

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 12.01.2012

+ **W.P.(C) 7239/2010**

NATIONAL INSTITUTE OF BIOLOGICALS & ANR ... Petitioners

versus

DR R.N. PRASAD

... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr V.K. Rao with Mr Vaibhav Kalra and
Ms Neha Bhatnagar

For the Respondent : Mr Rakesh Khanna, Sr Advocate with
Mr Varun Kumar

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition has been filed both by the National Institute of Biologicals as well as the Union of India being aggrieved by the order dated 09.03.2012 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, in MA 1578/2009 which, in turn, was passed in OA 381/2008. The petitioners are aggrieved by the observations and directions in the impugned order, which are specifically contained in paragraphs 6 and 7 thereof and which read as under:-

“6. The direction given in the OA number 381/2008 have to be understood in this context and in the light of the discussion in

the order dated 06.01.2009. These directions have not been complied with because no action has been taken to frame recruitment rules for all the posts of Deputy Directors, which were approved by the Committee of the Cabinet except the creation of the post of Deputy Director (Administration), which is stated to have been filled up. Three more posts remain, for creation of which no initiative has been taken. No light has been shed on the implementation of the in situ promotion scheme for which DoP&T's approval had been sought.

7. The MA is allowed. The Respondents are directed to comply with this Tribunal's directions in OA number 381/2008 within two months from the date of receipt of a copy of this order. The Application has been unnecessarily forced into this litigation and he would be eligible for the cost of litigation, which we compute to be Rs 10,000/-."

2. In order to fully appreciate the grievance of the petitioner, it would be necessary to refer to the order dated 06.01.2009, which was passed by the Tribunal in OA 381/2008. In paragraph 6 of the said order 06.01.2009, the contention of the respondent in the OA was noted to the following effect that there was only one post of Deputy Director (Quality Control), which had been filled up. The respondent had also denied that there were five posts of Deputy Director in the institute. It was also indicated that the respondent herein had been considered for promotion for the post of Deputy Director (Quality Control), but was not selected for the said post. It was also pointed out that although the Expenditure Finance Committee and the Cabinet Committee on Economic Affairs had created various posts for the institute, the proposal for

additional manpower was still under consideration of the competent authority and had not been cleared by the Department of Expenditure, Ministry of Finance. It was, therefore, contended on behalf of the respondents in the said OA that there was only one post available, namely, the post of Deputy Director (Quality Control), in the institute for promotion from the post of Scientist Grade-I.

3. After hearing the rival contentions of the parties, the Tribunal made the following observations and conclusions in the said order dated 06.01.2009:-

“10. From the reply of the Respondents and submissions made on their behalf, there seems to be a feeling of helplessness in the second Respondent. This is surprising considering that the Union Health Secretary is closely involved with the institution by virtue of being the *ex-officio* Chairman of the Governing Body as well as the General Body of the Institute. We are unable to understand the reason for this apathy of the first Respondent that in spite of having so many proposals for creation of posts and formulation of promotional policy, nothing has seen the light of the day. It is difficult to understand that the approval of the Expenditure Finance Committee and the Cabinet Committee on Economic Affairs would be disregarded by the Department of Expenditure in the Ministry of Finance. The Expenditure Finance Committee is chaired by the Secretary in the Department of Expenditure. The Cabinet Committee on Economic Affairs is chaired by the Prime Minister with the Minister of Finance being one of its members. It is a Committee of the Cabinet and a Department of the Government cannot act contrary to the decision taken by such Committee. There is surely a lack of effort and deficiency of interest on the part of the first Respondent in implementing these decisions. The Respondents have mentioned that the DOP&T had said in January 2008 that

the introduction of Flexible Complimenting Scheme was under consideration of the DOP&T as regards the autonomous institutions and yet at the end of the year nothing had emerged from this.

