

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

+ **W.P.(C) 3919/2015**

Reserved on: 24th October, 2016
Date of decision: 8th December, 2016

G.S. DHODI

..... Petitioner

In person.

Versus

GOVT. OF NCT OF DELHI & ORS.

.... Respondents

Through: Mr. Vikrant Naraya Vasudeva,
Advocate for R-1, 2 & 4.
Mr. Dev P. Bhardwaj, CGSC for UOI.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

SANJIV KHANNA, J.

G. S. Dhodi, the petitioner in this writ petition impugns order dated 18th July, 2014 passed in OA No. 2208/2012 by the Principal Bench of the Central Administrative Tribunal.

2. The impugned order holds that the petitioner has been rightly denied non-functional scale of Rs.8000-13500 (pre-revised) with effect from 1st January, 1996 on notional basis and with effect from 1st December, 2006 on actual basis. The petitioner had also prayed for setting aside or quashing the orders dated 17th March, 2011 and 20th March, 2012, by which his prayer for grant of non-functional scale of Rs. 8000-13,500 was rejected by the

respondent-Government of National Capital of Delhi (GNCTD, hereafter). The petitioner seeks grant of consequential benefits, arrears etc. as well as revision of his retirement benefits.

3. The petitioner was appointed as Lower Division Clerk in Delhi Administration (now GNCTD) in 1971. He was promoted to Grade-I (DASS) in 1989 and to DANICS with effect from 12th April, 2001.

4. The GNCTD vide order dated 1st February, 2007 had decided to grant non-functional scale of Rs.8000-13500 to ad-hoc appointees to DANICS on completion of four years of regular service in Grade-I (DASS) with effect from 1st December, 2006, subject to vigilance clearance. This order was to be effective from 1st December, 2006. However, by a subsequent order dated 19th October, 2007, the earlier order dated 1st February, 2007 was partially modified. It was decided to grant non-functional scale of Rs.8000-13500 in Grade-I (DASS) with retrospective effect, on notional basis with effect from 1st January, 1996, to those who have been appointed as ex-cadre post of DANICS on an ad-hoc basis and with actual benefit, on account of such re-fixation of pay being with effect from 1st December, 2006. The GNCTD issued another clarification dated 23rd August, 2007 referring to various letters received from different departments relating to grant of non-

functional scale. In response to query No.3, the clarification given was as under:-

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3	Whether the vigilance clearance is required for the date on which the officer has completed four years of regular service as Grade-I/Sr. PA or current vigilance clearance is required?	The Vigilance clearance is to be ascertained as on the date on which an official become eligible for non-functional grade, which came into effect 1.12.2006. However, if an officer had completed four years of regular service prior to 1/12/2006, Vigilance Status in his case should ascertain as on 1/12/2006
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As clarification given to query No.4 is also relevant, the same is also reproduced below:-

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4	Whether the upgradation of the scale of Grade-II (DASS) is application to ex-cadre post or not?	This up-gradation/grant of non functional scale issued vide order no.2/50/2003/S.I/Pt/38 and 2/50/2003/S.I/Pt/39 and subsequent corrigendum 2/50/2003/S.I/Pt/40 dated 1/02/2007 is applicable only in
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		respect of Grade-I (DASS) and Grade-II (Dass)
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5. Subsequently, the respondents issued a further clarification vide Office Memorandum dated 14th February, 2008, the relevant portion of which reads as under:-

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Sl. No.	Clarification	Explanation
1	Whether vigilance clearance is necessary for grant of non-functional scale of Rs.8000-13500 to Gr.I (DASS)/Sr. PA/Adhoc DANICS.	The non-functional scale of Rs.8000-275-13500 is admissible on completion of four years of regular service as Gr.I (DASS)/Sr. PA and also to the Gr.I (DASS)/Sr.PA who have been appointed to ex-cadre post of DANICS on ad hoc basis, subject to their vigilance clearance at the time of grant of Non-functional scale.

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6. However, grant of non-functional scales could not be implemented, inspite of the said order, for lack of clarity and as the issue was referred to the Government of India. The Government of India by their letter dated 9th April, 2010 informed the GNCTD that the earlier orders regarding grant of non-functional scale to Grade-I officers of DASS cadre, on completion of four years of regular service, had been examined in consultation with the Ministry of Finance, Department of Expenditure, i.e. the competent authority. Grant of non-functional higher pay-scale was without approval of the Ministry of Finance and hence void *ab initio*. The Ministry of Finance

taking cognizance of the report of the Sixth Pay Commission had advised immediate withdrawal of orders granting non-functional pay-scale of Rs.8000-13500 to Grade-I (DASS) officers and to make recoveries. The matter was again referred to the Department of Expenditure in the Ministry of Finance for re-consideration. By letter dated 27th January, 2010, the Department reiterated their earlier stand. However, it was observed that since the post of Grade-I (DASS) was placed in the pre-revised pay-scale of Rs.6500-10500, the post of Grade-I (DASS) was covered by the Implementation Cell, Department of Expenditure, Ministry of Finance OM dated 13th November, 2009.

