

(2011) 09 DEL CK 0563

In the Delhi High Court

Case No : Writ Petition (C) No. 665 of 2011

Union of India (UOI) and Another

APPELLANT

Vs

R.K. Trivedi and Another

RESPONDENT

Date of Decision : 14-09-2011

Acts Referred:

Citation : (2011) 09 DEL CK 0563

Hon'ble Judges : Dipak Misra, C.J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Saqib, for the Appellant; Piyush Sharma, for R-1, Naresh Kaushik and Aditi for R-2, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, C.J.—The Respondent No. 1, being grieved by the action of the Departmental Promotion Committee (DPC), which considered 7 retired persons for promotion to the post of Assistant Director(Grade-I) as per the instructions of the Department of Personnel and Training(DOPT) for preparation of an extended panel for only three persons whereas it was incumbent on the DPC to prepare an extended panel of 4 retired persons as per the DOPT office memorandum No. 22011/8/87 - Estt.(D) dated 9.4.1996, approached the Central Administrative Tribunal, Principal Bench (for short, "the tribunal") in OA No. 2156/2009 for issuance of direction to the Respondents to convene a review DPC for the post of Assistant Director(Grade-I) and include his name in the extended panel. It was contended before the tribunal that 4 persons retired in the vacancy year 2004-05 out of which one D.R. Chakravarty retired on 31.3.2005 but the authorities did not count the said vacancy to have occurred in the vacancy year 2004-05 as a consequence of which serious prejudice has been caused to the Petitioner.

2. The undisputed fact is that the vacancy year is from 1.4.2004 to 31.3.2005. The DPC met on 27.12.2005 to consider the promotion in respect of 17 posts (14 unreserved, 2 scheduled castes and 1 scheduled tribes category) in the grade of Assistant Director (Grade-I) in the Directorate General of Supply and Disposal.

The DPC recommended 15 names and in the extended panel kept 3 names. As on 27.12.2005, 7 officers had already retired and, therefore, it necessitated preparation of the extended panel, as per the DOPT office memorandum dated 9.4.1996. Relying on the said office memorandum, it was contended before the tribunal that the language employed in the said office memorandum stipulates that the extended panel is to be prepared keeping in view the vacancies arising in a particular vacancy year. As D.R. Chakravarty was retiring on 31.3.2005, his vacancy should have been treated to be vacancy for the vacancy year 2004-05 not 2005-06.

3. The aforesaid stand put forth by the Respondent was rebutted by the present Petitioners contending, inter alia, that the vacancy arose on 1.4.2005 and, therefore, the DPC had appositely prepared the extended panel of three persons. The tribunal referred to the DOPT office memorandum dated 9.4.1996 and the earlier office memorandums dated 10.4.1989, 17.10.1994, 20.4.1998 and came to hold that the vacancy occurred within the year, that is, 31st March, 2005. The tribunal interpreted that the term "within the year" has to be read in the context of the year mentioned all through in the instructions and the "year" mentioned is "the vacancy year" and nowhere is it even remotely hinted that 31st March would be excluded from the "vacancy year" or any vacancy occurring on the 31st March would not be taken into account for calculating the vacancy for the "vacancy year". Being of this view, the tribunal directed the present Petitioners to convene a meeting of the review DPC for the post of Assistant Director (Grade-I) and include the name of the applicant Respondent herein in the extended panel and if he is found fit by the DPC, promote him from the date his immediate junior was promoted.

4. We have heard Mr. Saquib, learned Counsel for the Petitioners, Mr. Piyush Sharma, learned Counsel for the Respondent No. 1, and Mr. Naresh Kaushik, learned Counsel for Respondent No. 2.

5. The seminal question that arises for consideration is whether the vacancy in question would be treated to have arisen in the vacancy year, that is, 1.4.2004 to 31.3.2005. In the DOPT office memorandum dated 10.4.1989, Clause 4.1, which has been referred to by the tribunal in the impugned order, reads as follows:

4.1 It is essential that the number of vacancies in respect of which a panel is to be prepared by a DPC should be estimated as accurately as possible. For this purpose, the vacancies to be taken into account should be the clear vacancies arising in a post/grade/service due to death, retirement, resignation, regular long term promotion and deputation or from creation of additional posts on a long term. As regards vacancies arising out of deputation, only those cases of deputation for periods exceeding one year should be taken into account, due note, however, being kept also of the number of the deputationists likely to return to the cadre and who have to be provided for. Purely short-term vacancies created as a result of officers proceeding on leave, or on deputation for a shorter period, training, etc. should not be taken into account for the purpose of

preparation of a panel. In cases where there has been delay in holding DPCs for a year or more, vacancies should be indicated yearwise separately.

6. The clarification that was issued on 17.10.1994 reads as follows:

It has been decided that for preparation of a select panel, Ministries/ Departments may calculate the vacancies for reporting to DPC on financial yearwise where ACRs are written financial yearwise and calendar yearwise where ACRs are written on calendar yearwise.

7. The office memorandum dated 9.4.1996, which has been brought on record as Annexure P-2, is as follows:

Sub: Guidelines for preparing extended panel in the case of promotion - Regarding.

