

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.19861 OF 2018

Date: 10.07.2018

Between:

Smt. P.Radha Rani D/o P.RamaKishan Rao, Aged 56 years,
Hostel Welfare Officer Grade-II, Govt.College Girls Hostel,
Kachiguda, FAC of Govt.College Girls Hostels of
Addagutta and Zamistanpur, Hyderabad, Telangana State.

.....Petitioner

and

The State of Telangana, rep.by its Principal Secretary,
Scheduled Caste Development Deopartment, Secretariat,
Hyderabad and two others.

.....Respondents



The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.19861 OF 2018

ORDER:

Heard Sri C.Srinivasa Baba learned counsel for petitioner and Sri N.Ramesh, learned Government Pleader for respondents.

2. Facts on record would disclose that petitioner is working as Hostel Welfare Officer Grade-II. In the seniority list of Hostel Welfare Officers Grade-II, her name stands at serial No.1. According to petitioner, 9 persons including person placed at serial No.16 were promoted as Hostel Welfare Officer Grade-I ignoring her claim. According to petitioner, she is ignored because disciplinary proceedings are pending against her. This writ petition is filed praying to grant direction to the respondents to consider the claim of the petitioner for promotion to the post of Hostel Welfare Officer Grade-I without reference to the disciplinary proceedings.

3. According to learned counsel for petitioner throughout her career petitioner has been subjected to harassment and humiliation and on one pretext or other she is denied promotion. She was served with charge memo dated 7.5.2003. Without, following due procedure, punishment was imposed. Aggrieved thereby petitioner filed O.A.No.1174 of 2005 in A.P.Administrative Tribunal. APAT allowed the OA granting liberty to the disciplinary authority. On remand fresh charge sheet was issued. This was challenged in O.A.No.2699 of 2011. This OA was dismissed on 10.09.2013. Based on raid conducted by ACB on 09.01.2012, she was served with 2nd charge memo. There is no progress in the disciplinary proceedings. The criminal case filed by ACB on the same issue ended in acquittal vide judgment delivered on

27.09.2017. Learned counsel would further submit that charge memo dated 09.09.2016 was served based on alleged surprise check conducted by ACB on 31.01.2015. According to learned counsel for petitioner, in May-June 2017, Enquiry Officer submitted his report, but so far there is no further progress and on the contrary, referring to the very same proceedings her promotion is denied. According to learned counsel, for an instance relating to 31.01.2015, for no fault of her the proceedings are kept pending and, on that ground, she is harassed and humiliated. An employee has right for consideration for promotion and same cannot be denied merely because disciplinary proceedings are pending. He would submit that promotion to Grade-I is based on seniority and is non-selection post. As petitioner claiming promotion to non-selection post, pending disciplinary proceedings is not a bar for consideration for promotion.

4. *Per contra*, according to learned Government Pleader, as disciplinary proceedings are pending, petitioner is not entitled to claim promotion even to non-selection post. He would further submit that pursuant to charge memo dated 09.09.2016, Enquiry Officer submitted his report and pending consideration of the said report, promotion cannot be granted to petitioner. According to learned Government Pleader, petitioner does not have good record of service and in view of several disciplinary proceedings petitioner cannot be declared as fit for promotion even to non-selection post. He has placed before this Court compilation of the charge sheets issued in disciplinary proceedings.

5. There is no clarity on outcome of two earlier disciplinary proceedings. However, admittedly the disciplinary proceedings initiated in the year 2016 are pending. It appears Enquiry Officer submitted his report. Thus, matter stands at the stage of taking further action on the report of the Enquiry Officer.

6. The issue for consideration is whether petitioner is entitled for promotion pending disciplinary proceedings.

7. One of the important parameters of public service is if an employee is facing disciplinary action/trial on his/her misdemeanor or misconduct-criminal/civil, he/she should not be granted promotion. It is not in public interest to grant promotion to an employee when on allegation, enquiry/trial/investigation is pending against him. Thus, though employee is entitled to be considered for promotion, on such consideration even if he is found fit, his promotion can be differed if disciplinary proceedings/criminal proceedings are pending. On this aspect, no distinction can be made between selection posts and non-selection posts.

