

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

+ **Date of Decision: 13.10.2014**

+ **W.P.(C) 4067/2014**

JOINT ACTION COUNCIL OF SERVICE

DOCTOR'S ORGANISATION

..... Petitioner

Through: Mr. Sagar Saxena, Advocate.

versus

MINISTRY OF PERSONNEL, PUBLIC

GRIEVANCES AND PENSIONS, DEPTT. OF

PERSONNEL AND TRAINING AND ORS

..... Respondents

Through: Mr. Anurag Ahluwalia, CGSC along
with Mr. Balkishan, Section Officer,
M/o H & FW for respondents No.1 to
3.

+ **W.P.(C) 4073/2014**

DELHI ADMINISTRATION DOCTORS

WELFARE ASSOCIATION AND ORS

..... Petitioners

Through: Mr. Sagar Saxena, Advocate.

versus

MINISTRY OF PERSONNEL, PUBLIC

GRIEVANCES AND PENSIONS, DEPTT. OF

PERSONNEL AND TRAINING AND ORS

..... Respondents

Through: Mr. Rajesh K. Gogna, CGSC for
respondents No.1 to 3.

Ms. Nikhita Khetrapal, Advocate for
respondent No.4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. These two petitions have been preferred by two associations, namely, Joint Action Council of Service Doctor's Organization and Delhi Administration Doctors Welfare Association, and others, to assail the common order dated 04.10.2013, passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short, 'the Tribunal') in O.A. Nos. 2727/2012 and 2726/2012 respectively preferred by these petitioner associations. The Tribunal by the impugned order has declined the petitioner's claim for grant of benefit of non-functioning upgradation (NFU) to the members of the petitioner associations and has directed the respondents to deliberate upon the issue through an officer of the level of Joint Secretary, in the light of the observations made in para 6 of the order passed by the Tribunal in O.A. No. 1169/2010.

2. The members of the two petitioners' association are members of the Central Health Scheme which is an organized Group 'A' service. The Sixth Central Pay Commission recommended higher pay scale on non-functional basis to members of organized Group 'A' services in the Pay Band-3 and Pay Band-4. This proposal was accepted by the government. Consequently, the Department of Personnel & Training (DoPT) issued O.M. dated 24.04.2009, which, inter alia, stated:

*"No. AB.14017/64/2008-Estt.(RR)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training*

New Delhi, the 24th April, 2009

Office Memorandum

Subject: Non-Functional upgradation for officers of organized Group 'A' Services in PB-3 and PB-4.

Consequent upon the acceptance of the recommendations of the Sixth Central Pay Commission, the following orders are issued:-

- (i) *Whenever an Indian Administrative Services Officer of the State of Joint Cadre is posted at the Centre to a particular grade carrying a specific grade pay in Pay band 3 or Pay Band 4, the officers belong to batches of Organized Group A Services that are senior by two years or more and have not so far been promoted to that particular grade would be granted the same grade on non-functional basis from the date of posting of the Indian Administrative Service Officers in that particular grade at the Centre.*

.....
.....

2. *Grant of higher scale (i.e. pay band and/or grade-pay) under these instructions would be w.e.f. 1.1.2006 wherever due and admissible."*

3. This non-functional upgradation was to be based on empanelment and posting of an IAS officer at the Centre. Such upgradations were not to be linked to the vacancies in the grade. The upgradation to be granted was to be purely non-functional, personal to the officer and it did not bestow any right on the officer to claim promotion or deputation benefits based on non-functional upgradation. Amongst other conditions, it was also provided that all the prescribed eligibility criteria and promotion norms, including 'benchmark' for upgradation for a particular grade pay would have to be met

at the time of screening for grant of higher pay scale under the said orders. The terms and conditions of office memorandum also contained the illustration to the following effect:

“ILLUSTRATION: If officers of 1987 batch of IAS are empanelled as Joint Secretary in the grade pay of Rs. 10,000/- in PB-4 and an officer of the batch gets posted in the Centre (under Central Staffing Scheme) on 15th January 2008, all the officers of the 1985 batch of organized Gr.A Central Services who have not been promoted to the Joint Secretary or equivalent grade and who are eligible for the same on 1/1/2007 for the panel year 2007-08, would be appointed to the same grade on non-functional basis under these instructions w.e.f. 15/1/2008. Same would be the case in the event of posting of an officer of particular batch as Deputy Secretary/Director under Central Staffing Scheme.”

