

A

BUREAU OF INDIAN STANDARDS

v.

S.K. KANOJIA

OCTOBER 5, 2007

B

[DR. ARIJIT PASAYAT AND TARUN CHATTERJEE, JJ.]

Service Law:

C

Bureau of Indian Standards (Recruitment to Scientific Cadre) Regulations, 1988—Regulation 9—Promotion—Under ‘Flexible Complementing Scheme—Amendment of Scheme in 1998—Amendment adopted by the employer in 2002—Promotion given as per 1998 amendment—Writ Petition claiming promotion on the basis of unamended Scheme—Courts below directing promotion on the basis of unamended Scheme on the ground that at the time when the promotions fell due, amended rules did not exist—On appeal, held: Employees not entitled to promotion under the unamended Scheme—The amendment having been given immediate effect to by the Notification of the date prior to the date the promotions fell due as per unamended Scheme, view of courts below not correct—Bureau of Indian Standards Act, 1986—s. 38.

D

E

F

G

‘Flexible Complementary Scheme’ (FCS), introduced in 1983/1986 was adopted by the appellant-Bureau in 1996 after recommendation of Fifth Central Pay Commission. By a Notification dated 9.11.1998 changes were introduced in the FCS whereby benefit of FCS was based on scientific and technical knowledge; and eligibility for promotion was increased to 7 years from 5 years. The benefit of FCS was also extended to Scientist ‘F’ and ‘G’ thereby. The Bureau implemented the change by amending Regulation 9 of Bureau of Indian Standards (Recruitment to Scientific Cadre) Regulations, 1988 in 2002. The benefit thereunder was to be given w.e.f 9.11.1998. Respondents were working as Scientist ‘C’ w.e.f 1994, in the pay-scale of Rs. 10,000-15,200 in the Bureau. They

H

were promoted under FCS in 2003 w.e.f. 2001. They filed Writ Petition on the ground that they were to be promoted as Scientist-D on completion of 5 years i.e. in 1999. The Bureau attributed the delay in promotion, to the change in Service Regulations. During pendency of the petition, another Notification was issued in 2004, again amending Regulation 9 whereby a bar against retrospective implementation of the Scheme was introduced. Single Judge allowed the Writ Petitions holding that the petitioners (respondents herein) had become entitled to promotion as Scientist 'D' in 1999 and at that time Rules to the contrary did not exist. Division Bench of High Court held that the amendment of 2004 being prospective in its operation was not applicable to the employees. The order of Single Judge was upheld. Hence the present appeal.

Allowing the appeal, the Court

HELD: Single Judge of High Court was not right in holding that in 1999 the respondents had become eligible for promotion to Grade 'D' and at that time rules to the contrary did not exist, overlooking the fact that in 1998 itself amendment had been brought, in the prevailing Flexible Complementing Scheme on the basis of 1998 Notification and not under Bureau of Indian Standards (Recruitment to Scientific Cadre) Regulations, 1988. Clause 3 of Notification dated 9.11.1998 goes to show that it was intended to give immediate effect to the decision. The revised scheme of 1998 shows the assessment norms for promotion. Definite focus was on evaluation of scientific and technical knowledge. Under the revised scheme the respondents became eligible for promotion on completion of 7 years of service. Undisputedly, the Regulations of 1988 in Regulation 9 provided that the benefit of FCS was available upto Scientists grade 'E'. It was therefore necessary to amend the Regulation so that the Scientists grade "F" and 'G' could be given the benefit of FCS. Single Judge was also not correct in directing promotion because promotion is not automatic and the Annual Confidential Reports had to be looked into. Regulation 9 provided that the promotion of selected officers under the FCS was to be on the basis of evaluation from "time to time". That being so, the Single Judge and the Division Bench were not correct in their views. The change in 2004 does not in any way cover

A **the respondents. [Paras 17, 20, 21 and 22] [584-E-F; 585-E-H; 586-A]**
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4657 of
2007.

From the final Judgment and Order dated 6.2.2006 of the High Court
B of Delhi at New Delhi in L.P.A. No. 1689/2005.

WITH

C.A. Nos. 4658, 4659 and 4660 of 2007.

C Vikas Singh, A.S.G., B.K. Sood and Indra Sawhney for the
Appellant.

J.P. Singh and S.S. Jauhar for the Respondent.

The Judgment of the Court was delivered by

D **DR. ARIJIT PASAYAT, J.** 1. Leave granted.