8. An employee has right for consideration for promotion but has no right to ask promotion as a matter of course [**K.Samantaray Vs National Insurance Company Limited - (2004) 9 SCC 286**]. In **Delhi Development Authority vs. H.C.Khurana**¹, Supreme Court set out scope of consideration of competing claims. Supreme Court observed as under:

“8.Where a decision has been taken to initiate the disciplinary proceedings against a government servant, his

¹ (1993) 3 SCC 196

promotion, even if he is found otherwise suitable, would be incongruous, because ***a government servant under such a cloud should not be promoted till he is cleared of the allegations against him***, into which an inquiry has to be made according to the decision taken. In such a situation, the correctness of the allegation being dependent on the final outcome of the disciplinary proceedings, it would not be fair to exclude him from consideration for promotion till conclusion of the disciplinary proceedings, even though it would be improper to promote him, if found otherwise suitable, unless exonerated. To reconcile these conflicting interests, of the government servant and public administration, ***the only fair and just course is, to consider his case for promotion and to determine if he is otherwise suitable for promotion, and keep the result in abeyance in sealed cover to be implemented on conclusion of the disciplinary proceedings***; and in case he is exonerated therein, to promote him with all consequential benefits, if found otherwise suitable by the Selection Committee. On the other hand, giving him promotion after taking the decision to initiate disciplinary proceedings, would be incongruous and against public policy and principles of good administration.”

(emphasis supplied)

9.1. Telangana State and Subordinate Service Rules 1996 (for convenience referred to as ‘General Rules’) deal with general conditions of service of all Government employees. Rule 5 deals with procedure for promotion to selection posts and non-selection posts. Rule 6 deals with preparation of panels. Rules 5 and 6 to the extent necessary read as under:

“5. Selection Posts:-

(a) All first appointments as a State Service and all promotions/ appointments by transfer in that service shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, by the appointing authority as specified in sub-rule

(a) of Rule 6 from the panel of candidates. Such panel shall be prepared as laid down in Rule 6 by the appointing authority or any other authority empowered in this behalf.

(b) **Non-selection posts:-** No non-gazetted post should be treated as selection post. Promotion and appointment by transfer to higher posts other than those mentioned in sub-rule (a) shall be made in accordance with seniority-cum-fitness, unless:

(i) such promotion or appointment by transfer of a member has been withheld as a penalty; or

(ii) a member is given special promotion for conspicuous merit and ability.

6. Method of preparation of panels:

(a) to (h) xxxxxxxx

(i) Non-selection posts:-

For non-selection posts referred to in sub-rule (b) of Rule 5 the appointing authority shall prepare a list of eligible employees every year i.e., from 1st September of the year to 31st August of the succeeding year after considering the record sheet and the qualifications prescribed for the said post in the relevant Special Rules for promotion to next higher category of non-section post.”

9.2. According to sub-rule (a) of Rule 5, all first appointments to a State service and all promotions/appointments by transfer in that service should be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal from the panel of candidates provided. According to Rule 5(b), non-gazetted posts are not treated as selection posts. In case of non-section post, sub-rule (b) contemplates that it should be made in accordance with the seniority cum fitness.

9.3. Rule 6 deals with method of preparation of panels. The salient features of this provision are: panel of approved candidates as envisaged in Rule 5 (a) should be prepared by appointing authority/authority empowered, in consultation with, the Departmental Promotion Committee / the Screening Committee, in respect of the posts within the purview of Telangana State Public Service Commission; the appointment should be made from the panels so drawn; the 1st September of the year shall be reckoned as qualifying date to determine the eligibility and such panel would lapse on 31st December of the succeeding year or when the next panel is prepared, whichever is earlier; for computation of vacancies, 1st September of the year to the 31st August of the succeeding year should be reckoned as the period; the zone of consideration is confined to 1:3.

9.4. According to Rule 6(i) for non-selection posts, competent authority should prepare list of eligible employees every year i.e., from 1st September of the year to the 31st August of the succeeding year, after considering the record sheet and qualifications prescribed.

9.5. It is appropriate to notice that Rules 5 and 6 of the Telangana State and Subordinate Service Rules, 1996 do not deal with the issue of consideration for promotion when disciplinary proceedings or criminal proceedings are pending, whether promotion is to selection post or non-selection post. The administrative instructions/ orders notified vide G.O.Ms.Nos.424 General Administration (Ser.C) Department, dated 25.05.1976 and G.O.Ms.No.257 General Administration (Ser.C) Department, dated

10.06.1999 reflect the policy of the Government on consideration for promotion when disciplinary proceedings/criminal proceedings are pending.

10. At this stage it is expedient to consider the policy of the State Government. In the combined State, prior to bifurcation, the Government formulated promotion policy on consideration of employees/officers facing the disciplinary proceedings and the same is in force in both States. The two states are not adopting sealed cover procedure. After consideration of the case by the DPC or by the appointing authority, if the employee is found suitable/fit for promotion, the result of consideration is declared but his actual promotion is differed till the proceedings pending against him are concluded.

