

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

Reserved on: 21.11.2014
Pronounced on: 28.05.2015

+ **W.P.(C) 8152/2013**

+ **W.P.(C) 8156/2013**

SUNIL ALAG

.....Petitioner

Through: Sh. Arun Bhardwaj and Sh. Piyush Gaur,
Advocates.

Versus

UNION OF INDIA AND ANR.

.....Respondents

Through: Sh. Amit Mahajan, CGSC, Sh. Nitya Sharma
and Sh. M.P. Singh, Advocates, for UOI along with Sh.
Poulose, Section Officer, DOPT.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT

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1. This petition under Articles 226/227 of the Constitution of India questions the correctness of an order of the Central Administrative Tribunal [hereafter "CAT"] in O.A. No. 4231/2011 and O.A. No. 4560/2011 dated 24.09.2013. The CAT negatived challenges to the decisions of the

Appointments Committee of the Cabinet (“ACC”) dated 8.4.2009 and 15.11.2011, denying promotion to the petitioner to the grade of Scientist “G” (and promoting certain others).

2. The brief facts are that the petitioner is a Master of Technology, having graduated from IIT in 1982. He joined Central Government service in the grade of Scientist “C” in what is now the Department of Electronics and Information Technology, on 16.4.1987 (“DoE”). The Petitioner was promoted to the grades of Scientist “D”, “E” and “F” on 2.1.1992, 19.4.1998, and 24.1.2001, respectively.

3. Through a notification issued by the Department of Personnel and Training (DoPT) on 9.11.1998, the “Flexible Complementing Scheme” for promotion was made applicable to the petitioner’s department. An Annexure to the Notification, defined “scientists” and “engineers” as follows:

"They should be engaged in research, design, development or programme implementation (including review, analysis, promotion and aspects of science policy, etc.) which would cover a broad spectrum of pure and applied research but the essential feature would be innovative character and spirit of enquiry that permeates their overall functioning."

4. The Annexure also defined Scientific Activities and Services which included, *inter alia*:

“(c) Experimental Development: Use of scientific knowledge directed towards producing new or substantially improved materials, devices, products, processes, systems or services.

(d) S&T activities which are directly linked to R&D in terms of promoting the scientific activities and services.”

5. It further clarified the meaning of scientists and engineers in the following terms:

“a. who possess academic qualification of at least Master's degree in Natural / Agricultural Science or Bachelor's Degree in Electronics / Technology / Medicine and

b. working in those capacities, use or create scientific knowledge, and engineering and technological principles i.e. persons with scientific or technological training who are engaged in professional work on S&T activities, high level administrators who plan, direct or co-ordinate the execution of S& T activities.”

6. Annexure-II, which contained the recruitment and promotion rules, stated that:

"Field Experience in Research and Development and/or Experience in implementation of such scientific projects is compulsory for promotion of scientists recruited to the posts in the Secretariat of the Scientific Ministries / Departments to higher grades under FCS. Field Experience of at least 2 years and 5 years respectively will be essential for promotion to Scientist "F" and Scientist "G" grades respectively."

7. The process of promotion from Scientist “F” to Scientist “G” was also listed. It was a two-step process, and took the following path:

“i. Screening by Screening Committee (Para (a) of Annexure-II of DoPT OM dated 9-11-1998 (Anne P- 6): All officers are first screened on the basis of gradings in the Annual Confidential Reports for consideration for promotion. The ACRs are assessed on a 10-point scale. Only those officers who satisfy the minimum residency period linked to their performance as indicated in the table in the above said Annexure-II are 'Screened-in'.

ii. Selection by Selection Committee (Para (c) of Annexure-II of DoPT OM dated 9-11-1998 (Anne P- 6): All officers who are 'screened-in' by the Screening Committee are called for interview /assessment by the Selection Committee which assesses their suitability for promotion under FCS, i.e. suitability with respect to all criteria under FCS including suitability with respect to 'Field Experience' and 'Innovative Work'. The performance in the interview is graded similarly on a 10 point scale and the eligibility for promotion is based on the same norms as in table for screening norms (mentioned above).”

8. By virtue of an Office Memorandum dated 21.11.2005, the Respondent No. 1 added a further layer of procedure – i.e., review by a Departmental Peer Review Committee (“DPRC”), after the screening and selection had taken place. The final step of the process was the approval of the recommendations of the DPRC by the Minister-in-Charge. In the case of promotion to Grade “G”, the cases approved by the Minister-in-Charge would also need the further approval of the ACC.

9. The petitioner – along with 8 other scientists –was asked to appear before the Selection Committee on 25.7.2007. After an interview, he was one among the three candidates recommended for promotion. This was cleared by the DPRC on 14.8.2007. The Department then sought the approval of the ACC on 17.10.2007, and in response to a letter of enquiry from the same, clarified the details of the scientific projects initiated by the scientists, including the petitioner. In a second letter of enquiry, dated 12.12.2008, the ACC asked for details about the innovative activities carried out by the scientists, which were also provided by Respondent No. 2 in a letter dated 22.12.2008, and repeated this in other letters dated 9.2.2009 and 24.3.2009.

