

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**CWPOA No.428 of 2019**

**Reserved on 26.06.2020**

**Decided on: 30.06.2020**

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Nandi Verdhan ....Petitioner.

**Versus**

State of Himachal Pradesh & others ...Respondents.

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***Coram***

***The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.***

**Whether approved for reporting?<sup>1</sup> Yes**

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For the petitioner : Mr. Prem P. Chaunan, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General.

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**Ajay Mohan Goel, Judge (Oral)**

By way of this petition, which stood filed by the petitioner before the learned Erstwhile Himachal Pradesh Administrative Tribunal and which after abolition of the

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learned Tribunal, stands transferred to this Court, the petitioner has prayed for the following reliefs:-

“(a) quash the impugned order A-5 issued arbitrarily, malafide and illegally by the respondents;  
(b) Direct the respondents to consider and promote the applicant to the post of Incharge-Technical from the date the post is lying v vacant with all the consequential benefits and arrears of salary etc. alongwith interest thereon @ 18% p.a.”

2. Brief facts necessary for the adjudication of the present petition are as under:-

The case of the petitioner was that he was initially appointed as Radio Instructor in the year 1968 and he joined as such on 21.06.1968. According to the petitioner, who was 58 years old at the time when the Original Application was filed by him, since his initial appointment, he had not been given any promotion by the Department, though he was due for retirement with effect from 28.02.2006. It was further the case of the petitioner that opportunities for promotion though

available to the post of Incharge-Technical, respondents were not promoting him to the post in issue, though five posts of Incharge-Technical were lying vacant in the respondent-Department and there were only five candidates available for being promoted against the posts in issue. It was further the case of the petitioner that despite the fact that five promotional posts were available, respondent-Department had recommended only two names, thus depriving the petitioner of his legitimate claim as well as constitutional and fundamental right of being considered for promotion. It was further the case of the petitioner that earlier also, Shri Ravinder Singh and Shri Subhash Gupta, both Technical Instructors, had filed a writ petition in this Court, claiming reliefs similar to that being claimed by the petitioner, which petitions on transfer to the learned Himachal Pradesh Administrative Tribunal, were finally decided by the learned Tribunal on 23.06.2000, vide

Annexure A-3 and pursuant to the directions so issued, Departmental Promotion Committee (DPC) was convened and both the officers names hereinabove were duly promoted vide order dated 04.07.2002.

3. According to the petitioner, earlier also, officer junior to him stood promoted against the post of Technical Officer, while the petitioner was ignored. In this background, petitioner had earlier filed O.A. No.1257 of 2005, titled as Nandi Verdhan Versus State of Himachal Pradesh and Another, in the learned Himachal Pradesh Administrative Tribunal and on the request of the petitioner, learned Tribunal ordered the Original Application to be treated as a representation, so that the case of the petitioner for promotional post could be considered from retrospective date. However, the representation of the petitioner stood rejected

arbitrarily by the respondent, leading to the filing of the present case.

4. As per the petitioner, the act of the respondent-Department of not promoting the petitioner was arbitrary as when the DPC to fill up the promotional post was not held every year, then the respondent-Department was bound to follow the instructions contained in the Hand Book on Personal Matters, Vol-1, Chapter 16, which Chapter provided that where the DPC had not been held in any year, then subsequently when the DPC was held, for the year in issue, only those candidates could be considered for promotion, who were eligible at the relevant time and delay in holding the DPC could not expand the zone of consideration. It is on these basis that the petition was filed by the petitioner, praying for the relief already mentioned hereinabove.

5. The petition has been resisted by the respondents, who in the reply(s) filed by them have taken the stand that promotion cannot be claimed as a matter of right and further the promotions are to be made as per rules in vogue and number of posts which the employer intends to fill up by way of promotion, is the prerogative of the employer.

6. Respondents No.1 and 2 have taken the stand in their reply that petitioner had filed O.A. No.1257 of 2005, before the learned Himachal Pradesh Administrative Tribunal, wherein the learned Tribunal was pleased to pass interim orders that the case of the petitioner be considered in the next DPC. The Department convened the next DPC as per the procedure, however, petitioner was not found eligible for promotion as there were officers senior to the petitioner waiting for promotion and it is in this background that the representation of the petitioner was decided by the authority

concerned. As per respondents, the representation was decided after affording an opportunity of being heard to the petitioner and after taking into consideration the relevant record. It is further the stand of the respondents that promotions were made strictly on the basis of seniority and the R&P Rules and no illegality was committed by not promoting the petitioner to the next promotional post.