4. The same decision was reiterated vide office memorandum dated 21.05.2009 which reads as follows:

“Office Memorandum

Subject: *Non-Functional upgradation for officers of organized Group ‘A’ Services in PB-3 and PB-4.*

A reference is invited to this Department OM of even No. dated 24.04.09 on the above subject. As indicated at point (v) of para 1, the details of batch of the officers belonging to the Indian Administrative Service who have been posted at the Centre in the various grades of PB-3 and PB-4 w.e.f. 01.01.2006 as well as the date of posting of the first officer belonging to the batch is annexed. Necessary action may be taken for grant of higher scale for the Officers belonging to batches of Organized Group A Services that are senior by two year or more and have not so far been promoted to that particular grade.”

5. It appears that certain doubts with regard to the aforesaid decision arose, which too were clarified vide office memorandum dated 25.09.2009. We may note that none of the clarifications issued sought to limit the scope of entitlement to NFU in respect of officers/category of officers who were otherwise entitled to pay upgradation/revision under the Assured Career Progression Scheme (ACP) or the Dynamic Assured Career Progression Scheme (DACP). The DoPT, however, sought to restrict the grant of NFU by issuing an office memorandum dated 05.11.2009. The relevant part thereof reads as follows:

“No. AB.14017/39/2009-Estt.(RR)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training
New Delhi

New Delhi, the 5th November, 2009

Office Memorandum

Subject: Non-Functional upgradation for officers of organized Group ‘A’ Services in PB-3 and PB-4-applicability to Central Health Services (CHS).

*The undersigned is directed to refer to Ministry of Health and Family Welfare OM No. A45012/1/2009-CHS.V dated 15.5.09 on the above subject and to say that the matter has been examined in this Department in consultation with Department of Expenditure. **Keeping in view the fact that Dynamic ACP and Non-Functional Upgradation are separate schemes and it would not be desirable to mix one with the other, it has been decided that the Department cannot selectively choose the operation of different scheme at various***

levels and a different dispensation at this stage cannot be accepted.”
[emphasis supplied]

6. Consequently, the NFU was sought to be denied on the ground that where Dynamic ACP was being granted, NFU could not be granted as it was ‘not desirable to mix one with the other’.

7. The members of the petitioner association assailed the said decision to deny the benefit of NFU on the basis that they were covered by that DACP Scheme by preferring O.A. No. 1169/2010. The Tribunal considered the following issue in its order dated 11.11.2010 disposing of the aforesaid original application:

“.....Whether the doctors belonging to the Central Health Service (CHS), who are covered by the Dynamic Assured Career Progression (DACP) Scheme can be denied the benefit of the Office Memorandum number AB.14017/64/2008-Estt.(RR) dated 24th April, 2009 issued by the Department of Personnel and Training (DOP&T), which provides that:

- (i) Whenever an Indian Administrative Services Officer of the State of Joint Cadre is posted at the Centre to a particular grade carrying a specific grade pay in Pay band 3 or Pay Band 4, the officers belong to batches of Organized Group A Services that are senior by two years or more and have not so far been promoted to that particular grade would be granted the same grade on non-functional basis from the date of posting of the Indian Administrative Service Officers in that particular grade at the Centre”.*

8. The Tribunal returned a finding that the members of the petitioner satisfied the conditions for grant of NFU as provided for in the office memorandum dated 24.04.2009. The contention of the petitioner was that

there was nothing in the Scheme for grant of NFU and the instructions and the clarifications issued in its wake, to show that the DACP Scheme and NFU are mutually exclusive. The DoPT had not given any justification in its letter dated 05.11.2011 for its decision that the DACP Scheme would exclude the application of the NFU as prescribed by the OM dated 24.04.2009. After considering the explanation furnished by the respondents- which was that the NFU Scheme was intended to remove the disparity between different services in the matter of promotion; that CHS officers have their own Assured Career Progression Scheme under DACP; prior to Sixth Central Pay Commission, DACP was upto NFSG level and Sixth Central Pay Commission did not recommend any modification to the same, the Tribunal, inter alia, held as follows:

“6. We do not find the explanation satisfactory at all. The intention of the NFU scheme seems to remove the disparity between the IAS and other organised Group ‘A’ services. No facts have been given to substantiate the statement that promotions under the DACP Scheme are faster than under the NFU. Even if that be so, it would not exclude the CHS from the NFU Scheme, first, because the said scheme does not apply to HAG level and second, because if any batch of the CHS has already been promoted to PB-3 or PB-4, as the case may be, before an IAS officer posted at the Centre gets the same pay band, the NFU Scheme would not apply to CHS, but in case it is not so, the scheme would apply to them. The first Respondent-DOP&T has, it is clear, not thought through its response properly. The rejection seems to be without any application of mind.