10. The ACC, however, rejected the recommendation for the petitioner's promotion. The petitioner claims that this rejection was brought to his notice only through reply to a query under the Right to Information Act (RTI) in 2009-2010. In the meantime, he was called for another interview for promotion w.e.f. 1.1.2009, but despite being found fit by the statutory bodies, his case was again rejected by the ACC on 15.11.2011, whereas four other scientists were promoted to Grade G.

11. The petitioner filed O.A. No. 4231/2011 before the CAT, challenging this rejection. In the reply affidavit, Respondents stated the reasons for rejecting the petitioner's promotion, as follows:

"... from the Bio-data and note on achievements of the officer, it was felt that the officer was mainly engaged in application of scientific techniques, without directly contributing towards R&D activities. The activity of the officer in managing the autonomous bodies of the department was not taken as having requisite field experience which is one of the basic requirements for promotion under FCS. It was thus concluded that the officer is mainly engaged in application of and promotion of scientific techniques in administrative capacity and had not added much by way of innovation. As such the officer was not considered eligible for promotion under FCS."

12. The Petitioner also filed O.A. No. 4560/2011, challenging the order of the ACC, dated 15.11.2011. Rejecting both his applications through the common impugned order, the CAT reasoned, *inter alia*, that:

"... the power of the Appointment Committee of the Cabinet flows out of the powers of the cabinet and is not open to challenge on the ground that it lacks in expertise to overrule the recommendations of an expert body. In fact it would be against both the express provisions of the constitution and its spirit to do so."

The CAT however acknowledged that decisions of the ACC were subject to judicial review, and stated that:

“... the ACC is undeniably a decision making authority. Its decisions have to conform to the laws of natural justice and other related statutory provisions. These decisions are not beyond the purview of the courts where they deviate from the law of natural justice. However, there can be no uniform prescription in this regard. Every case will have to be judged on its own merit. However, the courts are prejudged going into the merits of the decision and supplementing the same with their own decisions.”

On the specific facts of the case, the Tribunal took account of the Note of the Cabinet Secretary dated 13.03.2009, which stated, that *“the scientists are mainly engaged in application of scientific techniques without directly contributing towards R&D activities. Managing the 6 autonomous bodies of the Department cannot be taken as requisite field experience.”* Consequently, it held that:

“... the rejection is on the ground of field experience and merit. As mentioned earlier, this Committee is not competent to go into the issue of merit. We have already discussed while dealing with Issue No.1 that whether a Committee comprising non-technical persons could override the recommendations of the Technical Committee and we found this argument unacceptable as it strikes the very root of the democratic process.”

13. Before this Court, the petitioner challenges CAT’s findings. His primary argument is that the ACC’s decision was arbitrary and unprincipled, and therefore illegal, and that the CAT failed to give due regard to this fact. He contends that his task was never the management of “autonomous bodies”, but that he contributed directly to R&D by implementing scientific

projects under different programs of the department, in accordance with the requirements of the FCS. He further argued that officers in other years (2004, 2005, 2006, 2008 and 2009) had been promoted while doing similar work and discharging similar responsibilities. In any event, he argued that the question of what constitutes “innovation” is to be best left for decision by the experts in the field, who were present during his interviews. The petitioner relies on the judgment of the Supreme Court in *Union of India v B.D. Majumdar* 2009 (10) SCC 38 and submits that the ACC’s decision to disregard recommendations of selection committees and bodies has to be supported by reasons. For all these reasons, the petitioner urges this court to set aside the order of the Tribunal.

14. The Central Government argues that the CAT’s impugned order is balanced and does not call for interference. It is submitted that in accordance with the procedure prescribed in the DoPT memorandum governing the subject, for offices eligible as on 2007, a meeting of the duly constituted Screening Committee was held on 13-6-07. The Committee recommended all the officers for interview. The meeting of the selection committee was held on 25.07.07 to interview the 9 officers screened, for promotion to the grade of Scientist 'G' (₹18400-22400). Based on the performance of the 9 officers in the second stage of the selection process i.e. interview, the Selection Committee had recommended 3 officers (Scientist 'F') namely Shri S.S. Midha, Shri S.S. Garg & Shri Sunil Alag (the petitioner herein), for promotion to the grade Scientist G. Later, the recommendations of the Selection Committee were submitted to the Departmental Peer Review Committee (DPRC) constituted in terms of the DoPT guidelines by OM No. AB 14017/31/2004-Estt. (RR), dated 21-11-05 as clarified further on 07-06-

06 through DoPT OM No. AB 14017/44/2006-Estt. (RR), for their final recommendation. The DPRC, under the Chairmanship of Secretary, Department of Information Technology ("DIT"), met on 14-08-2007 and finally recommended two officers, namely Shri S.S Garg and Sunil Alag for promotion to the grade of Scientist 'G'. It argues that an Additional Secretary from the DoPT was present during the deliberations of the Departmental Peer Review Committee. It was submitted that the Secretariat of the ACC communicated on 08-04-2009 that the said Cabinet body did not approve the recommendation for promotion. The Central Government argues that though, according to procedure, promotions under the FCS are not considered by the Civil Services Board (CSB), nevertheless, since it is an important advisory body, its comments were called for before the ACC considered the materials and decided upon the issue of promotions to the post of Scientist 'G' in the present case.

