

Before I. S. Tiwana, J.

M. K. PURI,—Petitioner

versus

HARYANA STATE ELECTRICITY BOARD,—Respondent.

Civil Writ Petition No. 255 of 1983.

May 4, 1983

Punjab Civil Services Rules, Volume I—Rule 3.26(e)—Punjab State Electricity Board Service of Engineers (Electrical) Recruitment Regulations, 1955—Regulation 12—Member of Class III Service officiating in Class II Service—Whether could be regarded as a member of the latter service—Such member—Whether could be retired at the age of 50 years—Officer allowed to continue in his post after completion of maximum period of probation without any express order of confirmation—Whether deemed to have been confirmed thereafter—Proviso to Regulation 12(1) prescribing the outer limit of probationary period at four years—Whether directory.

Held, that for purposes of compulsory retirement under rule 3.26 of the Punjab Civil Services Rules, Volume I, the status of the employee in a particular service on regular or permanent basis has to be taken notice of. An officiating hand has no right to the post and is perhaps a fleeting bird who may have to go back to the substantive post from which he has been promoted on an officiating basis. What is more, a person who has been appointed *de-novo* may begin his service on an officiating basis or on a temporary basis and it is obvious that he has no right to the post and cannot be strictly said to be in that service or post as a member of that service. In short, an officiating Government servant does not really belong to Class I or Class II service until he acquires a right thereon. It is, therefore, abundantly clear that a member of Class III Service while officiating in Class II could not be treated as a member of the Service and for all intents and purposes and, more particularly, for purposes of his compulsory retirement he had to be treated as a member of Class III Service. It is patent that in terms of clause (e) of Rule 3.26 of the Rules he, not being a member of Class II Service, could not be retired at the age of 50 years.

(Para 4).

Held, that sub-regulation (2) of regulation 12 of the Punjab State Electricity Board Service of Engineers (Electrical) Recruitment Regulations, 1955 lays down that on the completion of the period of probation (original or extended), as the case may be, the

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Board may confirm such a member in his appointment or if his work and/or conduct has, in the opinion of the Board, not been satisfactory or he has not been able to pass the Accounts Examination and Safety Code Examination, the Board may dispense with his services if recruited direct or revert him to his former post or department, as the case may be, if recruited otherwise, provided that the Board may exempt any member from passing whole or any part of the said Examination. This sub-rule makes it clear that even after the completion of four years' period laid down by the proviso to sub-regulation (1), an employee may not be confirmed in certain situations, i.e., if he has failed to pass the Accounts Examination or the Safety Code Examination etc. This regulation obviously takes away the rigour of the language of the proviso and renders the same only directory. Sub-regulation (2) of regulation 12 of the Regulations entitles the competent authority not to confirm a member of Class II Service in spite of his having completed the requisite probationary period of four years till he passes the Accounts Examination or the Safety Code Examination. Besides this, clause (b) of sub-regulation (1) further lays down that no member who is officiating in an appointment shall, on completion of one or two years in service be entitled to be confirmed until he is appointed against a permanent vacancy. Read in this context, the language of the proviso to sub-rule (1) laying down the outer limit of probation period of four years is only directory and cannot be said to be mandatory. If no order of confirmation is passed at any stage by the Board it cannot treat the officiating hand in Class II as a permanent member of that Class.

