

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No. 2876 of 2007**

Dr. S.C. Shrivastava S/o Shri K.S. Shrivastava, R/o Kabirdham, Tahsil-Kawardha, District -Kawardha

---- Petitioner**Versus**

1. State Of Chhattisgarh Through the Secretary, Department of Health and Family Welfare, DKS Bhawan, Mantralaya, Raipur (CG)
2. Additional Secretary Health And Family Welfare Deptt., D.K.S. Bhawan, Tahsil-Raipur, District -Raipur,
3. Director, Health Services , D.K.S. Bhawan, , Tahsil-Raipur, District - Raipur,
4. Secretary, C.G. Public Service Commission, Tahsil-Raipur, District -Raipur,
5. Dr. Anil Kumar Pandey E.N.T. Specialist, Posted At District, Hospital, Tahsil-Raipur, District -Raipur,

---- Respondents

Shri Prakash Tiwari, counsel for the petitioner/s.
 Shri R.K.Gupta, Dy.A.G. for the State.
 Shri Y.C.Sharma, counsel for PSC.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****10/04/2017**

The petitioner has filed this writ petition assailing correctness and validity of order dated 06/01/2007 by which respondent No.5, his junior has been promoted to the next higher post of Specialist (ENT) in supercession of the petitioner.

2. Quintessential facts necessary for decision of the controversy

involved in this petition are that the petitioner was initially appointed as Assistant Surgeon (ENT) in the services of the Health Department of the State. The petitioner, after his appointment in the year 1982, was regularised w.e.f. 01/01/1986. The petitioner holds Post Graduate Degree of ENT discipline. In the seniority list published on 05/07/2005, petitioner's name appeared at serial no.171 whereas respondent No.5 was placed down below at serial No.270. Vide order dated 06/07/2006, senior pay scale was granted to the petitioner. While the petitioner was expecting his promotion to the next higher post of Specialist which is of Class I post, it came as a rude shock when he came to know that by impugned order, though number of Assistant Surgeons in ENT have been promoted, two doctors i.e. respondent No.5 and one Dr. Pramod Mahajan have been promoted, who are junior to the petitioner. Dr. Anil Kumar Pandey was placed at serial No.270 whereas Dr. Pramod Mahajan was placed at serial no.381. Aggrieved by his supercession, the petitioner preferred representation which failed to evoke response of the State whereafter, the petitioner filed this petition.

3. Learned counsel for the petitioner made straight and simple submission before the Court that the petitioner being senior and there being nothing adverse to the petitioner, he ought to be promoted in preference to his junior. Learned counsel for the petitioner contends that the applicable rule in the matter of promotion of Public Service of the State of Chhattisgarh provides that the criteria for promotion from Class II to Class I post would be seniority-cum-fitness. This rule was not followed and on some unknown criteria, his juniors were promoted. One of the junior – Dr. Anil Kumar Pandey has been, therefore, impleaded as one of the respondents in the instant petition. It has been categorically asserted that the petitioner was never communicated any adverse remark, no departmental enquiry pending, no penalty imposed or otherwise any adverse remarks rendering him unfit for promotion.

4. Per contra, learned State counsel submits that petitioner's claim for

promotion has been duly considered by applying the criteria of seniority-cum-fitness. He submits that the petitioner is only entitled to be considered in accordance with the rules and once that consideration has taken place, no legitimate grievance could be raised as there is no vested right for promotion and the only right guaranteed under the rules is consideration for promotion. Learned State counsel further contended that the case of the petitioner and other officers were considered applying certain criteria of fitness that the integrity should not be doubtful and that for the purposes of assessment, ACRs of preceding five years would be taken into consideration and further that overall assessment should be atleast 'Good' and there should not be any remark of “घ”. Moreover, it was also decided that last remark out of five years should necessarily be “ख” or higher category and upon assessment of the five years ACRs, officer must have attained minimum 10 marks. He submits that applying this criteria, the service records of all the eligible officers including the petitioner were considered and the petitioner was not found fit for promotion.

5. In the present case, no specific return has been filed but the respondents have adopted the return filed in WPS No.637/2007 presumably for the reason that common issues of law as to what criteria should be adopted arises for consideration in both the cases. However, what has been stated in the return is that the case of the petitioner was considered and the petitioner was not found fit for promotion. In the present case also, the stand of the respondents is that the petitioner was considered and not found fit for promotion. Considering that the return discloses less and suppresses more relevant information, this Court had earlier directed the respondents to produce records of DPC. Today, a photo copy of minutes of meeting dated 31/10/2006 was placed for perusal of the Court by learned State counsel. The promotion in public service is governed by C.G. Public Services (Promotion) Rule, 2003 (for short 'the Rules of 2003').