The undersigned is directed to refer to Department of Personnel & Training O.M. No. 22011/5/86-Estt. (D), dated 10.4.1989 laying down guidelines on Departmental Promotion Committees. Normally in the case of promotion, the number of persons recommended in the panel is equal to the number of vacancies reported. However, sometimes DPCs recommended additional vacancies (extended panel) to tide over situations where officers on the select panel are not available for appointment by reason of being on deputation, etc. There are at present No. clear instructions regarding the guidelines to be followed for preparation of such extended panel. It has been noticed that such extended panels have sometimes been utilized for filling vacancies which have arisen subsequent to the DPC or during currency of the panel. This is an incorrect use of the extended panel.

2. The matter has been examined in consultation with the UPSC and it has been decided that DPCs shall prepare an extended panel only in the following contingencies:

(i) when persons included in the panel are already on deputation or whose orders of deputation have been issued and will be proceeding on deputation shortly for more than a year, OR

(ii) when persons included in the panel have refused promotion on earlier occasions and are under debarment for promotion, OR

(iii) when officers included in the panel are retiring within the same year, provided there is No. change in the zone of consideration by the expected date of their retirement.

3. It has also been decided that while giving the extended panel, the DPC should stipulate a condition against the additional names to the effect that they will be promoted only in the event of the officer(s) in regular panel not being available for promotion / appointment for the reason given by the Ministry / Department.

4. Ministries/Departments are requested to bring these instructions to the notice

of all concerned including WP(C) No. 665/2011 Page 7 of 10 their Attached and Subordinate Offices for guidance and strict compliance.

8. The same has been clarified again on 12.10.1998. We may profitably reproduce the same:

Promotion to be followed by the Departmental Promotion Committee in regard to retired employees:

2. Doubts have been expressed in this regard as to the consideration of employees who have since retired but would also have been considered for promotion, if the DPC(s) for the relevant year(s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law(Department of Legal Affairs). It may be pointed out in this regard that there is No. specific bar in the aforesaid Office Memorandum, dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing year wise panel(s), who were within the zone of consideration in the relevant year(s). According to legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered while preparing year wise zone of consideration / panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration, if the DPC(s) had been held in time. The considered imperative to identify the correct zone of consideration for relevant year(s). Such retired officials would, however, have No. right for actual promotion. The DPC(s), may, if need be, prepare extended panel(s) following the principles prescribed in the Department of WP(C) No. 665/2011 Page 8 of 10 Personnel & Training, O.M. No. 22011/8/87-Estt. (D), dated 9.4.1996. (Copy enclosed)

4. Ministries / Departments are requested to bring these instructions to the notice of all concerned including their Attached and Subordinate Offices.

9. In the impugned order, the office memorandum dated 20.4.1998 has been placed reliance upon. It reads as follows:

In reiteration of the aforesaid provision (Para.4.1) of the DPC guidelines, dated 10.4.1989, it is hereby clarified that such vacancies arising in a particular vacancy year, as noted in the aforesaid Para 4.1, would be considered together by the DPC. These vacancies should also include newly-created posts in the same vacancy year. Hence, the DPC for a particular vacancy year held subsequent to the creation of such new posts in the same vacancy year would be required to take into consideration such newly-created posts also along with other already existing / anticipated vacancies arising in the same vacancy year. As a sequel to it, the zone of consideration would also get enlarged in a corresponding manner in terms of the Dept. of Per. & Trg., O.M. No. 22011/1/90-Estt.(D), dated 12.10.1990 and 22.4.1992.

(Emphasis added)

10. When interpreting the said office memoranda, the tribunal has opined that vacancy is from 1st April of an year to the 31st March of the following year and the reference is to the vacancies arising in a particular vacancy year and, therefore, as the last date of retirement of D.R. Chakravarty is 31.3.2005, that should have been computed as having occurred in the vacancy year 2004-05.

11. We are of the considered opinion that an incumbent, who works till 31.12.2005, remains in office on that day and, therefore, the post / vacancy becomes available only on the next day, that is, 1.4.2005. Once the post / vacancy becomes available on 1.4.2005, it would become a vacancy for the subsequent year, that is, 2005-06. The words used in the memorandum are "vacancies arising in a particular vacancy year" and this would come within the concept of anticipated vacancy as the vacancy would arise due to retirement. The clarificatory office memorandum dated 20.4.1998 clearly stipulates that vacancies must arise in a particular vacancy year. It does not seem to be logical that the vacancy would arise on 31.3.2005 when the incumbent was still holding the post and it is not undisputed that the incumbent was holding the post till 31.3.2005. In such a case, he holds the post till the end of the day. In R.K. Sabharwal and others Vs. State of Punjab and others, while making a distinction between "posts" and "vacancies", their Lordships opined that "post" means an appointment, job, office or employment, a position to which a person is appointed, whereas "vacancy" means an unoccupied post or office. The plain meaning of the two expressions makes it clear that there must be a "post" in existence to enable the "vacancy" to occur. We have referred to the said decision only to indicate that a vacancy can arise only when the post is unoccupied. Thus, the vacancy really arose only on 1.4.2005. Therefore, it is to be calculated in the next vacancy year, that is, 2005-2006.

12. In view of the aforesaid analysis, we are disposed to think that the order passed by the tribunal is unsustainable and, accordingly, it is quashed. In the result, the writ petition is allowed leaving the parties to bear their respective costs.