7. Thereafter, the competent authority in GNCTD constituted a Committee to look into all aspects of grant of non-functional scale of Rs.8000-13500 to Grade-I (DASS) officers, vide order No. 161 dated 12.05.2010. This Committee was to look into all aspects, including references received from the Ministry of Home Affairs etc. and adoption of replacement pay-scales consequent to implementation of the Sixth Pay Commission's recommendations. The Committee came to the conclusion that grant of non-functional scale to Grade-I (DASS) was within the delegation of financial powers for creation of Group A to D posts, both on the plan and non-plan side. The salary of the staff was paid from the funds

of GNCTD and it would be impracticable to reverse the decision. These recommendations were approved by the Lieutenant Governor. In the Committee's view the recommendations were in consonance with the recommendations of the Sixth Pay Commission.

8. The aforesaid decision was communicated by the GNCTD to the Ministry of Home Affairs, Government of India on 15th November, 2012. Thereafter there was a time gap and the correspondence exchanged and position is unclear.

9. The Services Department of the GNCTD vide order No.56 dated 3rd February, 2015, was pleased to grant non-functional scale to Grade-I (DASS) officers who had completed four years of regular service in Grade-I (DASS) with effect from 1st January, 2006 as per Column Nos.5 and 6 of Part-B, Section II(1) of the First Schedule of the Central Civil Services (Revised Pay) Rules, 2008. The said employees were entitled to Grade Pay of Rs.5400 in Pay Band-3. This order refers to the power conferred on the GNCTD vide Notification S.O. 853 dated 24.09.1998 of the Government of India, and clarification conveyed vide Government of India, Ministry of Home Affairs letter No. 14012/02/2008-Delhi-I dated 12.01.2015.

10. The petitioner herein, who had retired on 31st December, 2010, as *ad-hoc* DANICS officer made a complaint to the Public Grievance Commission

that he had been denied non-functional scale of Rs.8000-13500 as he had worked on the post of Grade-I (DASS) for 11 years from 12th May, 1989 to 12th April, 2001. Before the Public Grievance Commission, it was stated by the Directorate of Vigilance that two cases for initiation of major penalty proceedings under Rule 14 of the of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 were pending against the petitioner as on 1st December, 2006, though no charge sheet had been issued against him as on 1st December, 2006. The Chairman of the Public Grievance Commission opined that as charge sheets had not been issued, non-functional pay-scale should be given to the petitioner. He relied upon the clarification given by the Ministry of Personnel, Public Grievance and Pensions in OM dated 25th October, 2004 read with DOPT's OM dated 14th September, 1992 issued pursuant to the judgment of the Supreme Court in ***Union of India Vs. K.V. Jankiraman***, AIR 1991 SC 2010, recording that sealed cover procedure would be justified only when (i) the officer is under suspension, (ii) major penalty proceedings have been initiated and articles of charge have been served (iii) decision to prosecute the charged officer had been taken or charge sheet had been filed.

11. Pursuant to the aforesaid opinion expressed by the Public Grievance Commission, the matter was examined by the Directorate of Vigilance of

the GNCTD and it was pointed out vide letter dated 9th November, 2011 that the petitioner was cautioned vide order dated 21st February, 2008 in one disciplinary proceeding. In the second disciplinary proceeding, the petitioner was chargesheeted for major penalty vide memorandum dated 25th March, 2010 and the proceedings were in progress. By letter dated 9th August, 2012, the petitioner was informed that his representation for grant of non-functional pay-scale was under consideration by the Committee constituted vide the letter of the Government of India dated 9th April, 2010.

12. It was in these circumstances that the petitioner filed OA No.2208/2012 before the Tribunal in which the impugned order dated 18th July, 2014 has been passed.

13. Another fact, which may be noted, is that vide order dated 26th August, 2013, the disciplinary authority in the second charge sheet after considering the evidence and facts on record has imposed penalty of withholding of 10% of the monthly pension of the petitioner for a period of three years. Gratuity, it was directed, would be released if not otherwise required.