(Para 6)

Petition under Articles 226 of the Constitution of India praying that :

- (a) *a writ of certiorari or mandamus may be issued thereby quashing the order of compulsory retirement Annexures P/8 & P/9 and it be directed that the petitioner is entitled to all rights, benefits and privileges available to the members of his service.*

OR

- (b) *such other appropriate, writ, order or direction as may be deemed fit under the circumstances of the case may be issued in favour of the petitioner and against the respondent.*

It is further prayed that :

- (c) *pending the final disposal of the writ petition ad-interim stay order may be issued thereby staying the operation of the order of compulsory retirement.*

- (d) *production of certified copies of the Annexures may be dispensed with.*
- (e) *Service of notice of motion may also be dispensed with at this stage.*
- (f) *Cost of the petitioner may be allowed to the petitioner against the respondent.*

K. P. Bhandari, Sr. Advocate with Rohit Tandon, Advocate and Ravi Kapoor, Advocate, *for the Petitioner.*

Harbhagwan Singh, A.G. Hy. with Arun Walia, Advocate, *for the Respondent.*

JUDGMENT

I. S. Tiwana, J. (oral)

(1) This set of three petitions (C. W. P. Nos. 255, 53 and 124 of 1983) is proposed to be disposed of through this common judgment on account of the identity of facts and the contentions raised.

(2) All the petitioners while working in Class II of the Punjab State Electricity Board Service of Engineers on officiating basis have been retired from service on attainment of the age of 50 years in exercise of the powers under rule 3.26 of the Punjab Civil Service Rules (Volume I) as adopted by the respondent-Board, i.e., the Haryana State Electricity Board (hereinafter called the Rules). The learned counsel for the parties are agreed that for the decision of these petitions, a reference to the averments made in the first-noted petition only would suffice.

(3) Petitioner M. K. Puri was officiating as an Assistant Engineer in the Hydrel Project at Yamuna Nagar on 30th December, 1982, when he was served with the following order (annexure P9):—

“It is to inform you that the Board is of the considered view that it is in the public interest to retire you from the service in terms of Rule 3.26(d) of Punjab Civil Services Rules, Volume I, Part I, read with Rule 5.32(c) of Punjab Civil Services Rules, Volume II. You are accordingly hereby retired from the service of the Board with immediate effect. A cheque No. 200702, dated 1st January, 1983

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for Rs. 4989.00 towards three months pay and allowances in lieu of notice is enclosed.

Please acknowledge its receipt.

Sd/-
Secretary,
H.S.E.B., Chandigarh."

Undisputably, rule 3.26 *ibid* deals with the right of the employer to retire the employee in the contingencies specified in the rules and rule 5.32 of Punjab Civil Services Rules Volume II entitles the retired employee to have his pension. This order is impugned primarily on two grounds: (i) that as per clause (e) of rule 3.26 *ibid*, only permanent member of Class II Service can be retired at the age of 50 years whereas a member of Class III Service can be retired only on attaining the age of 55 years. Since the petitioner was only officiating in Class II and, thus could not be considered as a member of Class II Service he could not be retired in exercise of the powers under this rule at the age of 50 years; and (ii) that there is no compliance of sub-clause (ii) of Note 8 to this rule. As against this, the stand of the respondent-Board is that the petitioner having successfully completed the outer time-limit of the probationary period fixed under regulation 12 of the Punjab State Electricity Board Service of Engineers (Electrical) Recruitment Regulations, 1955 (for short, the Regulations), he had to be deemed to have been confirmed in Class II and on that account could legally be retired from service at the age of 50 in terms of rule 3.26 *ibid*. The requirements of clause (ii) of Note 8 have also been, if not fully, substantially complied with. After hearing the learned counsel for the parties at some length, I, however, do not find any merit in the stand of the respondent-Board.

(4) In support of his contention that for purposes of compulsory retirement under rule 3.26 of the Rules, the status of the employee in a particular Service on regular or permanent basis has to be taken notice of, Shri K. P. Bhandari, the learned senior counsel for the petitioners, squarely relies on the following observations of the Supreme Court in *Union of India vs. K. R. Tahillani and another* (1). The question which came up for consideration before their Lordships of the Supreme Court therein was "whether a Government servant officiating in Class I or Class II service or post can be

(1) 1980(1) SLR 847.