15. Learned counsel for the Central Government relied on the reply filed in OA 4560/2011 to the effect that the Petitioner's candidature was found wanting because, according to it, he was:

“ mainly engaged in application of scientific techniques, without directly contributing towards R&D activities. The activity of the officer in managing the autonomous bodies of the Department was not taken as having requisite field experience which is one of the basic requirements for promotion under FCS. It was concluded that the officer is mainly engaged in application and promotion of scientific techniques in administrative capacity and had not added much by way of innovation. As such the officer was not considered eligible for promotion under FCS.”

It was argued that as the highest decision making body, the ACC had the discretion to adjudge, with appropriate input from senior most officials,

whether in fact a scientist or technical official recommended by expert bodies was suitable to occupy a senior scientific level post such as Scientist 'G'. It was contended that this court should not delve into the merits of the decision, based on the suitability of assessment of the petitioner. Underlining the scope of judicial review, it was submitted that the court should confine its scrutiny to whether the decision making process took into account relevant facts, disregarded external factors and irrelevant considerations and whether the statute or the policy guidelines, as the case may be, had been adhered to. It was submitted that in the absence of any *mala fides*, proven or pleaded, or manifest discrimination or arbitrariness, judicial review would be uncalled for. The petitioner's grievance in reality calls for a "merits review" of his candidature, which is not permissible or within this Court's jurisdiction under Article 226 of the Constitution of India.

16. Learned counsel relied on *Centre for Public Interest Litigation and Anr v. Union of India & Anr.* (2011) 4 SCC 1, and argued that in the absence of a clear violation of statutory provisions and regulations laying down the procedure for appointment, the High Court does not possess jurisdiction to examine the wisdom or choice of an executive appointment to a post under the Union. It was argued that in fact, the petitioner has not argued that there is any violation of statutory rules or binding guidelines. The selection committee recommended his name for appointment. The decision making authority - the ACC was bound to and in fact did consider that recommendation. In these given circumstances, neither was any procedural infirmity established, nor was any overriding right proved, to seek judicial review. It was argued that in these circumstances, it would be inappropriate

for the court to conduct an in-depth analysis of the merits of the candidates and conclude that the private respondents were somehow less deserving than others.

Analysis and conclusions

17. The narrative of facts previously discussed would show that there is no dispute about the following circumstances:

- a. FCS is governed by the OM dated 9.11.1998 issued by DoPT;
- b. The said OM covered Scientists;
- c. The Petitioner is a Scientist 'F' who was eligible for consideration;
- d. The OM requires a three-stage consideration of every officer for FCS promotion- screening, interview and Peer Review. Different bodies undertake these.
- e. The Petitioner was cleared at each of the three stages for promotion to the post of Scientist 'G', as on 01.01.2007. His candidature was cleared again, in 2009 for the later year.
- f. Upon communication to the ACC for the Petitioner's clearance, comments and clarifications were sought from the DIT, which were given in respect of the points sought, on two occasions- 19.05.2008 and 22.12.2008.
- g. Based upon the note of the Establishment Officer (who was of the opinion that the materials in the form of CV and the work undertaken by the petitioner did not comprise technical field experience), the Cabinet Secretary put up a note to the ACC that the petitioner's name may not be recommended. This note ultimately prevailed; the ACC accepted the Cabinet Secretary's

recommendation.

- h. For the vacancy, which arose for the subsequent year, i.e. as on 01.01.2009 too, the same process- clearance by the screening committee, recommendation by the Selection Committee, and approval of the DPRC was undertaken. The petitioner was selected or cleared at each of these three stages/levels. However, the ACC did not approve the recommendation. Here, the official note, which prevailed was that there was no significant change in his experience profile.

18. The official files were furnished by the Union of India. They reveal that on 08.04.2008, the Establishment Officer, after going through the materials stated, *inter alia*, that:

“From the proposal, it was not evident that the two officers fulfill the condition of field experience of five years which is one of the essential conditions for promotion as Scientist ‘G’, as the proposal as well as the minutes of the Departmental Peer Review Committee did not have any mention in this regard. The Department had, therefore, been requested to confirm the fulfillment of this condition. On the basis of reply received from the Department of Information Technology, a note was submitted for consideration by the ACC at pp.5-10/ante. The clarification of the department as regard fulfillment of the full condition was submitted in para 19 at page 9/ante. The CS, however, has desired the position to be checked out from the Department.”

