

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Date of Decision: 14.10.2014**

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**W.P.(C) 629/2014 & C.M. No. 1250/2014**

UNION PUBLIC SERVICE COMMISSION

..... Petitioner

Through: Ms. Amita Kalkal Choudhary with  
Ms. Aditi Gupta, Advocates.

versus

SMT. RENUKA TYAGI

..... Respondents

Through: Mr. Padma Kumar S., Advocate for  
R-1.  
Mr. Vikas Mahajan, CGSC for R-2&3  
along with Mr. Rohan Gupta, Mr. S.S.  
Rai and Ms. Ruchika Mahajan,  
Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**VIPIN SANGHI, J. (OPEN COURT)**

1. The present Writ Petition has been preferred by the Union Public Service Commission (UPSC) under Article 226 of the Constitution of India to assail the order dated 20.12.2012 passed in OA No. 1223/2012, as also the against the Order dated 19.11.2013 passed in R.A. No. 123/2013 in O.A. No. 1223/2012 by the Central Administrative Tribunal, Principal Bench, Delhi (CAT/ Tribunal) whereby, the Tribunal allowed the Original

Application of the respondent no. 1 and dismissed the Review Application of the petitioner.

2. Respondent no. 1 qualified the civil services examination in the year 1993 and was allocated the Armed Forces Headquarters (AFHQ) service. Presently, respondent no. 1 is working at the post of Section Officer.

3. On 17.12.2007, respondent no. 1 was served with a charge memo. Consequently, she was visited with a minor penalty of '*withholding of next increment for two years with cumulative effect*' on 09.04.2008. This penalty ended on 08.04.2010.

4. On 04/05.05.2011, the Departmental Promotion Committee (DPC) meeting was held by the petitioner for considering promotions to the post of Civilian Staff Officer (Deputy Director) in the AFHQ Civil Services for the vacancy years 2001-02, 2002-03, 2003-04 and 2004-05. Respondent no. 1 did not fall within the zone of consideration for the vacancy year 2001-02. For the vacancy year 2002-03, she did not make the cut, as she was at seniority position No.14. When the DPC considered the case of respondent no.1 for the vacancy year 2003-04, though she was at S. No. 1, she was found 'unfit' for promotion by the DPC due to the penalty imposed on her in the year 2008. The respondent no. 1 was, therefore, considered for the vacancy year 2004-05, and she was found 'fit' by the DPC and recommendation was accordingly sent to the department.

5. Aggrieved by the aforesaid non-selection for the vacancy year 2003-04, respondent no. 1 filed O.A. 1223/2012 before the Tribunal praying for quashing of the select list dated 24.05.2011, and the orders dated 25.05.2011

& 27.07.2011, whereby she was held to be ‘unfit’ for being placed on the select list for 2003-04, whereas her juniors were promoted.

6. The Tribunal allowed the Original Application relying on ***Union of India v. Arun Kumar***, CWP 11715/2011, decided on 08.07.2011 and held that – as the charge sheet was issued and punishment was inflicted after occurrence of the vacancy in the year 2003-04, it could not have been a ground for denying the applicant-respondent no. 1 the promotion.

7. The petitioner, being aggrieved by the aforesaid order of the Tribunal, has preferred the present petition.

8. Learned counsel for the petitioner submits that respondent no. 1 could not have been promoted for the vacancy year 2003-04, since penalty had been imposed upon her. Learned counsel places reliance on ***Union of India v. K.V. Jankiraman***, (1991) 4 SCC 109, and urges that the whole record of the employee has to be considered for promotion. She further submits that no employee can claim promotion as a matter of right. Specific reference has been made to para 29 of the judgment of the Supreme Court in ***K.V. Jankiraman*** (supra) and to the facts of SLP (Civil) No.2344/1990 dealt with by the Supreme Court in the said judgment. Paragraph 29 of the judgment in ***K.V. Jankiraman*** (supra) reads as follows:

*“29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion*

*should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of paragraph 3 of*

*the said Memorandum. We, therefore, set aside the said findings of the Tribunal.”*

9. The facts noted in SLP (Civil) No.2344/1990 were that in respect of conduct pertaining to the year 1982-85, the employee was chargesheeted in February 1988 and was penalized in August 1988. In the meantime, the DPC met on 03.06.1988 for considering promotion to the selection grade. Some of the juniors of the concerned employee were given the selection grade with retrospective effect from 30.07.1988. The concerned employee's name was kept in a sealed cover and was not included in the list of promotee officers. The Tribunal had allowed the claim of the concerned employee. The Supreme Court had reversed the decision of the Tribunal by holding as follows:

