residency period of three years and of Scientists "C", "D" and "E" on completion of minimum residency period of four years and of Scientists "F" on completion of minimum residency period of five years. It is also stipulated that the Internal Screening Committee would evolve its own criteria for deciding the eligibility of scientists for consideration by the Assessment Boards. Clause (i) thereof stipulated, at the relevant time that the Internal Screening would be based on not more than last five years' confidential performance appraisal reports in the grade and scientists securing less than 60% average marks in the confidential performance appraisal reports shall not be eligible for assessment. This rule thus clearly stipulate 60% as the minimum marks which was required to be obtained by the candidate in the confidential performance appraisal reports on the basis of Internal Screening.

2. The aforesaid rule was framed by the President in exercise of his power under proviso to Article 309 of the Constitution of India.

3. This Clause was amended by the President under proviso to Article 309 of the Constitution of India. The substituted Clause (i), after amendment, reads as under:

(1) In Rule 8, Sub-rule 2,-

(a) In Clause (a), for sub Clause (i), the following shall be substituted, namely:

(i) Internal Screening shall be based on not more than last five years confidential appraisal reports in the grade. Scientists "B" and "C", Scientists "D" and Scientists "E" securing less than 60%, 65% & 70% marks on an average respectively, shall not be eligible for assessment.

It is clear that the criteria of 60% average marks which were applicable for

promotion to all levels was changed. Instead it was the modified criteria provided for different marks average in respect of different category of scientists. For scientist "B" and "C" it remained at 60% whereas for scientist "D" and "E" it was changed to 65% and 70% per cent respectively. Since the Petitioner was Scientist "C" at that time aspiring for promotion to Scientist "D", in his case the criteria remained the same namely securing not less than 60% marks on an average.

4. It is thus clear that insofar as the Petitioner is concerned, the eligibility criteria fixed as per the rule is that the persons like the Petitioner who is Scientist "C" would not be eligible if they secure less than 60% marks on an average on the basis of Internal Screening. However, within two days of the publication of the aforesaid Notification, the DRDO, Ministry of Defence issued Circular dated 25th March, 1996 caption "Eligibility criteria and methodology for promotion of scientists in DRDS cadre". In this communication addressed to all the Directors of all the R& D Labs & Establishments, the eligibility criteria for assessment for promotion up to the level of Scientist "F" under DRDS was provided as per details given in Appendix "A" to this letter. This letter mentions that "the DRDS rules have been reviewed in respect of rules and provisions governing the criteria and methodology for promotion of scientists". Appendix "A" incorporates Table-I stipulating following eligibility criteria:

Eligibility Criteria for Assessment for promotion of Scientists under DRDS Scheme.

Eligibility in Years/Grades

3

4

5

6

7

8

9

B

82

77

70

65

60

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C

90

85

80

75

70

65

60

D

90

85

80

75

70

65

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E

90

85

80

75

70

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NOTE: The marks indicated above are minimum marks to be obtained by the candidate averaged over maximum of previous five years.

For scientist "C" five years service is stipulated with 80% minimum marks which is to be obtained by the candidate on an average over maximum period of five years. When the turn of the Petitioner came for considering his candidature for promotion to the Scientist "D", Internal Screening of the Petitioner was done by

the Screening Committee along with others. The Petitioner secured 782 marks out of 1000 which would mean that the percentage of marks secured by the Petitioner was 78.2. Since it was less than 80% as prescribed in letter dated 25th March, 1996, the Petitioner was not called for interview and thus was denied the promotion to the post of Scientist "D". The Petitioner felt aggrieved by this act on the part of the Respondent and filed O.A. before the Tribunal. The Petitioner, apart from others, raised following two contentions in the said O.A.:

(i) The eligibility criteria which was fixed by the statutory rules framed under proviso to Article 309 of the Constitution of India namely 60% marks was changed by an administrative circular/communication dated 25th March, 1996 to the prejudice of the Petitioner by raising the bar to 80% as the eligibility criteria. He thus contended that the statutory rules could not be supplanted or amended by an administrative instruction.

(ii) The Notification dated 8th March, 1986 vide which 60% marks as eligibility criteria for assessment was prescribed for Scientist "B" and "C", was published on 23rd March, 1996 and as per Rule 1(2) thereof, this amendment was to come into force on the date of its publication in the official gazette. Likewise, the communication dated 25th March, 1996 could also be enforced prospectively. On this premise, his submission was that Screening Committee had taken into consideration the confidential performance appraisal reports of the Petitioners pertaining to five years i.e. 1993 to 1997.