14. The petitioner, who had appeared in person, had submitted that grant of non-functional pay-scale to Grade-I (DASS) officers with four years of regular service was neither vacancy dependent, nor selection based. Thus,

the petitioner should have been granted the said non-functional grade as he was not facing any departmental proceedings as on 1st December, 2006. Reliance was placed upon decision in the case of ***K.V. Jankiraman*** (supra), for on the said date i.e. 1st December, 2006, no departmental proceedings were pending by issue of a charge sheet. Sealed cover procedure could not have been followed. Reference is also made to DOPT's Office Memorandum dated 14th December, 2007, wherein it is observed that vigilance clearance shall not be withheld due to filing of a complaint unless it is established, on the basis of at least a preliminary enquiry or on the basis of information that the concerned department already has in its possession, prima facie substance to verify the allegations regarding corruption, possession of disproportionate assets, moral turpitude or violation of the conduct rules. Vigilance clearance should not be withheld if the preliminary enquiry takes more than three months. There were other similar stipulations as well. It was observed that vigilance clearance would be decided on a case-to-case basis keeping in view the sensitivity of the purpose, gravity of the charges and the facts and circumstances in each case.

15. We find that there is incongruity and conflict between the petitioner's argument predicated on the decision in the case of ***K.V. Jankiraman*** (supra) and the reliance placed upon the Office Memorandum dated 14th December,

2007. ***K.V. Jankiraman's*** case dealt with 'sealed cover procedure' and not grant of vigilance clearance, which was subject matter of the Office Memorandum dated 14th December, 2007. In ***K.V. Jankiraman's*** case the issue in question was when departmental proceedings could be treated as pending and in that context, it was observed that sealed cover procedure would apply when the officers who are under suspension, or against whom a charge sheet had been issued, or a criminal trial was pending. It would not apply when the allegations against the employee were pending investigation [see decision of a single Judge of this Court in ***Y.N.P. Sinha Vs. Union of India & Others***, (2002) 95 DLT 186].

16. The petitioner has also relied upon the decision in the case of ***Coal India Ltd. and Ors. Vs. Saroj Kumar Mishra***, (2007) 9 SCC 625. In the said case, referring to the concept of vigilance clearance, the finding of the Supreme Court was that the employer, i.e. the appellant, had not pleaded or setup a case that pursuant to the complaint received they had satisfactorily arrived at a conclusion that a charge sheet was likely to be issued on the basis of the preliminary enquiry held in that behalf, or otherwise. The earlier decision of the Supreme Court in ***Manoj Kumar Singh Vs. The Coal India Ltd. and Ors.*** dated 2nd January, 2006 and subsequently reported as (2006) 13 SCC 205 was held to be inapplicable, for this decision did not lay

down any ratio decidendi. In ***Manoj Kumar Singh*** (supra), a decision to take action against the employee had been taken and, therefore, he was not granted vigilance clearance. These judgments do, however, draw a clear distinction between sealed cover procedure and vigilance clearance.

17. We would now like to refer to other case law on the subject of vigilance clearance. In ***The Central Provident Fund Commissioner Vs. Ashok Dubey*** 1993 Supp (2) SCC 708, an officer of Canara Bank was selected by the Union Public Service Commission for appointment to the post of Assistant Provident Fund Commissioner in the Employees' Provident Fund Organisation. A letter of appointment etc. had been issued by the Provident Fund Department and the employee had also sent a letter of resignation to the bank. At that time, the bank refused to grant vigilance clearance as departmental proceedings had been initiated and were pending. The letter of resignation was not accepted by the bank. It was held that vigilance clearance or integrity certificate was absolutely necessary and, therefore, the High Court had erred in granting the relief to the petitioner that he should be appointed to the new post.

18. In ***Union of India Vs. Pushpa Rani and Ors.***, (2008) 9 SCC 242, the Supreme Court referred to the concept of cadre, which means strength of

service or part of service sanctioned as a separate unit, and the concept of promotion and non-financial upgradation, and it was opined as under:-

“23. In the service jurisprudence which has developed in our country, no fixed meaning has been ascribed to the term “cadre”. In different service rules framed under proviso to Article 309 of the Constitution as also rules framed in exercise of the powers of delegated legislation, the word “cadre” has been given different meaning.

24. In *A.K. Subraman v. Union of India* [(1975) 1 SCC 319 : 1975 SCC (L&S) 36] a three-Judge Bench of this Court while interpreting the provisions contained in Central Engineering Service, Class I, Recruitment Rules, 1954, observed as under: (SCC p. 328, para 20)

“20. ... The word ‘grade’ has various shades of meaning in the service jurisprudence. It is sometimes used to denote a pay scale and sometimes a cadre. Here it is obviously used in the sense of cadre. A cadre may consist only of permanent posts or sometimes, as is quite common these days, also of temporary posts.”