7. In view of the above discussion and considering that no rationale has been given to justify the impugned order, we quash and set aside the same with directions to the Respondent-DOP&T to reconsider the matter and pass a fresh order within

four weeks of receipt of a certified copy of this order, which should be logical, cogent and speaking order. The Applicants would be at liberty to challenge the same in an appropriate proceeding, if so advised and if the grievance survives. There will be no orders as to costs. The OA is disposed of in the above terms.”

[emphasis supplied]

9. Pertinently, this decision of the Tribunal attained finality as it was not assailed by the respondents.

10. Since the Tribunal gave an opportunity to the respondent-DoPT to reconsider the matter and pass a fresh order ‘*which should be logical, cogent and speaking order*’, the DoPT issued a fresh memorandum on 02.04.2012, once again denying the NFU Scheme to the members of the petitioner association on the same basis i.e. that they were covered by the DACP Scheme and, consequently, NFU Scheme shall not be applicable to officers of those organized services where FCS and ACP Schemes are already operating, and where officers are already separately covered by their own in-situ Career Progression Scheme. The said office memorandum dated 02.04.2012, insofar as it is relevant, reads as follows:

New Delhi, the 2nd April, 2012

Office Memorandum

Subject:- Non-Functional upgradation for Officers of Organised Group 'A' Services — applicability for Services covered under other promotion schemes.

Attention is invited to instructions of this Department issued in OM No. AB.14017/64/2008-Estt. (RR) dated 24.4.09 for Non-functional Upgradation to officers of Organised Group A Services in PB-3 and PB4 as per 6th CPC

recommendations and accepted by the Government. The instructions on NFU are applicable at HAG level where such a scale exists in the Service.

*2. The issue of wide spread stagnation in various Organised Group A Services where the promotion is vacancy based was considered by the 6th CPC which recommended NFU linked to empanelment/ appointment of IAS officers at the Centre. References for extending the benefit of NFU to officers included in Organised Group 'A' Services and who are covered by their own promotions schemes like DACP, FCS etc. continue to be received by this Department. The issue has been examined in consultation with Department of Expenditure. **The 6th CPC has specifically recommended separate schemes at various levels after detailed deliberations and the same are required to be followed 'in toto'. The attributes of one scheme cannot be transposed on another and two schemes cannot run concurrently for a cadre as it would be against the spirit of 6th CPC recommendations.***

3. Keeping in view that it would not be desirable to mix the provisions of one scheme with the other at different levels, it is clarified that the benefit of NFU to Organised Group A Services shall not be applicable to the officers in those Organised Services where FCS and DACP Schemes are already operating and where officers are already separately covered by their own in-situ Career Progression Schemes.

4. The Cadre Controlling Authorities of various Services in the Ministries/Departments may accordingly take necessary action."

[emphasis supplied]

11. The petitioner assailed the said office memorandum by preferring the aforesaid original applications. Before the Tribunal, the respondents

opposed the Scheme of the petitioners by furnishing the following 13 reasons:

- “(i) The Scheme of DACP was implemented exclusively for promotion of CHS officers upto NFSG level as per the 5th CPC’s recommendations and they have been the beneficiaries of the same since 05.04.2002; whereas the officers of other organized Group A cadres to whom no such benefit was granted post 5th CPC stage.*
- (ii) The Scheme implemented for the GDMO sub cadre of CHS post 5th CPC stage provided promotion to Chief Medical Officer (NFSG) (Rs. 14300-18300) on completion of 13 years of regular service in the GDMO sub cadre. Such a dispensation was not available to the other organized Group A cadres post 5th CPC stage.*
- (iii) Consequent upon the implementation of the recommendations of the 6th CPC this Scheme has been extended upto SAG level for CHS Doctors vide Ministry of Health & Family Welfare OM dated 29.10.2010.*
- (iv) Promotions under this Scheme will be made without linkage to vacancies. The GDMP sub-cadre would attain the SAG Grade after 20 years of service even if no posts are vacant.*
- (v) In the case of Organized Group A services, SAG officers can be allowed Non-functional upgradation to the HAG Grade only where there is such a Grade in the Service.*
- (vi) Whereas promotions for the officers of the other Organized Group A Services (which include technical services, non-technical services and other services) upto the SAG level took a much longer period than the CHS Doctors since such promotions were linked to vacancies.*
- (vii) Whereas the such officers could be promoted to the higher level only if posts were vacant.*