“Rule 4 provides for determination of basis for promotion as below -

4. Determination of basis of promotion—(1) Promotion from Class IV to higher pay scale of Class IV, Class IV to Class III, Class III to higher pay scale of Class III, Class III to Class II, Class II to higher pay scale of Class II and Class II to Class I shall be made on the basis of “seniority subject to fitness”.

(2) Promotion from Class I to higher pay scale of Class I posts shall be made on the basis of “merit-cum-seniority”.

Rule 6 provides for promotion based on seniority subject to fitness.

1. xxxx

2. xxxx

3. xxxx

4. xxxx

5. The Departmental Promotion Committee shall assess the suitability of the public servants for promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the Departmental Promotion Committee shall see the record with particular reference to the ACRs for the years equal to the required qualifying service.”

6. From the aforesaid statutory prescription, it is clear that in the matter of promotion from the post of Assistant Surgeon to Specialist i.e. for promotion from Class II gazetted post to Class I gazetted post, the rules prescribes criteria as seniority-cum-fitness. The criteria of seniority-cum-fitness, in the absence of there being any specific meaning assigned to it under the rules, which construed as a criteria as entitlement for promotion of an employee on the basis of seniority unless there is anything adverse against him. Thus, fitness would mean that there is

nothing adverse against the employee in the sense that there is no adverse remark, no departmental enquiry pending or any penalty imposed or any other verified complaint of such a nature which constitutes an element of unfitness for promotion. If that is not there, the officer will have to be held fit for promotion.

The rule does not provide for any particular criteria for adjudging fitness. In the absence of any special provision made under the rules, the criteria of seniority-cum-fitness has to be understood in the manner that if there is nothing adverse against an employee, he should be treated as fit for promotion.

7. In the present case, State could not come out with any material to show that the petitioner was communicated any adverse remark or was graded as “घ” (poor) so as to constitute an adverse material. There is nothing to show that the petitioner has suffered any penalty in any departmental enquiry nor is there any material to show that any verified complaint constitute adverse material. It is not even the case where any departmental enquiry was pending on the date when petitioner's case was considered for promotion.

8. Contention of learned State counsel that fitness was required to be assessed on the criteria of being possessed of gradings of a particular minimum merit, if accepted, would become an assessment based on merit. The distinction between a criteria of seniority-cum-fitness, seniority-cum-merit and merit-cum-seniority needs to be underlined.

As has been disclosed herein above, where the criteria for promotion is seniority-cum-fitness, fitness is to be judged by considering whether there is any adverse material like the adverse entry, penalty, departmental enquiry, serious complaint which have been verified etc. This may also include the case of doubtful integrity. If there is no adverse material, the only natural conclusion would be that the officer is fit for promotion.

Where the criteria for promotion is seniority-cum-merit, the minimum benchmark of merit is required to be prescribed and all the officer who fulfill minimum benchmark of merit have to be considered for promotion in the order of their seniority.

In a case where promotion is based on merit-cum-seniority, more meritorious officer, though junior, march-past his seniors and supersedes them because in this case, selection is based on comparative merit assessment and not merely on fitness or based on any minimum benchmark of merit. That is how the three criteria of promotion differ from each other. For this conclusion, this Court placed reliance on the decision of the Supreme Court in the case of **B.V.Sivaih and ors. v. K. Addanki Babu and ors., AIR 1998 SC 2565.**

9. What has been submitted by learned State counsel and has also borne out from the photo copy of the minutes of meeting, a minimum benchmark of merit was fixed as a criteria for promotion by prescribing that the ACR grading should be atleast "Good", grading of the last year should be atleast "ख" or better grading and the minimum benchmark of 10 to be secured. This kind of criteria is essentially a criteria of seniority-cum-merit. The criteria of seniority-cum-merit was not intended to be applied under the Rules of 2003 in the matter of promotion from Class II to Class I post, as per the provisions contained in Rule 4 of the Rules of 2003.

10. In the absence of there being any adverse material against the petitioner, there is nothing to say that the petitioner was not fit for promotion. Prescription of minimum benchmark of merit was clearly a transgression of statutory prescription. The DPC seems to have evolved its own minimum criteria of merit, contrary to the mandate of the rules. It is submitted before this Court that the petitioner was later on promoted in the year 2011 during the pendency of the petition. If that be so, the petition has to be allowed with the relief that as an officer below, the

petitioner in the seniority list was promoted vide impugned order dated 06/01/2007, the petitioner would also be entitled to seniority to the post of specialist from the same date and shall be kept over and above the said officer in the gradation list of Specialist. He would also be entitled to all other consequential benefits. The petition is accordingly allowed.

Sd/-

(Manindra Mohan Shrivastava)
Judge