In the light of this note – which had taken into consideration the observations of the Secretary to ACC - that the recommendations of the Selection Committee and the DPRC had not “specifically indicated” the issues such as field experience, the DIT was again asked to furnish its comments. These comments – as noticed earlier, were forthcoming by way

of a letter, dated 19.05.2008. The clarifications were duly taken note of and the Secretary to ACC in para 7 of the note dated 19.06.2008 duly reflected the view of the DIT in the following terms:

“.....Further, Information Technology being a rapidly moving area with high rate of obsolescence, it is imperative for the officers of the Department to keep themselves abreast of latest global developments, analyze best practices and then formulate road map for implementation of various projects. All these efforts are at par with field experience as required in the DoP&T OM referred to above. Based on the above detailed activities of the Department the review cases pertaining to years 2004, 2005 & 2006, (after the transitional period of five years) for promotion to grade Scientist ‘G’, had been duly approved by HLPRC/ACC. The officers presently, recommended for promotion by the Selection Committee & DPRC namely, Shri S.S. Garg and Shri Sunil Alag, Scientist ‘F’ as Scientist ‘G’, under FCS, have also been involved in the similar activities and well covered by the DOP&T OM dated 09.11.98, as evident from the detail of contributions made by them (furnished earlier p.12/c & p.15/c).”

19. This note was seen by the Cabinet Secretary six months later on 08.12.2008 when an interesting note was appended, stating that he (CS), *“has desired that the proposal may be processed in terms of the decisions taken in the meeting on 1.12.08, as per minutes intimated vide No.501/2/6/2007-IA.V dated 8.12.08.”* As to what happened on 01.12.2008 can only be gathered from a subsequent cabinet note – of the Secretary to the ACC of 25.02.2009:

“6. On 1.12.2008 a meeting was held in the Cabinet Secretariat to discuss cases of FCS of different departments. The file was received back with the direction to process the case in terms of the decision taken in the said meeting held on 1.12.08

(p.21/N). As per para 3(iii) of the minutes of the meeting dated 1.12.2008, the administrative Ministries/Departments are required to furnish detailed justification highlighting relevant aspects, the innovative activity of the Scientist for consideration of promotion of the officer. The Department of IT was requested to take necessary action accordingly.....”

In response, the DIT wrote another letter on 22.12.2008, which *inter alia* stated as follows:

“The S&T officers of this Department have been contributing to the R&D in Electronics Industry and Information Technology under various Programmes/Schemes. They are in constant touch with the implementation agencies right from the conceptualization stage to completion, to get the projects implemented successfully and this qualifies as field experience. It requires rigorous monitoring of the project at various stages including at the place of implementing agency in creating requisite infrastructure. The S&T officers of this department are highly qualified as well as skilled and contributing to the technology development & application in various areas such as agriculture, rural health & education, telemedicine, water sector, language technology, under privileged segments of societies etc. Apart from that in the field of Information Technology the scientists are also engaged in various activities & services such as E-Governance, Media Lab Asia, Indian Computer Emergency Response Team Cyber Security etc. Apart from this the Department has two attached offices viz. NIC and STQC Dte. The STQC Dte has a testing, calibration, standardization, training and ISO Certification Scheme. IT being the latest gadgets in the hands of terrorists and criminal, Cyber Security, Computer Emergency Response teams and IT Act has become inevitable and integral parts of Internal Security system. Besides all this Department also manages six autonomous bodies engaged in field activities.

As regards the composition of the Selection Committee, it is informed that out of the four members two are Secretary level

Officers and the remaining two are senior technical experts. Three of the members are from outside the Department. Hence, scientists are judged for promotion at the highest level of parameters without any prejudice. In addition to this we are also enclosing justification and the innovative activities of individual officer due for promotion.

2. In this regard please find enclosed one page write up of all Scientists who are eligible for promotion from Scientist F to G as on 1.1.07 (two officers) and 1.1.2008 (seven officers) for perusal and consideration.”

20. The dossier/annexure to the said letter dated 22.12.2008 listed the innovation, its utility and academic excellence/field experience of the petitioner. The relevant extracts of the same are reproduced below:

“Name: Sunil Alag, Scientist “F”

<i>Innovation</i>	<i>Academic Excellence</i>
<i>Major initiatives undertaken:</i> <i>1. 1. <u>E-Learning Initiative</u></i> <i>(2002 onwards): With a view to make available learning knowledge resources on any time, anywhere, any place basis for learners conceptualized/evolved/implemented 11 projects, with an outlay of Rs.6.6 crore, in the following thrust areas:</i> <i>• - Development of tools and techniques.</i> <i>• - Multimedia rich and interactive Content Development</i> <i>• - Capacity</i>	<i><u>Field Experience:</u></i> <i>• ☐ M. Tech Integrated Electronics and Circuits, IIT Delhi.</i> <i>• ☐ Worked in Bharat Electronics Ltd. Ghaziabad (1982 to 87) in D&D Division on Design of Defense Electronic Eqpt.</i> <i>• ☐ Worked in DOE/DIT from 1987 to till date in the following areas:</i> <i>• - Conceptualized, initiated and implemented e-learning/Digital Library/HRD Technology Dev.</i> <i>• - Drafted Semiconductor</i>