2. These appeals are directed against the judgment of a Division
Bench of the Delhi High Court dismissing the appeals preferred against
the order of a learned Single Judge who allowed the writ petitions filed
E by the respondents.

3. Background facts in a nutshell are as follows:

The respondents had claimed for directions to the appellants-Bureau
of Indian Standards (hereinafter referred to as 'BIS') to promote them
F as Scientists-D in the pay-scale of Rs.12000-375-16500 on the date of
their completion of 5 years of service in the lower grade under a scheme
known as the "Flexible Complementing Scheme" (hereinafter referred to
as 'FCS').

G The BIS is governed by statutory regulations. The relevant provision,
viz. Regulation 9 of Bureau of Indian Standards (Recruitment to Scientific
Cadre) Regulation, 1988 (in short the "Regulation") reads as follows:

H "9. Promotion to the Posts upto System Scientist-E [Director
(selection Grade)] " (1) The selection for promotions shall be made
from amongst the scientific cadre officers serving in the next lower

grade by the standing staff committee of Selection Committee 'A' as the case may be, on the recommendations of the Assessment committee appointed by the Director General under sub-regulation (3). Selection of officers for promotion shall be made on the basis of assessment procedure as laid down by the Executive Committee which shall take into account qualifications performance, merit, seniority, potential, annual confidential reports for previous five years and interview.

(2) The promotion of Selected officers to next higher grade upto the System Scientist-E shall be made in the same manner as laid down in the Scheme of Flexible Complementing formulated from time to time by the Department of Science and Technology for promotion of Scientists in scientific organizations under the Central Government and shall be effective from the date of eligibility."

4. The BIS adopted recommendations of the Fifth Central Pay Commission, with effect from 1-1-1996, and implemented the FCS. The FCS contemplated promotion, after completion of certain prescribed periods of service, in relation to each post (known as the "residency period"). These pertained not only to posts, but also to scales of pay. The relevant residency periods were as follows:

Scales of Pay	Designation Residency	Minimum period linked to Performance
(a) Rs.8000—13500	Scientist B	3 years
(b) Rs.10000—15200	Scientist C	4 years
(c) Rs.12000-16500	Scientist D	4 years
(d) Rs.14300-18300	Scientist E	5 years

5. The respondents were in the pay-scale of Rs.10,000-15,200, and working as Scientist-C, with effect from 10.3.1994 and were to have been promoted to Scientist -D, after five years in 1999. The promotions were granted only in March, 2003, with effect from March, 2001. The delay was attributed by the BIS, to a contemplated change in the Service Regulations. Changes were introduced to the FCS by an Office Memorandum dated 9th November, 1998 which modified the eligibility

A for benefits of the FCS linked to the Annual Confidential Reports of the person concerned. Regulation 9 was amended by notification dated 3rd May, 2002, in exercise of the powers conferred by Section 38 of the Bureau of Indian Standards Act, 1986 (in short the “Act”) to read as follows:

B “9. Promotion to the Posts up to Scientist-G “(1) The selection for promotions shall be made from amongst the Scientific Cadre officers serving in the next lower grade by the Assessment Committee appointed by the Director General under sub-regulation (2). Selection of officers for promotion shall be made in the same manner as laid down in the Scheme of Flexible complementing formulated from time to time by the Central Government for promotion of scientists in Scientific Organizations under the Central Government and shall be effective from the date of eligibility. The Scheme of Flexible Complementing as formulated by the Central Government vide OM No.2/41/P1C-97 dated the 9th November, 1998 would be effective for Scientific Cadre Officers upto and inclusive of the level of Scientist-E from 9th November, 1998 and for the levels of Scientist-F and Scientist G, the date of promotion would be effective from the date of Gazette Notification of this revised regulation.”

D
E
6. The rationale for the amendment was spelt out in Explanatory Memorandum to the notification, which stated, *inter alia* that:

F “The Scheme of Flexible Complementing (FCS) was earlier introduced based on the guidelines issued by the Department of Science and Technology (DST) in November, 1983 for all Scientific and Technical Organizations/Institutions of the Government of India, which was later modified vide Department of Science & Technology’s OM No.A.42014/2/86-Admn.1(A) dated the 28th May, 1986. According to this scheme, the promotion of an officer in scientific service from one grade to the next higher grade would take place after a prescribed period of five years residency service on the basis of assessment procedure as laid down by individual organization. Promotions made under

G
H

this scheme would be in-situ and with effect from the date of their A
eligibility as per the residency period and personal to the officer
concerned irrespective of the occurrence of the vacancy in the
higher grade. Accordingly, in Bureau of Indian Standards, all
Scientific Cadre Officers were considered eligible for promotion
from one grade to the next higher grade after they had put in 5 B
years of residency service in that grade. Thereafter, based on the
assessment procedure as laid down by the Executive Committee
of Bureau of Indian Standards, which shall take Into account
qualifications, performance, merit, seniority, potential, annual
confidential reports for previous five years and interview by the' C
Assessment Committee appointed "by the Director General, the
officers would be promoted to the next higher grade as per their
date of eligibility."