11. In the absence of rules, we cannot direct the Respondents to consider the Applicant for promotion. However, we direct the Respondents especially the first Respondent to formulate a policy for promotion of Scientists working under the second Respondent including consideration of policy of implementing the Scheme of in-situ Promotion/ Flexible Complimenting Scheme/ Assured Career Progression Scheme and draft rules for promotion and get these cleared from all concerned authorities within six months from the receipt of a certified copy of this order. In the facts and circumstances of this case, there will be no orders as to costs.”

4. The learned counsel for the petitioners submitted that there was no direction in the order dated 06.01.2009 passed in OA 381/2008 for creation of three additional posts of Deputy Director in the institute. He submitted that the impugned order passed in MA 1578/2009 has expanded the scope of the order passed in the original OA 381/2008, which the Tribunal could not do. It has been the contention of the learned counsel for the respondent that there were more posts of Deputy Director in the institute but the same were not being filled by the petitioners inasmuch as there were no rules prescribed and there was no policy for promotion of scientists working in the institute to the said posts of Deputy Director.

5. From the arguments advanced by the counsel for the parties and also from the record of the case it is apparent that initially, although five posts of

Deputy Director had been approved for the institute by the Expenditure Finance Committee and the Cabinet Committee on Economic Affairs, only two posts of Deputy Director were, in fact, created at that point of time. It was also considered that further creation of posts of Deputy Director would be incumbent upon the successful functioning of the institute as per its mandate and consequent expansion of its activities, justifying need for additional personnel. The fact of the matter is that the Tribunal has expressed its anguish as to why those additional posts have not been created. This is apparent from the observations made by the Tribunal in the order dated 06.01.2009 in OA 381/2008, as indicated in the extracted paragraph 10 above. However, that anguish has not translated into a direction, and rightly so, for creation of three additional posts of Deputy Director in the institute. It is obvious that when the posts do not exist, there cannot be any rules for promotion in respect of those posts. It is in this light that the observations and directions of the Tribunal contained in paragraph 11 of the order dated 06.01.2009, have to be understood. The only direction was that a policy be formulated for promotion of scientists working in the institute, including consideration of policy of implementing the Scheme of in-situ Promotion/ Flexible Complimenting Scheme/ Assured Career Progression Scheme and draft rules for promotion and to get these cleared from all concerned authorities within six months from the

receipt of the certified copy of the order. There was no clear direction that the three posts of Deputy Director be created. In our view, there could not have been such a direction because it was incumbent upon the government, considering the exigencies, to decide as to whether additional posts were to be created or not. In fact, we are informed by the learned counsel appearing on behalf of the petitioners, on instructions, that the institute had placed a proposal for creation of other three posts of Deputy Directors before its governing body and the governing body, in its 21st meeting held in the month of April, 2011, had decided that a fresh proposal be sent to EFC and thereafter a fresh proposal be sent to the Government for creation of several additional posts, which included the three posts of Deputy Director. Insofar as the consideration of implementing the other schemes are concerned, the learned counsel for the petitioners points out that a modified assured carrier progression scheme has already been put in place insofar as the respondent is concerned and the benefit under the scheme has already been given to him with effect from 01.09.2008. Therefore, it is the contention of the learned counsel for the petitioners that all that was required to be done, pursuant to the order dated 06.01.2009, has been done by the petitioners.

6. In view of the aforesaid, we are clear that the direction given in the impugned order dated 09.03.2010 travels beyond the scope of the order dated

06.01.2009. We make it clear that the order dated 06.01.2010 cannot be construed as a direction given to the respondents in the said OA to create three posts of Deputy Director. It is obvious that unless and until a post exists, there cannot be any rules prescribed for promotion to that post. Insofar as the post of Deputy Director (Quality Control) is concerned, the learned counsel for the petitioners drew our attention to the recruitment rules as indicated at page 116 of the paper book, which specifically provides for the recruitment rules insofar as this post is concerned. Therefore, it cannot be said that there are no rules for promotion insofar as the post of Deputy Director (Quality Control) is concerned from Scientist Grade-I.

7. The writ petition stands allowed. The impugned order dated 09.03.2010 is set aside and the order dated 06.01.2009 stands clarified. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

**JANUARY 12, 2012
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