

IN THE PUNJAB & HARYANA HIGH COURT, CHANDIGARH

Civil Writ Petition No.15481 of 2011

Date of decision: 30.08.2013

Surender Kumar Yadav

..... Petitioner

Versus

State of Haryana and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Jagbir Malik, Advocate,
for the petitioner.

Mr. Sunil Nehra, Sr. DAG, Haryana

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This matter was posted for final disposal on 30.8.2013.

It is taken up by consent disposal on merits. I have heard the learned counsel for the parties at length.

The complaint in this petition filed under Article 226 of the Constitution of India is that the petitioner's promotion with effect from 23.7.2007, when vacancy occurred and his junior was promoted as Principal in Haryana Education Service Class-II, but it was unlawfully withheld on account of a charge sheet issued to him later on, on 13.8.2008. This charge sheet could affect only in the future but not retroactively when there was nothing against him.

For Subsequent orders see COCP-1687-2014, COCP-718-2015, -- and 1 more.

The brief facts necessary for a decision, in this case, are as follows: -

On 1.4.2005, a seniority list was circulated where the petitioner was shown at Serial No.1221. Private respondents No.4 to 7 were shown at slots 1079, 1085, 1090 and 1095 respectively. By this seniority list, the petitioner indisputably was junior to the private respondents. Against this seniority list, a number of affected persons filed objections. It is the case of the petitioner that without taking into consideration the objections and deciding them, the Government proceeded to promote respondents No.4 to 7 as Principals on 22.8.2007. They have continued to hold the posts since then.

Later, on a consideration of the objections, a revised and amended seniority list was issued and circulated on 11.2.2009. In this list, the petitioner was shown senior to the private respondents. On 13.8.2008, the petitioner was charge sheeted under rule 7 of the Haryana Civil Services (Punishment and Appeals) Rules, 1987 and the same was served on him on 21.8.2008. The charge was based on allegation of a mistake committed by the petitioner as Officiating Principal. Enquiry was conducted. The enquiry report was submitted on 23.2.2010. The petitioner's request for promotion with effect from 23.7.2007 when his admitted juniors were promoted as Principals was not heeded to for a substantial period and remains undecided till date. In the departmental enquiry of the 5 charges leveled, 4 of them were found not proved. Charge No.5 levelled was proven. Against the charges not proved, the disciplinary authority entered a dissenting note which was remitted to the petitioner on 30.9.2011 for his response. The reply was not found satisfactory. Ultimately, a penalty of stoppage of two annual grade increments with cumulative effect was inflicted on the petitioner.

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Aggrieved by the punishment order, the petitioner filed a memorial before His Excellency the Governor of Haryana who was pleased to hear the petitioner in person and the penalty was reduced to stoppage of one increment without cumulative effect vide order dated 19.9.2012, the currency of the substituted punishment order ran its course till 1.7.2013.

In the written statement filed by the Government on notice being issued by this Court, they had taken the stand that the petitioner could not be promoted as Principal till 30.6.2013 because of imposition of punishment. Reliance has been placed on Government instructions dated 31.5.2006 which deal with promotion during currency of stoppage of increments. The operative part of those instructions reads as follows:

“The State Government has considered the matter in the light of aforesaid judgment and it has been decided that no promotion should be allowed to any employee during the currency of punishment of stoppage of his grade increment(s). The instructions issued vide letters No.6034-2GS-I-71/32498, dated 18.11.71 and No.3508-4GS-I-73/18540, dated 19.07.73 shall stand modified to the extent indicated above.

These instructions may be brought to the notice of all concerned for their information and strict compliance.

Mr. Jagbir Malik, learned counsel appearing for the petitioner submits that the seniority list was revised and corrected by the Government itself and not through the intervention of Court. Therefore, the petitioner

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cannot be deprived of his right of consideration for promotion with effect from 22.8.2007 when, admittedly, a vacancy occurred and the persons junior to him were promoted as Principals. These were private respondents No.4 to 7 who have been served but have not entered appearance through Counsel or to request their personal appearance to defend the action. Merely because the charge sheet was issued on 13.8.2008 after juniors were promoted cannot detract from right of consideration from the date when the juniors were promoted about one year before and, therefore, the stand of the State in the written statement that the petitioner could not be promoted because of imposition of penalty cannot be considered as good reason.

Mr. Malik submits that the instructions relied upon do not apply to the facts of this case. He also produced the provisional seniority list of Lecturers (School Cadre) as on 1.10.2011, in which, the petitioner has been shown at Serial No.33 and senior to the private respondents.

It is well settled that a right to promotion arises immediately upon promotion of admitted junior. The punishment, if any, can operate only prospectively and not retroactively.

Mr. Sunil Nehra, learned Sr.DAG, Haryana appearing for the State submits that even if promotion is to be accorded from the date the junior was promoted, then, arrears of salary should not be ordered to be paid. He relies on *State of Haryana and others v. O.P. Gupta*, (1996) 7 SCC 533 to buckle up his argument in defence of State exchequer. In *O.P. Gupta* case, the seniority list remained inchoate and under litigation and not free from doubt which had to be reconciled on judicial review and in such circumstances, the Supreme Court held that on notional promotion from back date, arrears of salary would not be paid. However, in this case, the

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seniority list has been corrected by the Government itself without Court intervention. The private respondents were promoted without finalizing the objections of affected persons. If they have continued to hold the promoted post, they obviously occupied substantive vacancy in the cadre of Principals. The petitioner may have a right of consideration for promotion but no indefeasible right to promotion but that right crystallized on 23.7.2007 when persons junior stood promoted and continue to hold promoted posts. Therefore, if there was nothing against the petitioner on 23.7.2007, he deserves to be promoted as Principal, HES-2 from that date.

For the foregoing reasons, this writ petition is allowed. A mandamus is issued to the respondents to promote the petitioner as Principal, HES-2 with effect from 23.7.2007 when his juniors were promoted to the higher post, if all other promotional parameters are satisfied in terms of rules, but by ignoring the charge sheet for the present promotion. He would be entitled to all consequential benefits flowing therefrom.

Before parting, it may be noticed that it is not the case set up in the written statement that on 23.7.2007, the petitioner was not eligible for promotion. Because the petitioner has been compelled to approach this Court, against government apathy of denying benefit of promotion on such a rudimentary principle of service law, he would be entitled to costs of unnecessary litigation which are assessed as ₹ 10,000/- to be paid personally to him, together with the arrears of pay ordered, all of which would now be paid within two months failing which it would carry 6% interest till realization.

August 30, 2013
Paritosh Kumar

(RAJIV NARAIN RAINA)
JUDGE

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