



2025:DHC:489-DB



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

+ **W.P.(C) 7526/2017**

GOVT OF NCT OF DELHI

.....Petitioner

Through: **Mr. Sujeet Kumar Mishra, Adv.**

versus

RAKESH SEMALTY

.....Respondent

Through: **Mr. Anil Shrivastav, Adv.**

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT (ORAL)

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17.01.2025

C. HARI SHANKAR, J.

Rules and relevant executive instructions

1. The Fundamental Rules¹ and Supplementary Rules², governing all holders of civil posts and those in civil services under the Union and the States, were issued over a century ago, with effect from 1 January 2022. Article 313³ of the Constitution of India continues, in force, all laws in force immediately prior to the commencement of the Constitution, until any other provision, to that effect, is framed in the Constitution itself. By operation of Article 313, the FRs and SRs

¹ FRs

² SRs

³ **313. Transitional provisions.** – Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.



continue to govern all persons holding civil posts in this country.⁴

2. The respondent seeks protection of pay, under FR 22(1)(a)(1)⁵ read with Office Memorandum⁶ dated 7 August 1989 issued by the Department of Personnel & Training⁷. The OM dated 7 August 1989 read thus:

⁴ **Security Printing & Minting Corporation of India Ltd v. Vijay D. Kasbe, AIR 2023 SC 2042**

⁵ **F.R. 22 (I)** The initial pay of a Government servant who is appointed to a post on a time scale of pay is regulated as follows:

(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive temporary or officiating capacity, as the case may be, subject to the fulfilment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale shall be fixed by giving one increment in the level from which the Government servant is promoted and he or she shall be placed at a cell equal to the figure so arrived at in the level of the post to which promoted or appointed and if no such cell is available in the level to which promoted or appointed, he shall be placed at the next higher cell in that level.

Save in cases of appointment on deputation to an ex cadre post or to a post on ad hoc basis or on direct recruitment basis, the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the next higher cell in the level of the post to which he or she is promoted on regular basis and subsequently, on the date of accrual of next increment in the level of the post from which Government Servant is promoted, his pay shall be re-fixed and two increments (one accrued on account of annual Increment and the second accrued on account of promotion) shall be granted in the level from which the Government Servant is promoted and he or she shall be placed at a cell equal to the figure so arrived, in the level of the post to which he or she is promoted; and if no such cell is available in the level to which he or she is promoted, he or she shall be placed at the next higher cell in that level.

In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible from the date of initial appointment or promotion to be exercised within one month from the date of such regular appointment.

In cases where an officer has retired as ad hoc before being regularised to that post and later on has been assessed during the process of regularisation and found fit by the competent authority along with his or her juniors, who are still in service and are eligible to avail of the option facility from a date on which the retired employee was still in service, the same option facility shall also be extended to the retired employee, to be exercised within three months from the date when his or her junior became eligible to avail of option facility and in cases where such retired employee was himself the junior most, he or she may exercise the option facility within three months from the date when his or her immediate senior became eligible to avail of option facility:

Provided that where a Government servant is immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the level of the lower post, his initial pay in the level of the higher post shall be fixed at the cell equal to the figure so arrived at in the level of the post to which promoted or appointed by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the level of the lower post and if no such cell is available in the level to which he is promoted or appointed, he shall be placed at the next higher cell in that level.

⁶ "OM" hereinafter

⁷ DOPT



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“New Delhi, the 7 Aug, 1989

OFFICE MEMORANDUM

Subject:- Guidelines for fixing pay of candidates working in Public Sector Undertakings, etc. recommended for appointment by the Commission by the method of recruitment by selection – regarding –

The undersigned is directed to say that as per extant rules/orders on the subject, pay protection is granted to candidates who are appointed by the method of recruitment by selection through the UPSC if such candidates are in Government service. No such pay protection is granted to candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, when they are so appointed in Government. As a result of this, it has not been possible for Government to draw upon the talent that is available in non-Government organizations.

2. The question as to how pay protection can be given in the case of candidates recruited from Public Sector Undertakings, etc. has been engaging the attention of the Government for some time. The matter has been carefully considered and the President is pleased to decide that in respect of candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, who are appointed as direct recruits on selection through a properly constituted agency including departmental authorities making recruitment directly, their initial pay may be fixed at a stage in the scale of pay attached to the post so that the pay and DA, as admissible in the Government will protect the pay + DA already being drawn by them in their parent organizations. In the event of such a stage not being available in the post to which they have been recruited, their pay may be fixed at a stage just below in the scale of the post to which they have been recruited, so as to ensure a minimum loss to the candidates. The pay fixed under this formulation will not exceed the maximum of the scale of the post to which they have been recruited. The pay fixation is to be made by the employing Ministries/Departments after verification of all the relevant documents to be produced by the candidates who are employed in such Organizations.

3. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders are issued with the concurrence of the Comptroller and Auditor General of India.

4. These orders take effect from the first of the month in which this OM is issued.



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(E.K. Sreedharan)
Under Secretary to the Government of India

3. A copy of the above DOPT OM dated 7 August 1989 was forward by the Department of Education, Ministry of Human Resource Development to the Directorate of Education, Delhi Administration⁸, under the following covering letter dated 31 May 1991:

“Sub: Guidelines for fixing pay of candidates working in Public Sector Undertakings, etc. recommended for appointment by the Commission by the method of recruitment by selection – regarding.

Sir,

I am directed to forward herewith a copy of OM No 12/1/88-Estt (Pay-I) dated 7.8.89 from the Ministry of Personnel, Public Grievances & Pensions, Deptt. Of Personnel & Training *vide* which it has been decided that in respect of candidates working in Public Sector Undertakings, Universities, Semi-Government Institutions or Autonomous Bodies, who are appointed as direct recruits on selection through a properly constituted agency including departmental authorities making recruitment directly, their initial pay may be fixed at a stage in the scale of pay attached to the post so that the pay and DA as admissible in the Govt will protect the pay + DA already been drawn by them in their parent organizations. In the event of such a stage not being available in the post to which they have been recruited, their pay may be fixed at a stage just below in the scale of the post to which they have been recruited, so as to ensure a minimum loss to the candidates. The pay fixed under this formulation will not exceed the maximum of the scale of the post to which they have been recruited. The pay fixation is to be made by the employing Ministries/Departments after verification of all the relevant documents to be produced by the candidates who were employed in such Organisations.

2. The above instructions will come into effect from 1.8.89.

3. It is required that the pay of the teachers directly recruited may kindly be fixed accordingly.”

⁸ “the DOE” hereinafter



4. Consequent of receipt of requests seeking clarification regarding the scope of the aforesaid OM dated 7 August 1989, the DOPT issued OM dated 10 July 1998, titled “Guidelines for fixing of pay of candidates working in Public Sector Undertakings etc. recommended for appointment by the UPSC by the method of Recruitment by Selection – Regarding”, and providing thus:

“3. The benefit of pay protection is available to the Government servants on their recruitment by selection through UPSC, subject to fulfilment of certain conditions. The benefit under the OM dated 7.8.89 was extended to the candidates working in central PSUs/State PSUs/Universities/Semi-Government Institutions/Autonomous Bodies etc. with a view to drawing talent, which is available in these organisations. The question whether the objective underlying the above orders could be achieved through open competitive examination in which the employees from Public Sector Undertakings etc. also appear has been considered. It is clarified that the benefit of pay protection under the above orders is available only if the selection is through interview and not through an open competitive examination. Wherever the protection under the above orders is to be given, the Commission will indicate in its recommendation letter to the Ministry concerned that pay of such candidate(s) should be fixed as per the guidelines laid down in the above orders. Further, the benefit would be available to an officer coming from PSU etc. only if the officer has completed the period of probation successfully for being regularised/confirmed in the post in the parent organization.”

Facts

5. Having thus set out the Rules and executive instructions within whose peripheries the controversy in the present case meanders, we proceed to briefly recount the facts.

6. The respondent was a teacher in the Kendriya Vidyalaya



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Sangathan⁹, which is an autonomous body. Consequent to selection conducted by the Delhi Subordinate Services Selection Board¹⁰, and after obtaining a no objection from the KVS, the Deputy Director of Education¹¹, GNCTD by Order No. 3 dated 1 March 2002, appointed the respondent as PGT/Lecturer in the pay scale of ₹ 6,500-10,500/- apart from allowances, on temporary basis for one year. He was initially on two years' lien with the KVS, on the expiry of which he was absorbed with the DOE with effect from 15 March 2002 as PGT (English).

7. The respondent sought protection of the pay granted to him in the KVS, while on duty in the DOE, under FR 22(l)(a)(1). A representation in that regard was made by the respondent to the principal of the school in which he was employed on 23 March 2002. On 16 December 2009, the DDE addressed a memorandum to the respondent, rejecting his request on the ground that it was not admissible as per certain government instructions issued under FR 22(l)(a)(1).