7. Record demonstrates that no rejoinder has been filed by the petitioner to the reply(s) filed by the respondents.

8. I have heard learned counsel for the parties and have also gone through the record of the case.

9. It is settled law that right to be promoted is not a fundamental right of an employee, though the right of being considered for promotion is a fundamental right. It is borne out from the record that feeling aggrieved by the factum of his not being promoted to the next promotional post, petitioner

had earlier filed an Original Application before the learned Himachal Pradesh Administrative Tribunal, details of which have already been mentioned hereinabove and in terms of an interim order passed by the learned Tribunal, a DPC was convened by the employer and the case of the petitioner was considered for promotion, yet he could not be promoted as there were officers senior to him, eligible for promotion. There is nothing on record to demonstrate that the proceedings of the said DPC were challenged by the petitioner.

10. A perusal of the order passed by the Competent Authority, vide which the representation of the petitioner was dismissed, demonstrates that the following weighed with the Competent Authority, while rejecting the representation of the petitioner:-

“The Education Director has informed that 4 posts of Incharge Technical were created to supervise/inspect the working of Technical Instructors and also to provide promotional



avenues to the Technical Instructors. However, with the passage of time and non-availability of students of particular area, further recruitment to the post of Technical Instructors has not been made since 1968. The cadre was for all purposes being declared as dying Cadre. Further at present there is only one Technical Instructor namely the applicant. The Director is of the opinion that there is no need to have Technical Incharge because if the present Technical Instructor is so promoted, then there will be no Technical Instructor left whose work was to be supervised/ inspected. The Director is of the opinion that promoting anybody to the post of Incharge Technical will not enhance the efficiency of the Department.

It has been held by the courts that the Government was always competent to take conscious decision for valid reasons not to fill up posts. Further the courts have held that existence of a vacancy alone cannot sustain a claim to promotion. In view of this the mere existence of the post of Technical Incharge cannot give rise a claim to promotion.

Secondly, the Education Directorate has brought to notice prolonged periods of unauthorized absence by the applicant. These are yet to be settled. It is doubtful if the applicant could be promoted in these circumstances. As regards various alleged wrong doings by the Education Department to benefit other officials, unless very specific allegations

are made duly supported by evidence, no action can be taken”.

11. Incidentally, a perusal of the averments made in the petition demonstrates that there is no express challenge to the findings so returned by the Competent Authority while dismissing the representation of the petitioner.

12. Be that as it may, it is a matter of record that the present petition was filed by the petitioner just a few days before his superannuation and he stood superannuated as far as back in the month of February 2006. As no employee has a fundamental right to be promoted against a promotional post, this Court cannot pass a mandamus, directing an employer to order the promotion of an eligible employee, simply because vacancy was available. Whether or not, the employer intends to fill up a vacant post, is the prerogative of the employer and unless the judicial conscious of the Court is satisfied that the employer is not intentionally filling up the post with an

ulterior motive to deny promotion to an eligible incumbent, the Courts do not interfere in such like matters.

13. In the present case, there is nothing on record, from which it can be inferred that the employer purposely did not convene a DPC to promote the petitioner. To the contrary, while deciding the representation of the petitioner in terms of the directions passed by the learned Tribunal, reasons stand spelled out by the Competent Authority, as to why the Department was not filling up the promotional posts. Petitioner has also not been able to spell out in the petition that denial of promotion to him was either an act of colorable exercise of powers on behalf of the respondents or was due to some malafide intent.

14. Therefore, in these circumstances, when a conscious decision stood taken by the employer not to fill up the available promotional posts, said decision of the employer

does not call for any interference as the Court does not find anything arbitrary or illegal in the said decision of the respondent-Department.

15. In view of the findings returned hereinabove, this petition is dismissed. No order as to costs. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

**(Ajay Mohan Goel)**  
**Judge**

June 30, 2020  
*(Rishi)*