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31. In legal parlance, upgradation of a post involves the transfer of a post from the lower to the higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment — *D.P. Upadhyay v. N.R. Baroda House* [(2002) 10 SCC 258 : 2003 SCC (L&S) 250] .

32. The word “promotion” means “advancement or preferment in honour, dignity, rank or grade”. “Promotion” thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law the expression “promotion” has been understood in the wider sense and it has been held that “promotion can be either to a higher pay scale or to a higher post” — *State of Rajasthan v. Fateh Chand Soni* [(1996) 1 SCC 562 : 1996 SCC (L&S) 340] .

In the said case, the issue involved was whether there should be reservation in “financial upgradation” as per the scheme and the issue was answered in affirmative.

19. Reference can be also made to the judgment of the Supreme Court in *Union of India Vs. R.S. Sharma*, (2000) 4 SCC 394, wherein the employee had placed reliance upon *K.V. Jankiraman* (supra) to assert that sealed cover procedure can only be resorted to after the charge memo had been received or the charge sheet was filed, and till that time the employee cannot be denied promotion which he is entitled to. The said contention was rejected on the ground that the employee was not actually promoted even when the matter was pending in the Supreme Court and that sanction for prosecution had been issued in the meanwhile. Thus, even if the sealed cover procedure was not followed, the promotion could not have been granted, due to the intervening events.

20. The effect of the aforesaid decisions is that non-functional pay-scale would not be granted when the intervening events predicate non-grant of vigilance clearance. This precept would be good, and applicable, even in the case of a non-selection or non-vacancy based pay scale upgrade. When vigilance clearance is required, the issue from vigilance perspective has to be examined. Sealed cover procedure is applied to Departmental Promotion Committee meetings and the two operate independently.

21. An employee need not be promoted even after the Departmental Promotion Committee has been held and the employee is declared eligible and fit for promotion, in case the employee is facing departmental proceedings or prosecution, before he is actually promoted. This may happen when there is some time gap between the date when the Departmental Promotion Committee meeting was held and the date when the promotion is due to take effect.

22. We would, at this stage, like to refer to and examine the decision of the Supreme Court in *Union of India & Ors. Vs. Anil Kumar Sarkar*, (2013) 4 SCC 161. The facts of the said case are distinguishable and quite distinct and different from the facts of the present case. In *Anil Kumar Sarkar's* case as per the Departmental Promotion Committee held, the employee was considered and placed in the extended select list. Sealed

cover procedure was not followed as the conditions stipulated in *Jankiraman's* case (supra) were not applicable. The Supreme Court dismissed the appeal filed by the Union of India as the batch mates of the employee were promoted on 21st April, 2003, when neither charge sheet had been issued against the said employee, nor was he placed under suspension. There was, therefore, no reason why the respondent-employee could not be promoted along with his batch mates and juniors on 21st April, 2003.

23. The Union of India had placed reliance on clause 7 of the Office Memorandum dated 14th September, 1992, which provides as under:-

“7. A government servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in Para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until the conclusion of disciplinary case/criminal proceedings and the provisions contained in this letter will be applicable in his case also.”

Reliance placed on clause 7 was rejected observing that in the said case, as on 21st April, 2003 when the batch mates and juniors of the employee were promoted, the said conditions of clause 7 were not satisfied. In the facts of the present case, the factual position is different. It is not the case of the petitioner that any of his batch mates were promoted or granted non-functional grade, prior to the date when he was served with the two charge

sheets. Thus, when the case of the petitioner was to be considered for grant of non-functional scale, he had already been chargesheeted. Consequently, he could not be given vigilance clearance. The decision, therefore, in the case of *Anil Kumar Sarkar* (supra) is not applicable and does not support the petitioner.

24. We have referred to several office memoranda issued by the respondents from time to time. However, in the facts of the present case, it is the last Office Memorandum dated 14th February, 2008, which had clarified and crystallised the situation, holding that grant of non-functional scale of Rs.8000-13500 would be subject to vigilance clearance at the time of grant of the said scale. It is only after this Office Memorandum dated 14th February, 2008 was issued that the case for non-functional scales was considered and approved by the Committee and the said scales were granted vide order No. 56 dated 3rd February, 2015. By that time, the petitioner was facing the aforesaid charge sheets and hence, he was not granted vigilance clearance, without which he would not be entitled to upgrade to non-functional scale.

25. In the light of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed holding that the petitioner was rightly denied non-functional scale of Rs.8000-13500 for

want of vigilance clearance. In the facts of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(SUNITA GUPTA)
JUDGE

DECEMBER 8th 2016
NA