- (viii) *As such vacancies arose after a considerable period of time, officers of other Organized Group A Services had to fact prolonged period of stagnation.*
- (ix) *As per the consolidated information for all such cadres prepared by DOPT the SAG level was attained by the technical services after 22 to 36 years of service, for non-technical services after 17 to 27 years of service and for other services 25 to 37 years would lapse before they could obtain such a Grade.*
- (x) *The issue of such widespread stagnation across innumerable Group A cadres was examined by the 6th CPC vide para 3.3.12 of its Report and recommended a higher no-functional grade to such officers of Organized Group A Services which shall be personal to them and shall be delinked from vacancies.*
- (xi) *The above recommendations of 6th CPC have been accepted by the Government as per the Ministry of Finance, Department of Expenditure Notification dated 29th August, 2008. It is also mentioned that this will also be applicable to the Indian Police Service and the Indian Forest Service in their respective State cadres for which the relevant cadre controlling authorities will issue the orders.*
- (xii) *The DOPT had accordingly issued the instructions in OM dated 24.4.2009 in respect of officers of Organized Group A services.*
- (xiii) *The doctors of CHS are not similarly placed with the other Organized Group A cadres in regard to grant of allowances also. There are several allowances like non-practicing allowance. Annual Allowance, PG allowance available to CHS Doctors which are not accruing to the other Organized Group A Officers.”*

12. The submission of the respondent was that fixation of pay and admissibility of financial upgradation to government service was a complex matter to be decided by the executive, and it is not for the courts/tribunals to intervene in such matters. The Tribunal accepted this argument of the respondent by placing reliance on the judgments of the Supreme Court in *Union of India Vs. P.V.Hariharan* (1997) 3 SCC 568 and the *Union of India Vs. Makhan Chand Roy* AIR 1997 SC 2391. The Tribunal rejected the petitioner's contention that since the OM dated 25.09.2009 had not clarified that those who had been given benefit of DACP Scheme, would not be entitled to NFU, there was no justification for denial of the benefit of NFU to the applicants. The Tribunal noticed the petitioner's submission that by way of clarification, the object of the Scheme could not be defeated. However, it held that it was not specifically provided in the NFU Scheme that the same would be applicable- even to those who were granted financial upgradation in terms of different schemes.

13. Learned counsel for the petitioner associations submits that the members of the associations are entitled to the higher pay scale on non-functional basis in accordance with the 6th CPC. Further, he submits that the denial of the benefit of the NFU Scheme, on the ground that the NFU and DACP are two different schemes, is an afterthought of the respondent no. 1, as neither the 6th CPC nor the Union Cabinet imposed any such condition.

14. Another submission of the petitioner associations is that the benefit of the DACP is given only till the level of SAG, while the benefit of the NFU is awarded till the level of HAG. Also, the NFU is not a career progression

scheme, and only an incidental scheme which provides for non-functional upgradation-which is personal only to the eligible officers belonging to the batches of organized Group 'A' service, senior by two or more years to the IAS officer of the State of Joint cadre posted in Centre to a particular to grade carrying a specific grade pay in Pay Band- 3 and Pay Band-4.

15. Learned counsel for the Respondent Ministry submits that the benefit of the NFU scheme is not applicable to the organized services where the FCS and DACP schemes are already in operation. Therefore, NFU would not be applicable to the CHS doctors as they are covered by the DACP scheme. Learned counsel submits that fixation of pay and admissibility of financial upgradation to government servants is a policy matter to be decided by the executive, and is not for Courts/Tribunal to interfere.

16. Having heard the counsels for the parties and perused the documents on record, this Court is of the opinion that the order of the Tribunal cannot be sustained.