7. The respondents had approached the court, complaining that the D
BIS acted arbitrarily in withholding promotions to them to the cadre of
Scientist D, from the date of their eligibility; instead of the promotion
rightfully due to them in 1999, they were given the benefit in 2001. During
the pendency of their writ petitions, another notification was issued on 12-
8-2004, and published in the Gazette of India. By this notification E
Regulation 9 was again amended. The Explanatory Memorandum clarified
the purpose behind the change. It stated that BIS Regulations, 2002
adopted the Scheme formulated by the Central Government and its benefits
were to be given to employees with effect from 9th November, 1998. It
was felt that the BIS did not possess powers to implement the Scheme F
retrospectively. The policy of the Central Government was that the Scheme
should apply to the Scientific Cadre Officers of the BIS only prospectively.
Therefore, the Notification was issued to rectify a mistake. Regulation 9,
as amended in 2004, read as follows:

"9.Promotion to the Posts up to Scientist-G "(1) The selection for G
promotions shall be made from amongst the Scientific Cadre
officers serving in the next lower grade by the Assessment
Committee appointed by the Director General under sub-regulation
(2). Selection of officers for promotion shall be made in the same
manner as laid down in the Scheme of Flexible Complementing H

A formulated from time to time by the Central Government for
 promotion of scientists in Scientific Organizations under the Central
 Government subject to the condition that the said Scheme shall be
 applicable to the Scientific Cadre Officers of the Bureau from the
 date of commencement of the Bureau of Indian Standards
 B (Recruitment of Scientific Cadre) Amendment Regulations, 2004.”

8. The original writ petitioners had also urged that other employees,
 viz Shri H.J.S. Pasricha, Smt. D.G. Dastidar, Shri G. Bhaskar, Shri
 Bijender Kumar Jain, Shri Jayanta Roy Chowdhury and Smt. Mala
 C Ayyappan, had been given the benefit of automatic ‘promotion’ to Class-
 D in December 1998, although by that time the proposed changes had
 already been effected.

9. The learned Single Judge allowed the writ petitions of the
 respondents, relying upon the decisions of this Court in *State of Andhra*
 D *Pradesh & Ors. v. Sreenivasa Rao & Ors.*, [1993] 3 SCC 285; *P.*
Mahendran & Ors. v. State of Karnataka & Ors., [1990] 1 SCC 411;
P. Murugesan & Ors. v. State of Tamil Nadu & Ors., [1993] 2 SCC
 340 and a decision of this Court, in CW No. 4555/2001 entitled *Mr.*
N.C.Jain & Ors. v. New Delhi Municipal Council & Ors., decided on
 E September 16, 2003. He rejected the contention of the appellant BIS
 that by virtue of the amendments, particularly of 2004, it was no longer
 possible to grant benefit of retrospective promotion to any official or
 employee.

F 10. The learned Single Judge held as follows:

“In 1999 the Petitioners had become entitled to ‘promotion’ to
 Group-D and at that time Rules to the contrary did not exist. The
 then prevailing FCS ought to have therefore been implemented in
 1999 itself and had this been so done the Petitioners would have
 G been promoted to Group-D after the expiry of five years service
 in Group-C. It should also not be overlooked that the effect of
 the Notification of 12th August, 2004 was to return to the regime
 which entitled the Petitioner to automatic progression to Group-D
 on their completing five years in Group-C.

H

In these circumstances, the Writ Petitions are allowed and the respondents are directed to promote the Petitioners to the post of Scientist-D in the pay-scale of Rs,12,000-375-16,500/- as soon as each of the petitioners had rendered five years service in the post of Scientist-C as per the Flexible Complementing Scheme applicable on the said date.”