5. He thus argued that even it is presumed that the eligibility criteria vide communication dated 25th March, 1996 was rightly changed from 60% to 80%, the same was to be operated prospectively and thus could not relate back to the year 1993 to 1995. To put it otherwise, his submission was that for the purposes of eligibility, for the years 1993, 1994 and 1995, the eligibility criteria to be taken was 60% and in respect of 1996 and 1997 it could be 80%. It was argued that in these two years, i.e. 1996 and 1997, the Petitioner had secured 80% or above marks and for the years 1993, 1994, and 1995 he had secured more than 60% marks. He was thus eligible for consideration to the post of Scientist "D" and should have been called for interview on this ground as well.

6. The Tribunal has dismissed the O.A. of the Petitioner vide impugned orders dated 1st May, 2000. A perusal of the said decision of the Tribunal would show that it has considered second aspect of the matter namely the grant of retrospective effect raised by the Petitioner and has negated that ground. There is no consideration of the first ground of challenge raised in the O.A. For this reason, in the writ petition, it is specifically stated that though this ground was raised and argued, the same has not been dealt with by the Tribunal. In any case, since it is a pure question of law, we would like to deal with this argument.

7. We find force in this contention of the learned Counsel for the Petitioner. It is clear from the narration of facts mentioned above that the Defence Research and Development Service Rules are promulgated in exercise of powers conferred by

proviso to Article 309 of the Constitution of India and are thus statutory in nature. These Rules were initially enforced vide Notification dated 30th December, 1978 and amended from time to time. Insofar Rule- 8(2a)(i) is concerned, which stipulates eligibility criteria, it was amended again vide Notification dated 8th March, 1996 and published in the official gazette on 23rd March, 1996. This amendment, again, is carried out in exercise of powers conferred by proviso to Article 309 of the Constitution of India. It clearly stipulates the eligibility condition of securing 60%, 65% and 70% marks for Scientist "B" "C" and Scientist "D" and "E" respectively on the basis of last five years confidential performance appraisal reports. Such eligibility criteria which are part of the statutory rules, could not have been amended and/or altered by an administrative decision and/or instructions. Letter dated 25th March, 1996 modifies the aforesaid criteria, that too, to the disadvantage of the Petitioner in exercise of administrative powers. It is well settled by catena of judgments of the Apex Court that by an administrative instruction one cannot supplant or amend the statutory rules including the following:

- (i) Guman Singh and Others Vs. State of Rajasthan and Others,
- (ii) State of Punjab Vs. Madan Singh and Others,
- (iii) State of Haryana, Vs. Shamsheer Jang Bahadur, etc. etc.,
- (iv) S.N. Karkhanis and Ors. v. Union of India, AIR 1974 SC 2304 (Constitution Bench)
- (v) D.K. Gupta and Ors. v. MCD and Ors. 1979 (3) SLR 416
- (vi) State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others,
- (vii) Dr. Ms. Subhash Kaushal v. State of Punjab and Ors. 1982 (1) SLJ 684
- (viii) K. Kuppusamy and Another Vs. State of T.N. and Others,
- (ix) Dr. Rajinder Singh v. State of Punjab and Ors. 2001 (2) ATJ

8. Since the petition filed by the Petitioner succeed on this ground itself, it is not necessary to deal with the other contention rested on the retrospective operation of the said rule. Accordingly rule is made absolute. The impugned judgment dated 1st May, 2000 passed by the Central Administrative Tribunal is hereby set aside. The O.A. filed by the Petitioner before the Tribunal is allowed. As a consequence, direction is issued to the Respondent to reconsider the case of the Petitioner by holding review DPC and if found suitable for promotion, the Petitioner be accorded promotion to the post of scientist "D" with effect from the date his juniors were promoted on the basis of Internal Screening Committee which was held on 1st July, 1998.

9. We are informed that the Petitioner was subsequently given promotion to the post of scientist "D" w.e.f. 1st July, 1998, he shall be given arrears on enrooted

post from 1st July, 1998 to 30th July, 2001 and shall also be entitled to consequential benefits of seniority and promotion etc.

10. Since the Respondents have not appeared, no order as to costs.