*“We are afraid the Tribunal has taken an erroneous view of the matter. Admittedly, the DPC met in June 1988 when the employee was already served with the charge-sheet on February 22, 1988. The charge-sheet was for misconduct for the period between 1982 and 1985. Admittedly further, the employee was punished by an order of August 19, 1988 and his one increment was withheld. Although, therefore, the promotions to his juniors were given with retrospective effect from July 30, 1986, denial of promotion to the employee was not unjustified. The DPC had for the first time met on June 3, 1988 for considering promotion to the Selection Grade. It is in this meeting that his juniors were given Selection Grade with retrospective effect from July 30, 1986, and the sealed cover procedure was adopted in his case. If no disciplinary proceedings were pending against him and if he was otherwise selected by the DPC he would have got the Selection Grade w.e.f. July 30, 1986, but in that case the disciplinary proceedings against him for his misconduct for the earlier period, viz., between 1982 and 1985 would have been meaningless. If the Tribunal's finding is accepted it would mean*

*that by giving him the Selection Grade w.e.f. July 30, 1986 he would stand rewarded notwithstanding his misconduct for the earlier period for which disciplinary proceedings were pending at the time of the meeting of the DPC and for which again he was visited with a penalty. We, therefore, allow the appeal and set aside the finding of the Tribunal.”*

10. She placed reliance on three Office Memoranda dated 10.04.1989, 27.03.1990 and 09.04.1996 issued by the Department of Personnel & Training (DoP&T) to submit that the petitioner conducted the DPC strictly in accordance with the guidelines/ rules and regulations. Specific reference to these memoranda shall be made a little later.

11. On the other hand, learned counsel for the respondent no. 1 submits that he could not have been declared ‘unfit’ for promotion for the vacancy year 2003-04, on the basis of the penalty imposed in 2008, which got over on 08.04.2010. Learned counsel reiterated and affirmed the reasoning of the Tribunal in his favour.

12. Having heard learned counsels for the parties and considered the materials placed on record, we are of the view that the present petition is meritless and there is no error or infirmity in the impugned order. We are concerned with the claim of the respondent to be considered for promotion in the vacancy year 2003-04. During that period, or immediately after the expiry of the said year 2003-04, the respondent was not under any cloud and no charge sheet/ inquiry was pending pertaining to the conduct of the respondent for the year 2003-04 or earlier. The consideration of the respondent by the DPC for the year 2003-04 had to take place by transporting itself back into time – as if in a time machine, if the DPC was

being held soon after the expiry of the vacancy year 2003-04, by taking into consideration the fact situation as then prevalent. Had the DPC actually met to consider the cases for promotion for the vacancy year 2003-04 soon after the expiry of the said year, it would not be in a position to know as to what the future hold for the respondent in terms of her conduct and discipline. Thus, the respondent could not have been subjected to any disadvantage on the basis of conduct which had not taken place till then, and would take place in the future – of which there was no means of having knowledge.

13. A Division Bench of this Court in *Union of India & Others v. Mahavir Prasad*, W.P.(C.) Nos. 4682-83/2013 decided on 29.07.2013, dealt with a similar situation. In that case Mahavir Prasad – though empanelled at serial No.1 of the select list for the year 2002-03 by the DPC held, inter alia, for the vacancy year 2002-03, could not get the fruits of the said empanelment because of the fact that on 09.09.2008, a memorandum was served upon him along with the charge sheet for major penalty proceedings under Rule 14 of the CCS(CCA) Rules, 1965 resulting in penalty order on 07.02.2011 – stopping one increment for two years without cumulative effect. The stand of Union of India was that when the DPC met on 05.05.2011 after the seniority list was revised in August 2008, Mahavir Prasad had been issued a charge sheet, and thus, the promotion has to be kept pending till the disciplinary proceedings reach conclusion – which it did on 07.02.2011, with the imposition of penalty.

14. On the other hand, the stand of Mahavir Prasad was that the vacancy to which he had been promoted pertained to the year 2002-03, and the DPC which had met in 2009 had recommended him for empanelment for vacancy

year 2002-03. Mahavir Prasad contended that the factual situation which had to be considered was by transposing oneself back to the year 2002-03. The Division Bench while upholding the view taken by the Tribunal on the aforesaid aspect, observed as follows:

*“7. Three dates are important to be re-emphasized. The first is that the charge-sheet was issued on September 09, 2008 and the DPC met on May 05, 2011 and lastly that the penalty was inflicted on February 07, 2011. Notwithstanding the charge-sheet issued when DPC met, Mahavir Prasad’s name was not only considered by the DPC but was not put in a sealed cover. The reason is obvious, and the logical culmination of the said reason, would determine the fate of the 2 appeals. **The reason is that the DPC which met in the year 2011 had to transpose itself back to the year 2002-03 for the reason the select panel which it was drawing up pertained to said year.** Now, if you have to transpose yourself back into the past and perform an act as of the past, the facts and circumstances existing as of the past alone would determine the further course of action; untainted and uninfluenced by the current events. This flows out from the law declared by the Supreme Court in the decision reported as (2000) 7 SCC 2010 **Delhi Jal Board vs. Mahinder Singh**. Considering the law declared by the Supreme Court in the decisions reported as (1999) 5 SCC 762 **Bank of India vs. Degala Suryanarayana** and (1998) 4 SCC 154 **State of A.P vs. N.Radhakishan**, the Supreme Court considered a case where the recommendations of the DPC pertaining to Mahender Singh were kept in a sealed cover because Mahender Singh had been charge-sheeted. He was ultimately exonerated of the charges alleged against him, but unfortunately for him when said event took place he found himself under a cloud of a second charge-sheet being issued against him. With reference to the fact that the second charge-sheet was issued the department did not give effect to the recommendations of the DPC which were kept in the sealed cover in view of the pendency of the disciplinary enquiry relating to the first charge-sheet when the DPC met. Mahender Singh won the*