11. Government notified its policy vide G.O.Ms.No.424, dated 25.05.1976. For such consideration, Government classified the employees, who are facing enquiry, trial or investigation, into three categories. The three categories are as under:

i) an officer with a clean record, the nature of charges/ allegations against whom relate to minor lapses having no bearing on his integrity or efficiency, which, even if held proved, would not stand in the way of his being promoted;

ii) an officer whose record is such that he would not be promoted, irrespective of the allegations/charges under enquiry, trial or investigation; and

iii) an officer whose record is such that he would have been promoted had he not been facing enquiry, trial or investigation, in respect of charges which, if held proved, would be sufficient to supersede him.

11.1. On further review of this policy and subsequent orders of the Government, Government notified its fresh policy vide G.O.Ms.No.257 dated 10.06.1999.

11.2. The relevant portions of G.O.Ms.No.257 read as under:

“(5) Government also order that with immediate effect the following procedure and guidelines, be followed to consider the employees against whom disciplinary cases or criminal prosecution are pending or whose conduct is under investigation, for appointment by promotion or transfer, to next higher categories.

(A) The details of employees in the zone of consideration for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committees or Screening Committees: -

- (i) Officers under suspension;
- (ii) Officers in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending;
- (iii) Officers in respect of whom prosecution for a criminal charge is pending.

(B) Officers who are facing enquiry, trial or investigation; can be categorized into the following groups based on the nature of the allegations or charges pending against them or about to be instituted namely:-

(i) an officer with a clean record, the nature of charges or allegations against whom related to minor lapses having no bearing on his integrity or efficiency, which even if held proved, would not stand in the way of his being promoted.

(ii) an officer whose record is such that he would not be promoted, irrespective of the allegations or charges under enquiry, trial or investigation; and

(iii) an Officer whose record is such that he would have been promoted had he not been facing enquiry, trial or investigation, in-respect of charges which, if held proved, would be sufficient to supersede him.

(C) The suitability of the Officers for inclusion in the panel should be considered on an overall assessment based on the record which should include namely:-

- (i) Adverse remarks recorded in the Annual Confidential Reports, the penalties awarded, and the bad reputation of the

Officer as vouchsafed by the Head of the Department and the Secretary to Government of the Department concerned;

The above cases should be considered as falling under category (ii) of item (B) above.

(ii) The Officers who do not have any adverse entry in the Annual Confidential Report, and who have no penalties awarded against them in the entire duration of the post and not merely in the past five years and whose reputation is vouchsafed by the Head of the Department and the Secretary to Government of the Department concerned should be considered as falling under category (iii) of item (B) above.

The Officers categorized as under item (iii) of G.O.Ms.No.424, G.A.(Ser.C) Dept, dt: 25-5-1976 as mentioned above only should be considered for adhoc promotion after completion of two years from the date of the Departmental Promotion Committee or Screening Committee Meeting in which their cases were considered for the first time.

(6) The Appointment Authority should consider and decide that it would not be against public interest to allow adhoc promotion to the Officer concerned and this shall be decided with reference to the charge under enquiry. If the charge is one of moral turpitude, misappropriation, embezzlement and grave dereliction of duty then the Appointing Authority should consider as not in the public interest to consider adhoc promotion to such charged Officer. But, however, if the charge is not a grave one but is a minor one, not involving moral turpitude, embezzlement and grave dereliction of duty then only in such cases the Appointing Authority should consider that it would not be against public interest to allow adhoc promotion because till then his record is clean with reference to ACRs, past punishment and reputation in the Department as vouchsafed by the Head of the Department and Secretary to Government. The Appointing Authorities should strive to finalise the disciplinary cases pursuing them vigorously so that within two years the proceedings are concluded and final orders issued.”

11.3. This G.O. mandates that the concerned authority should bring to the notice of the Departmental Promotion Committee, the details of the employees in the zone of consideration for promotion falling under the three categories mentioned there under i.e., i) officers under suspension; ii) officers in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and iii) officers in respect of whom prosecution on

criminal charges are pending. Similar categorization of officers as was notified in G.O.Ms.No.424 is also incorporated in paragraph-5(B) of this G.O. The G.O. enables consideration of claims of officers also falling under the third category, if, even after completion of two years from the date of the Departmental Promotion Committee or Screening Committee meeting, there was no progress in the enquiry/trial/investigation. However, even this consideration is confined to officers against whom charge leveled is not grave, but is a minor one, not involving moral turpitude, embezzlement and grave dereliction of duty.