retired compulsory by exercising the powers under rule 56(j)(1) after he has attained the age of 50 years." It deserves to be pointed out here that rule 56(j)(i) of the fundamental rule is almost in similar terms as the present rule, i.e., rule 3.26 of the Rules. While answering this question, their Lordships observed that "since an officiating hand has no right to the post and is perhaps a fleeting bird who may have to go back to the substantive post from which he has been promoted on an officiating basis. What is more to the point, a person who has been appointed *de novo* may begin his service on an officiating basis or on a temporary basis and it is obvious that he has no right to the post and cannot be strictly said to be in that service or post as a member of that service. In short, an officiating Government servant does not really belong to Class I or Class II service until he acquires a right thereon." These weighty observations make it abundantly clear that the petitioner while officiating in Class II could not be treated as a member of the Service and for all intents and purposes and, more particularly, for purposes of his compulsory retirement he had to be treated as a member of Class III Service to which he undisputably had been confirmed. In the light of this, it is patent that in terms of clause (e) of rule 3.26 of the Rules he, not being a member of Class II Service could not be retired at the age of 50. Clause (ii) of clause (e) which deals with the retirement of members of Class III Service lays down that an employee of this class, i.e., Class III can be retired at the age of 55 years. It is the admitted position that by the time the impugned order was passed, the petitioner had hardly crossed 50 years of age and was much less than 55 years.

(5) Mr. Harbhagwan Singh, the learned Advocate-General appearing for the Board, however, chose to contend that in the light of the proviso to regulation 12(1) of the Regulations and the observations of the Supreme Court in *The State of Punjab v. Dharam Singh* (2) the petitioner has to be deemed to have been confirmed in Class II Service with the expiry of four years from the date of his initial promotion from Class III to Class II which took place on 31st December, 1970. Sub-regulation (1) of this regulation lays down that an officer appointed to the Service shall remain on probation for a period of two years if recruited by direct appointment and one year if appointed otherwise. Proviso to this sub-regulation lays down that "the total period of probation including extension, if any, shall not exceed four years in any case." According to Mr. Harbhagwan Singh, since this proviso fixes certain period

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beyond which the probationary period could not be extended and the petitioner was allowed to continue in that post after the completion of the maximum period of probation without any express order of confirmation he cannot be deemed to continue in that post as a probationer by implication. As already indicated, he seeks to support this argument of his with the observations of their Lordships of the Supreme Court in *Dharam Singh's* case (supra). I, however, find this stand of the learned Advocate-General as wholly untenable : factually as well as legally. In the memorandum (annexure P11) prepared by the office while processing the case of the petitioner for retirement and which undisputably was placed before the Board by the Secretary for the passing of the impugned order, records in no uncertain terms that "he (the petitioner) is holding the post of A. E. in an officiating capacity." Thus, it is apparent that what was placed before the Board at the time of the passing of the impugned order annexure P9 or was disclosed to it was that the petitioner was an officiating Assistant Engineer. So, now it does not lie in the mouth of the respondent-Board to say that the petitioner, as a matter of fact, was a confirmed or a permanent member of Class II Service. This somersault on the part of the respondent-authorities appears to be out of necessity in the light of the observations of the Supreme Court in *K. R. Tahliania's* case (supra) already referred to above. In fact, this proposition of law as advanced by Shri K. P. Bhandari is also supported by two later judgments of this Court in *G. K. Jain vs. The State of Haryana*, (3) and *Lakshmi Chandra Aggarwal vs. State of Haryana* (4). So, it is probably in the face of this difficulty that the argument that the petitioner should be deemed to have been confirmed in Class II Service has been advanced.

(6) So far as the reliance on the observations of their Lordships of the Supreme Court in *Dharam Singh's* case (supra) is concerned, those have been made in the context of rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules 1961, the phraseology of which rule is materially different from that of regulation 12 of the Regulations. In advancing the above-noted argument, the learned Advocate-General appears to have completely ignored the language of sub-regulation (2) of this regulation which lays down that "on the completion of the period of probation (original or extended), as the case may be, the Board may confirm

(3) 1980(2) SLR 29.