*battle when a Single Judge of this Court allowed the writ petition filed by him. He won the second battle when intra court appeal filed by Delhi Jal Board was dismissed. He won the third battle before the Supreme Court which held that once the first disciplinary enquiry resulted in a decision in favour of Mahender Singh the benefit of the finding of the DPC lying in the sealed cover could not be denied to him on account of pendency of the second enquiry which commenced after the DPC had met. The ratio of law which we cull out is this that legal rights and liabilities have to be considered with reference to the facts in existence as of the date on which the right or the liability has to be considered.*

*8. Thus, we hold that the view taken by the Tribunal is correct. The penalty imposed upon Mahavir Prasad on February 07, 2011 pertained to the charge-sheet issued on September 09, 2008 and it cannot be transposed back to the year 2002-2003. We would be failing not to note that the recommendations of the DPC which met on May 05, 2011 have been given retrospective effect for all others; even those who had died in the interregnum. The writ petitions are accordingly dismissed but without any order as to costs.”*

(emphasis supplied)

15. The DPC has taken into account the penalty imposed upon respondent no. 1 while considering her ‘unfit’ for promotion, even though the penalty is of a year much later than the vacancy year. The DPC should have considered the record of respondent no. 1 only to the extent which it could have done, if it would have met in 2003-04. Respondent no. 1 was not under penalty at the time when the DPC was convened on 04/05.05.2011.

16. The facts in the present case are distinguishable from the situation considered by the Supreme Court in ***K.V. Jankiraman*** (supra), as that case related to adoption of the “sealed cover procedure” for an employee whose

promotion is due, but the disciplinary proceedings are pending against him at the relevant time. However, in the instant case, the disciplinary proceedings had been concluded and even the penalty imposed, for a period of 2 years from 9.04.2008, had too had expired much before the DPC met.

17. The counsel for the petitioner has relied on OM dated 09.04.1996, relevant part of which reads as follows:

*“6.4.3. Service record to be scrutinized while preparing yearwise panel. – For the purpose of evaluating the merits of the officers while preparing yearwise panels, the scrutiny of the record of service of the officers should be limited to the records that would have been available had the DPC met at the appropriate time. For instance, for preparing a panel relating to the vacancies of 1978, the latest available records of service of the officers either up to December, 1977, or the period ending March, 1978, as the case maybe, should be taken into account and not the subsequent ones. However, if on the date of the meeting of the DPC, departmental proceedings are in progress and under the existing instructions sealed cover procedure is to be followed, such procedure should be observed even if departmental proceedings were not in existence in the year to which the vacancy related. The officer’s name should be kept in the sealed cover till the proceedings are finalized.”*

The aforesaid OM provides for the scrutiny of the record of the employee for the concerned vacancy year. In the present case, the DPC was conducted belatedly in the year 2011 and not in the year when the vacancy arose. Therefore, as the aforesaid OM states, the records of respondent no. 1 must be scrutinized only upto the year when the DPC should have met, and not for the year when it actually met. This OM does not support the stand of the petitioner.

18. The OM's dated 10.04.1989 and 27.03.1990 insofar as they are relevant, read as follows:

**Extract of OM dated 10.04.1989**

*“6.2.1 (e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.*

*x      x      x      x      x      x      x      x      x      x*

*6.2.3. Before making the overall grading after considering CRs for the relevant years, the DPC should take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him as reflected in the ACRs. The DPC should also have regard to the remarks against the column on integrity.”*

**Extract of OM dated 27.03.1990**

*“4.2.4 While sending DPC proposal to the Union Public Service Commission, all Ministries/ Departments should attach a statement showing the penalties imposed on the officers within the zone of consideration during a period of ten years preceding the year of DPC. Ministries/ Departments are also requested to ensure that copies of orders imposing the penalties and decisions taken on appeals, if any, are kept in the respective CR dossiers, as required under the extant instructions.”*

19. Once again, we find that the aforesaid OM's have no application in the facts of the present case since the respondent was subjected to penalty in the year 2008 in respect of her conduct subsequent to the vacancy year 2003-04.

It could not have, in any way, influenced the consideration of the respondent's case by the DPC, even if the DPC was held much later, i.e. in the year 2011.

20. For the above reasons, this Court finds no ground to interfere with the order of the Tribunal; the writ petition is accordingly dismissed along with pending application.

**VIPIN SANGHI, J**

**S. RAVINDRA BHAT, J**

**OCTOBER 14, 2014**