11. The appellants preferred writ appeals before the High Court which by the impugned judgment, dismissed the same. The conclusions of the High Court are set out in paragraphs 13 and 14 of the judgment. The High Court was of the view that the amendment introduced in 2004 for the first time sought to introduce a bar against retrospective promotions i.e. from the date the eligibility conditions of the officials aspiring for promotion were fulfilled. Before the amendment no such prohibition or condition existed. It was held that the amendment is not retrospective in its operation. It was held that though the term “retrospective” was used, the promotion under the previous scheme as modified in 1996 and amended in 1998 and 2002 created an entitlement in favour of the officer in a feeder cadre to be promoted from the date he fulfilled the eligibility condition. This, according to the High Court, is evident from the Notification dated 9.11.1998 and the amendment to Regulation 9 effective from 2002. The limiting condition of the date of promotion being after the due date of application of the notification was in respect of promotions above the level of Scientist E. The High Court felt that the rationale for this conclusion was that merely the post was included in the scheme for the first time on 3.5.2002 and the right to be considered and granted ‘in situ’ promotion to the petitioners from the dates they acquired eligibility after completion of the residency period did not stand altered. The prohibition introduced in 2004 was prospective and could not take away their right to be dealt with as on the date they became eligible to be promoted, which indeed was the date when the promotion was to be effective. It was held that the respondents were promoted in 2003.

12. In support of the appeals, learned counsel for the appellants submitted that the true effect of Regulation 9 has not been duly considered. The issue relates to entitlement of Scientific Officers in Grade ‘C’ to

- A promotion under Scientific Officer in Grade 'D'. FCS was introduced by a Notification issued in the year 1983/1986 wherein the same to be applicable to three levels i.e. S-I level in the pay scale of Rs.700-1300, S-II level in the pay scale of Rs.1100-1600 and S-III level in the pay scale of Rs.1500-2000. It was further provided in the scheme that in exceptional cases the scheme may be extended to next higher level i.e. S-IV in the pay scale of Rs.1800-2250 on merits depending upon the extent of stagnation at that level. In the year 1988 the BIS recruitment to Scientific Cadre Regulations were promulgated. In order to give benefit to scientific cadre officers of the BIS, Regulation 9 made the requisite provision.

13. It is pointed out that the order of the learned Single Judge and the judgment of the Division Bench have failed to take notice of a very crucial expression i.e. 'from time to time'. On 16.3.1994 the respondents were promoted to the post of Scientific Grade 'C' under the FCS. As the scheme stood then the respondents would be entitled to further promotion as Scientists in Grade 'D' under FCS upon completion of five years of service i.e. w.e.f. March, 1999 provided the respondents made it under assessment procedure laid down by BIS. Before the respondents became eligible for promotion the scheme itself was modified on 9.11.1998 where the minimum residency period for promotion was reduced from five years to four years. However, the number of years in which the Scientific Officer became eligible was to be determined under a graded scheme depending upon the merits in the ACR. Under the revised scheme of 1998 the promotion under FCS was made more rigorous providing more emphasis on evaluation of scientific and technical knowledge so that only scientists with demonstrable achievements or higher level of technical merit would be recommended for promotion under the FCS. Under the revised scheme, respondents became eligible for promotion in Scientists grade 'D' after completion of 7 years of service in the Grade of Scientists Grade 'C'. Under the amended scheme of 9.11.1998 Scientists in Grade 'F' as well as in Grade 'G' were also included for being given the benefit of FCS. Since the regulations of 1988 more particularly, Regulation 9 provided for the benefit of FCS only upto Scientists Grade 'E', there was necessity to amend the Regulation so that Scientists Grade 'F' and 'G'

could also be given the benefit. With effect from 3.5.2002, Regulation 9 was amended. A

14. It is submitted that before the respondents became eligible the scheme itself had undergone a change and 1986 scheme had been superseded in view of introduction of the new scheme on 9.11.1998. There was no vested right to be considered for promotion merely on completion of 5 years of service. The High Court erroneously held that even if the amendment existed there was vested right. In essence, it was submitted that both the learned Single Judge as well as the Division Bench committed a manifest mistake by holding that the respondents had a vested right in the year 1999 to be promoted to the grade of Scientists Grade 'D' on mere completion of five years of service. It was also submitted that out of 180 officers who were covered by the change in the scheme w.e.f. 9.11.1998 only four had filed writ petitions and rest accepted the change. B C D