Buildup/Teacher training • - Human Resource Development 1. 2. <u>Digital Library Initiative</u> (July 2005 onwards): With a view to strengthen country's identity, by digitally preserving national heritage and intellectual output, promoted "Digital Library" initiatives. This included: • - Digitizing & preservation of new IPR free physical data and lining digital data created under DIT initiatives. • - Address Policy issues: Redefine "Book" and provision to deposit e-book under delivery of Books and Newspaper Act; IPR/Digital Rights Management; Identify/adopt/adapt metadata standards etc. • - Technological Issues: Design and Development of tools and technologies for digital libraries. 1. 3. <u>Information Security Education and Awareness Programme</u> (2003-July 2005): Information security is a key enabler for networked society. With this in view, conceptualized and initiated programme, with outlay 70	Integrated Circuits Layout Design Act and Rules with Law Ministry. • - Member Technical of the UNDP sponsored Project entitled Center for VLSI Design and Prototyping in DIT. <u>Academic Excellence</u> Imparted six trainings programme (each one week duration – 40 hrs) on VLSI designing using VHDL to faculty of more than 60 engineering colleges/polytechnics from 1998-2001.
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crores and duration 5 years, at 40 Academic Institutions (5 Resource Centres IITs & IISc etc., 35 Participating Institutions NITs, Engineering colleges, Government Societies etc.) for manpower development in e-security. The components of the programme include – offering information security (degree/diploma/short-term) courses at educational institutes, capacity buildup, mass awareness, training government officers etc. Project presently being implemented by HRD Div. 2. 4. <u>Microelectronics initiative</u> (2001): With a view to protect IPR in VLSI design, drafted Subordinate Legislation under “Semiconductor Integrated Circuits Layout Design Act 2000.” The same was vetted and notified by Law Ministry.	

21. The Cabinet Secretariat's note of 13.03.2009, after highlighting that in the meeting dated 01.12.2008 in relation to the FCS, DIT was requested to indicate experience etc., stated as follows:

“3. The Department has written that the officers of the Department have been contributing to the R&D in electronic

industry under various programmes. They are in constant touch with implementation agencies, monitoring their work and this would qualify as field experience. The Scientists are also engaged in various activities and services such as e-Governance, Media Lab Asia etc.

4. *Establishment Officer has stated that from the bio-data and the note regarding their achievements, made available by the Department, it is seen that the Scientists are mainly engaged in application of scientific techniques, without directly contributing towards R&D activities. Managing the 6 autonomous bodies of the Department cannot be taken as having requisite field experience. Hence, there is little justification in support of the proposal of the Department.*

5. *In the present case, the brief provided by the Department shows that the two officers are mainly engaged in application and promotion of scientific techniques in administrative capacities and have not achieved much by way of innovation.*

6. *Considering the above mentioned facts, the Appointments Committee of the Cabinet may reject the proposal as given in paragraph 1 above."*

22. The Cabinet Secretary's above note of 13.03.2009 was accepted, without any comment, by the ACC. This led to rejection of the three tier recommendation of the petitioner's name, for promotion to Scientist 'G', as on 01.01.2007.

23. For the post of Scientist 'G' which arose on 01.01.2009, the materials on record show that the Selection Committee had recommended his case on 06.12.2009. The DPRC recommended the petitioner for promotion in its meeting on 15.03.2010. This proposal was sent, for consideration, on 10.05.2010 by the Secretary to the ACC. The Cabinet Secretary directed it

to be processed by his note, dated 29.06.2010. The noting of 11.08.2011 shows that the cases of five Scientists of DIT and the case of one Scientist from the Ministry of Environment and Forest were cleared in 2009 whereas similarly placed cases of earlier period were pending. This had resulted in litigation. The note also recommended that all cases had been gone through and since there were no alternative promotional avenues in the old FCS guidelines and also that individual cases were reviewed by DPRC, which cleared the names for promotions, the matter could be re-examined. These issues were also referred to the Civil Services Board (CSB) (Secretary Level Body) which had recommended in its meeting on 23.05.2011 that all the cases – including that of the petitioner be placed before the ACC. This proposal in respect of the petitioner had contained the following observations – reproduced from the DIT note of 08.04.2010:

“5. Shri Sunil Alag has contributed in drafting a Subordinate Legislation under “Semiconductor Integrated Circuits Layout Design Act”, which has come into force. Promoted applications of electronics and Information Technologies in education in new and emerging area of e-learning. Technologies developed included – Development of Open Source Brihaspati Learning Management System, Real-time captioning of content in Indian languages, Quality Assurance Frame work etc., Development of Multimedia rich content in e-security, engineering courses, Animation and Multimedia etc., Capacity Building – 240 Teachers (each programme of 04 weeks). These successful pilot initiatives have led to mega projects on ICT by MHRD. In the Digital Library area, identified content and institute and set up complete Digital Library Chain. Efforts in this area has led to strengthen country’s identity by digitally preserving national heritage and intellectual output.

6. *Shri Sunil Alag, an M.Tech has sufficient experience of more than 05 years in executing the scientific projects and fully meets the eligibility criteria laid down in the FCS guidelines. The recommendations of the DPRC have been approved by the Hon'ble Minister for Communications & Information Technology."*

24. Ultimately, however, when the final consideration took place, the Cabinet Secretary went by the note of the Additional Secretary dated 21.10.2011. In this statement, after recounting the facts pertaining to the vacancy as on 01.01.2007, in para 9, the note stated, *".....From the above it is seen that no significant achievements have been put forward by the Department. As such there appears no justification to suggest a change in the decision of the ACC in his case....."*. The ACC merely accepted this view and rejected the proposal and consequently the petitioner was again overlooked for promotion as Scientist 'G'.