17. There can be no quarrel with the proposition laid down in the judgments of the Supreme Court in *Union of India Vs. P.V. Hariharan* (supra) and *Union of India Vs. Makhan Chand Roy* (supra), that pay fixation and financial upgradation are complex issues, and interference by the Courts/Tribunals would not be justified unless there is hostile discrimination. However, the present is not one such case. In fact, the present is a case where the Sixth Central Pay Commission has granted the benefit of the NFU Scheme to the officers of the organized Group 'A' service in Pay Band – 3 and Pay Band – 4 who satisfied the conditions

stipulated in the aforesaid office memoranda, but the said benefit is sought to be denied by the respondents on the strength of the office memorandum dated 02.04.2012. If the justification offered by the respondents for denial of the benefit of the said NFU Scheme is not sustainable, and goes beyond the recommendation of the Sixth Central Pay Commission – which has been accepted by the government, certainly, the claim of the petitioner's association and its members cannot be denied.

18. The recommendations of the 6th CPC were to bring at par the pay of the officers in Pay Band – 2 and Pay Band – 3, who are senior by two or more years to the IAS officers who are posted at the Centre. The upgradation is non- functional, and does not create any right for promotion or deputation benefits for the officers who are given the upgradation, which is personal to them. The objective of the NFU Scheme appears to be to remove the disparity in the pay being drawn by officers of Group 'A' Services (PB-3 and PB-4) *vis-a-vis* IAS Officers of the State or joint cadre who are posted at the Centre. The endeavour appears to be to remove the said disparity to a certain extent, as only such of the officers of the organized Group 'A' Service would get non-functional upgradation, who are at least two years senior to the IAS officer posted at the Centre. Pertinently, the Tribunal had itself found in the earlier round (while deciding O.A. No. 1169/2010) that the intention of the NFU Scheme was to remove the disparity between the IAS and other Group 'A' Services. The aforesaid finding has become final and it was never challenged by the respondents. The thirteen reasons given by the respondents before the Tribunal-which were recorded in the impugned order itself, appear to be wholly irrelevant to the purpose for

which the NFU Scheme was granted by the 6th Central Pay Commission to officers of Group 'A' organized services. In our view, it is wholly irrelevant that the DACP Scheme was implemented for the CHS Officers up to NFSG level as per the Fifth Central Pay Commission's recommendation since 05.04.2002, whereas officers of other organized Group 'A' cadres were not granted such benefits. This is a historical fact of which the 6th CPC was aware. Yet it did not seek to deny the benefit of the NFU Scheme to the CHS. Obviously, the grant of NFU to the eligible officers of the CHS would be relevant, only if after grant of benefit under the DACP Scheme, there is disparity between the pay of the eligible officers in the organized Group 'A' Services and the pay drawn by the IAS Officer posted at the Centre. To us, it is clear that the reasoning adopted by the respondents to deny benefit of the NFU Scheme to the officers of the petitioners association-which, admittedly, is an organized Group 'A' Service, is founded upon wholly extraneous considerations which do not find mention in the recommendation of the 6th Central Pay Commission as accepted by the government and the said reasons do not shake the basic purpose of the grant of NFU-as a personal upgradation to the eligible officers. Pertinently, even when clarifications were issued by the DoPT vide O.M. dated 25.09.2009, the DoPT did not seek to limit the scope of the entitlement to NFU, on the premise that where ACP or DACP schemes are in operation, the NFU shall not be admissible. Therefore, it appears to us, that the stand subsequently taken by the respondents to deny the benefit of the NFU Scheme to the eligible officers of the CHS, is clearly an after-thought.

19. Since we do not find any substance in the reasons given by the respondents to deny the benefit of the NFU Scheme to the officers of the petitioners associations, we have no hesitation in quashing the said decision of the respondents contained in the office memorandum dated 02.04.2010, which we hereby do.

20. For the above reasons, we are of the opinion that the impugned order of the Tribunal is unsustainable. It is, accordingly, set aside. The respondents are hereby directed to issue necessary and consequential orders granting benefit of the NFU Scheme as per the Sixth Central Pay Commission recommendations to the members of the Central Health Scheme – a Group ‘A’ organized service. The necessary orders in this regard shall be issued within six weeks from today.

21. The writ petition is allowed in the above terms.

VIPIN SANGHI, J.

S. RAVINDRA BHAT, J

OCTOBER 13, 2014

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