12. It is significant to note that even to non-selection post, promotion based on seniority position of an employee is not automatic. It is subject to assessment of fitness, on consideration of record sheet and on assessing whether employee is possessing requisite qualifications. Assessment of fitness/consideration of record sheet, necessarily mean consideration of conduct of employee. The only issue for consideration is whether consideration for promotion to non-selection posts pending disciplinary proceedings/criminal proceedings attract similar scrutiny as applicable to selection post. However, it is appropriate to note at this stage that in assessing the suitability even to selection posts, the pendency of disciplinary proceedings/criminal proceedings is not the basis. Employee's suitability is assessed independently, but when employee is found suitable DPC/Screening Committee would recommend deferring promotion pending disciplinary proceedings/criminal proceedings. Senior can be ignored for promotion for variety of reasons. If senior is under currency of punishment, he can be superseded. Further,

Rule 5(b) also carves out two exceptions. First one deals with a situation when employee is facing punishment of withholding of his promotion; if so, he cannot even be considered. Second deals with grant of accelerated promotion. If employee has conspicuous merit, he can be promoted ignoring his seniors. When disciplinary proceedings/criminal proceedings are pending, as per seniority, employee's suitability must be assessed and if found fit and qualified, he may not get his promotion as per his turn, but he would earn promotion retrospectively once he is cleared in disciplinary proceedings/criminal proceedings. As against this, in the three contingencies mentioned above, he would not earn his promotion retrospectively / on par with his juniors.

13. On an interactive analysis of provisions in Rules 5 and 6 of General Rules, Government Policy as reflected in G.O.Ms.No.424 and G.O.Ms.No.257 and law on the subject, I am of the view that pending disciplinary proceedings/criminal proceedings acts as a bar for granting promotion even to non-selection posts.

14. I am fortified in my view by the decision of Division Bench in W.P.No.25598 of 2007, dated 24.01.2008. In the above case, respondent was denied promotion to the post of Sub-Registrar Grade-II in Registration Department on the ground that disciplinary proceedings are pending. He approached the A.P.Administrative Tribunal. By way of interim order, the Tribunal directed consideration of his case for promotion without reference to disciplinary proceedings pending against him. Respondent claimed that promotion as Sub-Registrar Grade-II is based on seniority and, therefore, pending disciplinary

proceedings is not a bar for consideration of promotion. This Court vacated the interim order granted by A.P. Administrative Tribunal.

15.1. On construing scope of Rule 5 (b) and 6(i), Division Bench observed as under:

“11. A conjoint reading of the above two Rules would abundantly makes it clear that, when the disciplinary proceedings are pending, it is not the ‘seniority’ alone, that should be taken into consideration, but also the ‘record sheet’, for effecting promotions. In other words, the conduct of the incumbent has also to be looked into. While considering the aspect of conduct, it is essential that ‘record sheet’, which contains the details as to whether any disciplinary proceedings are pending as on the date of consideration for effecting promotions of the individuals, has to be looked into.”

15.2. On considering the scope of G.O.Ms.No.424, the Division Bench observed:

“15. From the above, it is clear that it is not only the Departmental Promotion Committee (for short ‘the DPC’), but also the other authority, which may or may not recommend the employees for promotion. It is further clear that the individuals would not be recommended for promotion, if their conduct is under enquiry, trial or investigation.”

15.3. Explaining the scope of ‘fitness’, the Division Bench observed:

“19. ‘Fitness’, in other words, means the conduct of an individual, which is in surveillance of the charges by way of departmental enquiry. It would rather keep such an individual away from the zone of consideration for sometime and such an individual would be restored to his

original status due, in case he is exonerated of the charges as contemplated in G.O.Ms.No.66, dated 30.01.1991.”

16. In the case on hand, as petitioner is facing disciplinary proceedings, the prayer to direct the respondents to grant promotion without reference to pending disciplinary proceedings cannot be granted. However, it can be seen from the narration of facts in the affidavit filed in support of writ petition, the contentions of learned counsel for petitioner, the material placed on record by the learned Government Pleader and the statement of learned Government Pleader in the disciplinary proceedings leading to issuance of charge memo dated 09.09.2016, enquiry officer has submitted his report and matter is pending at that stage. Findings of enquiry officer are not placed on record. Having regard to history of the disciplinary action and present stage of disciplinary proceedings no direction to grant promotion ignoring those disciplinary proceedings can be granted. However, as the latest disciplinary action is of the year 2016 and enquiry officer has already submitted his report, the competent authority is directed to ensure that disciplinary proceedings pursuant to charge memo dated 09.09.2016 are concluded as expeditiously as possible, at any rate within a period of two months from the date of receipt of copy of this order. Having regard to the facts of this case and that for no valid reason the disciplinary proceeding is not concluded even after submission of report of enquiry officer, for any reason, not attributable to petitioner, if the disciplinary action is not concluded within the time fixed above, the competent authority may consider the entitlement of petitioner for promotion as per her tern, without reference to charge memo dated

09.09.2016, subject to her suitability otherwise and if there is no other impediment.

17. With the above directions writ petition is disposed of. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 10.07.2018
Kkm



HONOURABLE SRI JUSTICE P.NAVEEN RAO



WRIT PETITION NO.19861 OF 2018

Date: 10.07.2018

kkm