25. It is evident from the above that at all material times, the Selection Committee and the DPRC, both of which comprised of experienced and skilled individuals in the field, applied the Office Memorandum of 1998 and were of the opinion that the petitioner had to be promoted as Scientist 'G'. When the first recommendation in respect of the vacancy as on 01.01.2007 was received, queries were raised as to whether he possessed field experience. The DIT replied on 19.05.2008. In the light of these facts, the Cabinet Secretary appears to have fallen back upon minutes of meeting which took place subsequently, i.e. on 01.12.2008 and directed in his note on 08.12.2008 that the matter be re-examined – and directed that the DIT be asked to clarify the issue. The DIT did so, even more specifically stating what according to it is "field experience". This letter crucially also enclosed

the “innovation” which the petitioner was credited with and the nature of experience he had. Nevertheless, when the case was put up and ultimately his candidature rejected by ACC, what prevailed was the original impression of the Establishment Officer as endorsed by the Cabinet Secretary that he did not possess requisite field experience and that the experience which he did possess was mere application of scientific techniques. This opinion prevailed and his candidature was rejected even for the purpose of Scientist ‘G’ as on 01.01.2009.

26. Thus on two separate occasions, the petitioner was declared fit for promotion to Grade “G” by all the relevant statutory entities, composed of experts in the field. These included the Screening Committee, the Selection Committee, and the Departmental Peer Review Committee. The question before this Court therefore is whether, going by the record, the ACC was justified in nonetheless rejecting the petitioner’s promotion. The ACC’s decision, as is evident from the excerpts above, was based on the argument that the petitioner’s task had been limited to management of autonomous bodies, and that consequently, he had failed to achieve the necessary innovative contributions that were required by the FCS. In this context, it is important to examine some of the communications between the DIT and the ACC, which are on record. In its letter, dated 19.5.2008, for instance, the Department wrote:

“It may be noted that DIT is a multi-disciplinary department with two attached officers viz i) NIC involved in the task of Information Technology and ii) STQC, which involved in testing, calibration, training and ISO certification schemes. There are also six autonomous societies under the administrative control

of DIT. These Societies are engaged in lot of field work both research and development in nature. The S&T officers of this Department are well qualified and skilled and meet the guidelines of DoPT OM dated 09.11.98. The S&T activities of this Department are directly linked to R&D in terms of promoting the scientific activities and services.

The S&T officers of this Department have been contributing to the R&D in Electronics Industry and Information Technology under various Programmes/Schemes. They are in constant touch with the implementation agencies right from the conceptualization stage to completion to get the projects implemented successfully and this would qualify as field experience. It requires rigorous monitoring of the project at various stages including at the place of implementing agency/organisation, assisting the implementing agency in creating requisite infrastructure i.e. technical manpower and setting up labs etc. by augmenting all the available resources at various places and convening meetings, from time to time, of the Project Review and Steering Groups (PRSG) which comprises of technical experts from academia, industry etc. This exercise calls for able guidance, administrative skill and technical capabilities in terms of subject specific and domain knowledge, understanding the research problem which is taken up for development for technical solution.”

Again, in its letter dated 22.12.2008, (in answer to a query from the ACC Secretariat) the Department re-emphasized:

“The S&T officers of this Department have been contributing to the R&D in Electronics Industry and Information Technology under various Programmes/Schemes. They are in constant touch with the implementation agencies right from the conceptualization stage to completion, to get the projects implementing successfully and this qualifies as field experience. It requires rigorous monitoring of the project at various stages

including at the place of implementing agency in creating requisite infrastructure.”

27. It is clear from both these letters, that the DIT (where the petitioner worked, and which assessed his performance and functioning as well as contained technical experts of all the fields related to the subject matter) provided a detailed job description of the applicants (including the petitioner), and explained how scientists involved in management tasks (such as the petitioner) fit the requirements of the FCS scheme. On the other hand, the ACC note merely assumed that management of bodies does not amount to innovative contribution, and goes on to restate the same.

28. There can be no debate about the executive government’s decision on the suitability – on the merits of an officer, while deciding whether to position him or her in a particular post. The wisdom of the executive cannot be gone into (the hands off “merits review” advocated in the *Centre for Public Interest Litigation (supra)*). However, what is open to review is the process of decision-making. Here, procedural regularity (adherence to prescribed guidelines and criteria, in regard to selection to ensure fairness, objectivity and equality); application of administrative law principles (taking into account relevant factors, eschewing irrelevant factors, applying the mind, objectively to the facts and disclosing a discernable and *relevant rationale* for the decision), adherence to prescribed statutory provisions (wherever existing), *bona fide* use of power and absence of any bias are as applicable in regard to appointments made by the Union Cabinet, as any other.