(4) 1980(3) SLR 714.

such a member in his appointment or if his work and/or conduct has, in the opinion of the Board, not been satisfactory or he has not been able to pass the Accounts Examination and Safety Code Examination, the Board may dispense with his services if recruited direct, or revert him to his former post or department, as the case may be, if recruited otherwise, provided that the Board may exempt any member from passing whole or any part of the said Examination." This sub-rule makes it clear that even after the completion of four years' period laid down by the proviso to sub-regulation (1), an employee may not be confirmed in certain situations, i.e., if he has failed to pass the Accounts Examination or the Safety Code Examination, etc. This regulation obviously takes away the rigour of the language of the proviso and renders the same only directory. It deserves to be noticed here that the petitioner admittedly had not passed the Accounts Examination by the time he was retired, —*vide* the impugned order. Thus, the above-noted submission of the learned Advocate-General is based on totally wrong premises. In *Shamsher Singh v. State of Punjab and another*, (5) while examining the implications of rule 7(1) of the Punjab Civil Service (Judicial Branch) Rules, 1951, in the light of explanation to rule 5 which to my mind is somewhat similar to sub-regulation (2) or regulation 12, in the context of the observations in *Dharam Singh's case* (supra) their Lordships pointed out that "provisions regarding the maximum period of probation for three years is directory and not mandatory unlike in *Dharam Singh's case* (supra) and that a probationer is not, in fact, confirmed till an order of confirmation is made." As already pointed out, in the instant case sub-regulation (2) of regulation 12 of the Regulations entitles the competent authority not to confirm a member of Class II Service in spite of his having completed the requisite probationary period of four years till he passes Accounts Examination or the Safety Code Examination. Besides this, clause (b) of sub-regulation (1) further lays down that no member who is officiating in an appointment shall, on completion of one or two years in service, as the case may be, be entitled to be confirmed until he is appointed against a permanent vacancy. To me, it appears clear that read in this context, the language of the proviso to sub-rule (1) laying down the outer-limit of the probationary period at four years is only directory and cannot be held to be mandatory. Above all this, Shri Bhandari, the learned counsel for the petitioner, has brought to my notice the adoption of the Government instructions dated 28th January, 1977, by the Board

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on 25th February, 1977 (annexure P10) whereby the policy of the State Government with regard to automatic confirmation with the expiry of the statutory period of probation was revised. In these instructions it was laid down in the light of the Supreme Court Judgment that "it has been decided that even if a permanent post is available, confirmation cannot be presumed and a specific order to this effect will have to be passed. Instructions dated 15th December, 1971 should be considered to have been modified to this extent." The Board obviously cannot now be allowed to take a stand just contrary to these instructions. As already pointed out, no order of confirmation of the petitioner in Class II was at any stage passed by the Board and it can obviously not treat him to be a permanent member of Class II. Thus, this petition deserves to succeed on this ground alone.

(7) The petitioner appears to be on still stronger footing so far as the second challenge to the impugned order is concerned. The relevant part of Note 8 to rule 3.26 of the Rules reads as follows:—

"(i) A Government employee shall retire immediately on payment of pay and allowances in lieu of notice given to him under clause (d). He shall be entitled to pension from the date of such retirement and the pension shall not be deferred till the expiry of the period of three months for which he is paid pay and allowances. In other words, pay and allowances paid in lieu of the notice period shall be in addition to pension for the said period. (ii) The payment of pay and allowances in lieu of the notice period shall be made simultaneously with the order of retirement.

....."