8. The petitioner, on 11 January 2010, responded to the DOE, stating that the instructions on which the DOE placed reliance to reject the respondent's representation for pay protection were inapplicable, as they pertained to direct recruitment by way of selections conducted by the Union Public Service Commission¹², whereas the respondent had been selected through the DSSSB.

⁹ "KVS" hereinafter

¹⁰ "DSSSB" hereinafter

¹¹ "DDE" hereinafter

¹² "UPSC" hereinafter



9. The respondent contended that his case was covered by the DOPT OM dated 7 August 1989 *supra*. This was followed by reminders dated 18 March 2010 and 12 July 2010.

10. As the respondent's representation and reminders failed to evoke any response from the petitioners, the respondent moved the Central Administrative Tribunal¹³ by way of OA 3372/2010. The Tribunal disposed of OA 3372/2010 on 1 December 2010 with a direction to the petitioners to pass a speaking and reasoned order on the respondent's representation.

11. Purportedly, by way of compliance with the said directions, the DDE issued an order on 13 March 2012, rejecting the respondent's representation for pay protection on the basis of the DOPT circular dated 10 July 1998 *supra*.

12. Aggrieved by the aforesaid response, the respondent re-approached the Tribunal by way of OA 3626/2012 which stands allowed by the judgment under challenge dated 10 February 2017. Before the Tribunal, the respondent prayed that the DOPT OM dated 10 July 1998, insofar as it restricted the benefit of the earlier DOPT OM dated 7 August 1989 only to selection by interview, be quashed and set aside and that the pay which was earlier being drawn by the respondent in the KVS be directed to be protected during the respondent's employment as PGT (English) in the DOE. Arrears of

¹³ "Tribunal" hereinafter



pay were also sought.

The impugned judgment

13. The Tribunal has, in the impugned judgment dated 10 February 2017, held that the DOE could not be faulted in refusing to grant pay protection to the respondent, as it had acted on the basis of the DOPT OM dated 10 July 1998, which was squarely applicable.

14. Thereafter, however, the Tribunal has proceeded to examine whether the OM dated 10 July 1998 could sustain in law, insofar as it restricted the benefit of the OM dated 7 August 1989 only to selection by interview, and not selection through an open competitive examination. The Tribunal has rejected the reliance, placed by the respondent, on the case of certain other candidates, whose pay had been protected though they had been selected by open competitive examination on the premise that Articles 14 and 16 do not guarantee negative equality.

15. The Tribunal has, however, proceeded to hold that the OM dated 10 July 1998, in so far as it restricts the benefit of pay protection, available under the earlier DOPT OM dated 7 August 1989, only to candidates selected by interview, and does not extend the benefit of pay protection to candidates selected by open competitive examination, is unconstitutional and violative of FR 22(I)(a)(1). Having thus declared the OM dated 10 July 1998 to be illegal, the Tribunal has gone on to hold the respondent entitled, during his tenure in the DOE, to protection of the pay earlier drawn by



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him in the KVS. The petitioners have, therefore, been directed to grant the benefits of such protection to the respondent within 90 days of the judgment.

16. Aggrieved thereby, the DOE is before us in the present writ petition.

17. We have heard Mr. Sujeet Mishra, learned Counsel for the petitioner and Mr. Anil Shrivastav, learned Counsel for the respondents at length and perused the record.

18. Mr. Mishra contends that the petitioners cannot be faulted for having acted on the basis of the clarificatory DOPT OM dated 10 July 1998.

19. He, therefore, submits that the Tribunal was in error in directing pay protection to be granted to the respondent.

Analysis and Findings

Respondent entitled to benefit of FR 22(I)(a)(1)

20. Having considered the issue from all its perspectives, we are ourselves in agreement with the Tribunal. FR 22(I)(a)(1) is directly applicable. The Rule deals with a situation in which a government servant, holding a post, is promoted or appointed to another post. The government servant may be holding the earlier, as well as the later,



post, in any capacity; temporary, officiating or substantive. In the event that the later post to which the government servant is appointed carries higher duties and responsibilities, the government servant is entitled to have his initial pay, in the later post, fixed by protecting the pay drawn by him in the earlier post. The only condition to be satisfied is that the government servant must satisfy the eligibility conditions for appointment to the later post.