29. Authorities have ruled that the ACC can differ and refuse to appoint

an officer to a post, despite a recommendation by the selection committee or Departmental Promotion Committee(DPC). The ACC however has to record reasons while differing with DPC (*Union of India v N.P. Dhamania* 1995 Supp (1) SCC 1.) In a recent decision (*H.M. Singh v Union of India* 2014 (3) SCC 670), the Supreme Court held that rejection of a case recommended for promotion should be for valid and justifiable reasons. There, the officer was denied the post of Lieutenant General, on the ground that his extension (in service) was unwarranted. The Court held that:

“23. While dealing with the issue of consideration of the appellant’s claim for onward promotion to the rank of Lieutenant General, it is necessary for us to also conclude by observing, that had the claim of the appellant not been duly considered against the vacancy for the post of Lieutenant General, which became available with effect from 1.1.2007, we would have had to hold, that the action was discriminatory. This because, of denial of due consideration to the appellant, who was the senior most eligible serving Major General, as against the claim of others who were junior to him. And specially when, the respondents desired to fill up the said vacancy, and also because, the vacancy had arisen when the appellant still had 14 months of remaining Army service. Surely it cannot be over looked, that the Selection Board had singularly recommended the name of the appellant for promotion, out of a panel of four names. In such an eventuality, we would have no other alternative but to strike down the action of the authorities as being discriminatory and violative of Article 16 of the Constitution of India.

24. The deliberations recorded by us hereinabove are incomplete, inasmuch as, we have not answered the pointed objection raised by the learned senior counsel for the respondent nos. 1 and 2, namely, that an officer is not entitled to promotion during the period of extension in service. For the instant objection raised at the hands of the respondents, it is necessary to refer to the deliberations of the Appointments Committee of

the Cabinet, and specially paragraphs 8 and 9 thereof. A collective reading of the paragraphs 8 and 9 reveals an extremely relevant objective, namely, situations wherein an officer attains the age of retirement without there being a vacancy for his consideration to a higher rank, even though he is eligible for the same. Such an officer who is granted extension in service, cannot claim consideration for promotion, against a vacancy, which has become available during the period of his extension in service. The above conclusion drawn by us is clearly apparent from the paragraph 9 of the proceedings of the Appointments Committee of the Cabinet. In fact in the operative part of the proceedings recorded in paragraph 11, it has been noticed, that "...extensions motivated by a promotion in the offing during the extension period cannot be allowed..." We can derive only one meaning from the above observations, namely, extension being granted for promotion against a vacancy in the offing. That is to say, retention in service, so as to consider an officer for a vacancy, which has not become available prior to his retirement, but is in the offing. The above reason recorded in the operative part of the proceedings of the Appointments Committee of the Cabinet, is laudable and legal. Insofar as the present controversy is concerned, there is no doubt whatsoever, that a clear vacancy against the rank of Lieutenant General became available with effect from 1.1.2007. At that juncture, the appellant had 14 months of service remaining. It is not as if the vacancy came into existence after the appellant had reached the age of retirement on superannuation. The present case is therefore, not covered by the technical plea canvassed at the hands of the learned senior counsel for the respondents. The denial of promotion to the appellant mainly for the reason, that the appellant was on extension in service, to our mind, is unsustainable besides being arbitrary, specially in the light of the fact, that the vacancy for which the appellant was clamouring consideration, became available, well before the date of his retirement on superannuation. We have, therefore, no hesitation in rejecting the basis on which the claim of the appellant for onward promotion to the rank of Lieutenant General was declined, by the Appointments Committee of the Cabinet.

25. *In view of the fact, that we have found the order of rejection of the appellant's claim for promotion to the rank of Lieutenant General, on the ground that he was on extended service to be invalid, we hereby set aside the operative part of the order of the Appointments Committee of the Cabinet. It is also apparent, that the Selection Board had recommended the promotion of the appellant on the basis of his record of service, past performance, qualities of leadership, as well as, vision, out of a panel of four names. In its deliberations the Appointments Committee of the Cabinet, did not record any reason to negate the aforesaid interference, relating to the merit and suitability of the appellant. We are therefore of the view, that the appellant deserves promotion to the rank of Lieutenant General, from the date due to him. Ordered accordingly. On account of his promotion to the post of Lieutenant General, the appellant would also be entitled to continuation in service till the age of retirement on superannuation stipulated for Lieutenant Generals, i.e., till his having attained the age of 60 years. As such, the appellant shall be deemed to have been in service against the rank of Lieutenant General till 28.2.2009. Needless to mention, that the appellant would be entitled to all monetary benefits which would have been due to him, on account of his promotion to the rank of Lieutenant General till his retirement on superannuation, as also, to revised retiral benefits which would have accrued to him on account of such promotion. The above monetary benefits shall be released to the appellant within three months from the date a certified copy of this order becomes available with the respondents."*

30. In *R.S. Mittal v Union of India* 1995 (Supp) (2) SCC 230, the Supreme Court held that when an officer or employee is selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit, ordinarily there is no justification to ignore him for appointment and that there has to be a justifiable reason to decline to appoint a person who is on the select panel. Likewise, in *A.P. Aggarwal v Govt of*

NCT of Delhi 2000 (1) SCC 600, it was held that:

“11. In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said, that the instructions contained in the Office Memorandum dated 14.5.87 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory 'requirement of the Statute. It is not therefore open to the Government to ignore the panel, which, was already-approved and accepted by it, and resort to a fresh, selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any stage that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection.”