As is indicated by the impugned order itself, at the time of the passing of the same, a cheque for a sum of Rs. 4, 989 was sent to the petitioner in lieu of three months' notice in order to make his retirement effective immediately. It is the undisputed position that on the date of the passing of this order, the petitioner was getting Rs. 1,823 by way of pay and allowances. Thus, the total amount required to be sent to the petitioner as three months' pay and allowances in order to make his retirement effective was Rs. 5,469. The explanation rendered on behalf of the respondent-Board, however, is that out of these total emoluments, the petitioner was getting Rs. 160 p.m. as project allowance and 40 p.m. as special allowance. These allowances are payable only if the incumbent of the post

actually performs the duties or functions for which these allowances are payable and not otherwise. According to Shri Harbhagwan Singh, the learned counsel for the Board, since the petitioner was neither performing nor was supposed to perform these functions during the notice period as envisaged by rule 3.26 of the Rules, the petitioner was not entitled to the same and, therefore, the Board was justified in not sending or tendering that amount at the time of the passing of the impugned order annexure P9. To me, the whole argument appears to be fallacious. If the petitioner was required to be paid his salary and other allowances (minus the two allowances referred to above) in terms of Note 8 to rule 3.26 without working for the Board, then how could the Board possibly withhold payment of these two allowances on account of the fact that the petitioner was not to perform any function for which these two allowances were payable. Besides this, I find that the language of clause (ii) to Note 8 does not make any distinction between an allowance and allowance. The clear implication of this Note is that in case the employer wants to make the compulsory retirement effective immediately, then it has to tender or pay three months' pay and allowances whatever the incumbent was getting on the date of the passing of that order simultaneously with the passing of the same. This apparently has not been done in the case in hand.

(8) Mr. Harbhagwan Singh chooses to contend next that there is substantial compliance of Note 8 and the respondent-Board is willing to pay whatever is the shortfall of the amount which was required to be tendered to the petitioner. Firstly, this is not the stand of the Board in the written statement and is not the case pleaded and, secondly, this offer does not in any way remedy the situation in which the Board has landed itself in not strictly complying with the provisions of Note 8. In the absence of a complete tender in terms of clause (ii) of this Note, the impugned order annexure P 19 never became effective and the petitioner cannot be treated to have retired with effect from 30th December, 1982. For this conclusion of mine, I seek support from the following observation of the Supreme Court in *Senior Superintendent, R. M. S. Cochin and another vs. K. V. Gopinath,, Sorter* (6):—

“The proviso of Rule 5 is capable of the only interpretation that the order of termination can be upheld if the requisite amount in terms of the rule was paid into the hands

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of the employee or made available to him at the same time as he was served with the order. It does not lend itself to the interpretation that the termination of service becomes effective as soon as the order is served on the Government servant. The operative words of the proviso are "the services of any such Government servant may be terminated forthwith by payment". Therefore, to be effective, the termination of service has to be simultaneous with the payment to the employee of whatever is due to him."

The relevant part of rule 5 referred to in this judgment is again somewhat similar to the phraseology of clause (ii) of Note 8 to rule 3.26 of the Rules. The following judgments also lay down the same principles:—

(9) *Raj Kumar v. Union of India and others*, (7); *Krishana Kamal Ghosh vs. Union of India and others* (8) and *Jamshed Newroji Sarkary vs. The Zonal Manager, Food Corporation of India and another* (9).

(10) Yet another argument of Mr. Bhandari in impugning orders annexure P9 is that at the time of taking over of the services of the petitioner who admittedly was in Government Service prior to the formation of the Punjab State Electricity Board and later the Haryana State Electricity Board, he had been given an assurance,—*vide* letter annexure P3 that his service conditions would not be altered in any manner to his disadvantage with his absorption in the employment of the Board and now that assurance has been violated. I however, do not feel the necessity of going into this aspect of the matter in view of the above-noted conclusion of mine.

(11) For the reasons recorded above, these petitions succeed and the impugned orders are quashed with costs which I assess at Rs. 300 in each case.

N. K. S.

(7) AIR 1975 S. C. 536.

(8) 1980(1) SLR 531.

(9) 1978(1) SLR 471.