21. There is no dispute about the fact that the post of PGT (English), in the DOE, to which the respondent was appointed, carried higher duties and responsibilities than the post of TGT (English) held by him in the KVS. The respondent was undisputedly eligible for appointment as PGT. While fixing the pay of the respondent as PGT (English) in the DOE, therefore, FR 22(I)(a)(1) required protection of the pay drawn by him as TGT (English) in the KVS.

22. The DOPT OM dated 7 August 1989 merely vouchsafed this position, by directing the fixation of pay of persons working in, *inter alia*, autonomous institutions such as the KVS, on their direct recruitment through selection to other government ministries/departments, in accordance with FR 22(I)(a)(1), “at a stage in the scale of pay attached to the post, so that the pay and DA ... will protect the pay + DA already being drawn by (him) in (his) parent organization”.

23. This position was reiterated in letter dated 31 May 1991 addressed by the Department of Education, MHRD to the DOE.



24. There was, therefore, no justification whatsoever for the DOPT subsequently to issue the OM dated 10 July 1998, restricting the benefit of pay protection, available under FR 22(I)(a)(1) and under the earlier DOPT OM dated 7 August 1989, only to cases of selection through interview and not extend the benefit of selection through open competitive examination.

OM dated 10 July 1998 cannot be termed a “clarification”

25. Significantly, the DOPT OM dated 10 July 1998, terms this as “clarification”. It is settled law that a clarification cannot travel beyond the original executive instruction or rule or regulation, or take away a benefit available under the earlier executive instructions. As held by the Supreme Court in *UOI v. N.R. Parmar*¹⁴, a clarification “‘clarifies’ an unclear, doubtful, inexplicit or ambiguous aspect of an instrument” and “cannot be in conflict with the instrument sought to be clarified.” Thus understood, the OM dated 10 July 1998 was not a clarification at all, but a substantive revisitation and modification of the OM dated 7 August 1989 by substantially limiting its benefit and scope. While the OM dated 7 August 1989 granted pay protection in all cases of direct recruitment through selection, the OM dated 10 July 1998 denied the benefit to all cases except direct recruitment by interview. By no means could this have been regarded as a clarification.

OM dated 10 July 1998 infracts Articles 14 and 16

¹⁴ (2012) 13 SCC 340



26. That apart, the aforesaid distinction, carved out in the OM dated 10 July 1998 also infracts Articles 14 and 16 of the Constitution of India. There is no intelligible differentia between persons selected by direct recruitment through interview and persons selected by direct recruitment through an open competitive examination. If anything, the degree of objectivity in the case of persons selected by an open competitive examination is greater than in the case of persons selected by interview. There is, therefore, no reasonable basis whatsoever to grant pay protection to persons selected by interview and deny pay protection to persons selected by open competitive examination.

27. Besides, it is a settled principle of constitutional law, for which hardly any authority needs to be cited, that, in order to sustain the scrutiny of Articles 14 and 16, any differentia between categories of persons must not only be intelligible, but also bear a rational nexus to the object of the classification. *There is no tangible intelligible differentia, between persons directly recruited through open competitive examination and persons directly recruited through selection, as would have a nexus with the object of pay protection.* The decision to restrict the benefit of pay protection only to persons selected through by interview, and to deny pay protection to persons selected through open competitive examination is, therefore, on the face of it arbitrary, resulting in invidious discrimination between persons similarly situated.



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OM dated 10 July 1998 violative of FR 22(I)(a)(1)

28. Finally, the OM dated 10 July 1998 is violative of FR 22(I)(a)(1). As already noted, FRs and SRs are binding on all government servants. Inasmuch as their binding force is relatable to Article 313 of the Constitution of India, they must predominate over any executive instruction to the contrary. The DOPT could not, therefore, by the OM dated 10 July 1998, restrict the scope of the pay protection available under FR 22(I)(a)(1). Even on this ground, therefore, DOPT OM dated 10 July 1998 cannot sustain.

The sequitur

29. We are, therefore, of the opinion that the Tribunal was correct in extending the benefit to the respondent, in the matter of fixation of his pay as PGT (English) in the DOE, and of protection of the pay drawn by him as TGT (English) in the KVS.

Conclusion

30. For the aforesaid reasons, we find no cause to interfere with the impugned judgment of the Tribunal.

31. The writ petition is accordingly dismissed.

C.HARI SHANKAR, J.

AJAY DIGPAUL, J.

JANUARY 17, 2025/ar

Click here to check corrigendum, if any