31. Thus executive decision-making in regard to public appointments is to conform to public law and Constitutional standards. It is insufficient for a state agency or authority to rest its decision on a bald or superficial appreciation of the materials in the circumstances of any given case. The record should manifest that there was due application of mind, which preceded the decision and that such decision was impelled by reasons which were germane or relevant to the subject matter. The reasons may not necessarily be elaborately spelt out; inherently, executive decision making follows a pattern different from judicial reasoning. Yet, the decision must be founded on a discernable and germane *rationale* or applicable principle.

32. A pertinent decision on the subject is *Rajesh Awasthi v Nandlal Jaiswal* 2013 (1) SCC 501. The court had examined the appointment to the Electricity Regulatory Commission under the Electricity Act, 2003; the relevant provision (Section 84 (1)) stated that the Chairperson and members “shall be persons of ability and integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce or management.” The High Court had after considering the minutes of the Selection Committee as well as the bio data, concluded that the statutory requirements had not been fulfilled. The Supreme Court repelled the appellant’s contention of judicial review overreach. *Dipak Misra, J.*, who delivered a concurring judgment, emphasized the necessity of adhering to the statute, and most crucially, the necessity of intellectual objectivity, which is to be brought to bear while considering the candidature of individuals:

“25 It is manifest in the selection of the appellant that there is absence of “intellectual objectivity” in the decision making process. It is to be kept in mind a constructive intellect brings in good rationale and reflects conscious exercise of conferred power. A selection process of this nature has to reflect a combined effect of intellect and industry. It is because when there is a combination of the two, the recommendations as used in the provision not only serves the purpose of a “lamp in the study” but also as a “light house” which is shining, clear and transparent.”

33. This Court finds that to the extent that the ACC in this case relied on reasons and file notings ultimately endorsed by the Cabinet Secretary for its decisions to override two expert bodies on two separate occasions, as well as the elaborate explanations of the DIT. The said decisions – rather the

reasons on which they are founded- are so sketchy as to be almost non-existent, and simply make assertions of non-contribution to innovative work. The detailed FCS requirements, and the equally detailed accounting provided by the DIT had clarified any legitimate doubt in this regard as to the Petitioner's possessing field experience. This was based on the conscious understanding of the issue, i.e. whether the petitioner possessed field experience, had any innovative contributions to his credit, etc. These innovations included Digital Library initiatives i.e. digitizing and preservation of new IPR free physical data and lining digital data created under DIT initiatives; addressing policy issues such as redefine what is a "book" and formulation of provision to deposit e-books under delivery of Books and Newspaper Act; IPR/Digital Rights Management; identify/adopt/adapt metadata standards etc. He also conceptualized and initiated a programme for information security education and awareness, with an outlay of ₹70 crores, at 40 academic institutions. He also conceived and was instrumental in the drafting of the Semiconductor Integrated Circuits Layout Design Act, 2000. The ACC had nothing to contradict that these innovations and the experience indicated to it by the DIT was not the requisite field experience. The Court is of opinion that, even on the exercise of its limited powers of review, the ACC's decision is arbitrary, and cannot stand. This Court also finds considerable force in the submission that if the key component under the FCS scheme was "innovation", then the best judges of such a quality must be field experts. There is nothing on record to show that the ACC's overturning of expert opinion was grounded on any expert input; it purely went by bureaucratic input that such innovation and experience was mere application of scientific knowledge. The ACC's

decision not to promote the Petitioner therefore, cannot be upheld; it is hereby quashed.

34. The question to be considered next is the nature of direction to be issued. Undeniably the petitioner's name was cleared by the DPRC, which is the last rung in the selection process, on 14-08-2007. The time taken between this date and 13-03-2009 (when the recommendation was finally rejected) was on account of the clarifications sought from the DIT by the ACC and the Cabinet Secretariat. The first of these was sought in April 2008 and given on 19.05.2008. The vacancy or consideration was in respect of Scientist 'G' as on 01.01.2007. Although the decision was delayed, there is no indication that this was on account of any special reason *vis-à-vis* the petitioner; there is also no allegation of *mala fides*. Resultantly, the court concludes that the delay of almost two years – unusual considering the senior level of the post in a scientific establishment- was for legitimate and *bona fide* reasons. At the same time, this decision became a barrier for an objective consideration of the petitioner for the later year, i.e. as on 01.01.2009; ultimately for that year too, the same reasons – which led to rejection of recommendations for his promotion earlier (as on 01.01.2007) prevailed and he was denied the post of Scientist 'G'. In these circumstances, ends of justice would be met with if the respondents are directed to promote the Petitioner with all consequential benefits to the post/position of Scientist 'G' effective from 01-04-2009. A direction to that effect is issued; the respondents shall issue appointment letter and consequential orders to that effect, also fixing the petitioner's pay scale and granting notional increments for intervening years – within four weeks from

today.

35. The writ petitions are allowed in the above terms. In the circumstances of the case, there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

VIPIN SANGHI
(JUDGE)

MAY 28, 2015