15. In response, learned counsel for the respondents submitted that the explanatory memorandum at the time of amendment on 12.8.2004 made the position clear and the High Court's view was right. It was clearly stated that the appellant had no power to implement the scheme retrospectively. The respondents are entitled to be considered as per the earlier FCS and promoted in situ w.e.f. 10.3.1999. Therefore, it was submitted that the appeals deserve to be dismissed. E

16. Under the amended scheme there are gradings according to the ACRs and the criteria for being considered for promotion under the FCS have been laid down. They read as follows: F

“(a) All officers will be first screened on the basis of gradings in the Annual Confidential Reports (ACRs) for consideration for promotion; the ACRs should be assessed on a 10 point scale giving 10 marks for “outstanding”, 8 marks for “very good”, 6 marks for “good”, 4 marks for “average” and 0 for “poor” and only those officers who satisfy the minimum residency period linked to their performance as G H

A	Number of years in the grade					
	3	4	5	6	7	8
Minimum percentage for eligibility						
Scientist B to Scientist C	90%	80%	70%	65%	60%
B Scientist C to Scientist D	...	90%	80%	75%	70%	60%
Scientist D to Scientist E	...	90%	80%	75%	70%	60%
C Scientist E to Scientist F	90%	80%	75%	70%
Scientist F to Scientist G	90%	80%	75%	70%

D Exceptionally meritorious candidates with all outstanding gradings may be granted relaxation in the residency period, the relaxation being not more than one year on any single occasion. Such a relaxation will be limited to a maximum of two occasions in their entire career.”

E 17. The revised scheme of 1998 shows the assessment norms for promotion. Definite focus was on evaluation of scientific and technical knowledge. Under the revised scheme the respondents became eligible for promotion on completion of 7 years of service. Undisputedly, the Regulations of 1988 in Regulation 9 provided that the benefit of FCS was available upto Scientists grade ‘E’. It was therefore necessary to amend the Regulation so that the Scientists grade ‘F’ and ‘G’ could be given the benefit of FCS.

G 18. The crucial expressions in the Notification of 9th November, 1998 contain certain stipulations which are as under. In clause 2 it has been inter-alia stated as follows:

H “.....It has also been decided that assessment norms for promotions under the Flexible Complementing Scheme should be rigorous with due emphasis on evaluation of scientific and technical knowledge so that only the scientists who have to their credit

demonstrable achievements or higher level of technical merit are recommended for promotion under the Flexible Complementing Scheme.” A

19. Again in Clause 3 it has been stated as follows:

“.....Accordingly, all the posts covered under the Flexible Complementing Scheme shall carry the following uniform scales of pay, designations and the minimum residency period linked to performance:- B

Scales of Pay	Designation	Minimum Residency Period linked to Performance	C
(a) Rs.8000-13500	Scientist B	3 years	
(b) Rs.10000-15200	Scientist C	4 years	
(c) Rs.12000-16500	Scientist D	4 years	D
(d) Rs.14300-18300	Scientist E	5 years	
(e) Rs.16400-20000	Scientist F	5 years	
(f) Rs.18400-22400	Scientist G	Not available	

In order to give immediate effect to the decision contained in this para an umbrella Notification has been issued vide G.S.R. No.660(E) dated 9.11.1998” E

20. As a bare reading of above quoted clause goes to show that it was intended to give immediate effect to the decision, an umbrella Notification G.S.R.No.660(E) dated 9.11.1998 was being issued. The criteria for promotion have already been quoted above. F

21. Stand before the High Court was that the eligibility was after 1999 and there was a vested right. It is to be noted that under the 1998 Regulations also the same could not have been applied to Grade ‘F’ and ‘G’ and so the amendment as noted above was necessary. Learned Single Judge was not right in holding that in 1999 the respondents had become eligible for promotion to Grade ‘D’ and at that time rules to the contrary did not exist, overlooking the fact that in 1998 itself amendment had been G H

A brought in the prevailing FCS on the basis of 1998 Notification and not under 1988 Regulations. Learned Single Judge was also not correct in directing promotion because promotion is not automatic and the Annual Confidential Reports had to be looked into. The change in 2004 does not in any way cover the respondents.

B 22. Regulation 9 provided that the promotion of selected officers under the FCS was to be on the basis of evaluation from "time to time". That being so, the learned Single Judge and the Division Bench were not correct in their views. The appeals deserve to be allowed which we direct.

C The order of the learned Single Judge as affirmed by the High Court stands set aside. There will be no order as to costs.

K.K.T.

Appeals allowed.