

ORDER SHEET

WEST BENGAL ADMINISTRATIVE TRIBUNAL

Bikash Bhavan, Salt Lake, Kolkata – 700 091.

Present-

The Hon'ble Sayeed Ahmed Baba, Officiating Chairperson & Member (A)

Case No. OA – 224 of 2019

Shri Sukanta Paul & Another - VERSUS - THE STATE OF WEST BENGAL & ORS.

Serial No.	For the Applicants	: Mrs. Sunita Agarwal, Learned Advocate.
and		
Date of order		
<u>37</u>	For the State	: Mr. Gautam Pathak Banerjee, Mr. Manujendra Narayan Roy, Learned Advocates.
29.11.2024	Respondents	
	For the Pvt. Respondent Nos. 8, 9 & 12	: Mr. Vivekananda Bose, Mr. Rahul Kumar Singh, Learned Advocates.
	For the West Bengal Public Service Commission	: Mr. Saurav Bhattacharjee, Learned Advocate .

The matter is taken up by the Single Bench pursuant to the order contained in the Notification No. 638 - WBAT / 2J-15/2016 dated 23rd November, 2022 issued in exercise of the powers conferred under Section 5(6) of the Administrative Tribunals Act, 1985.

In presence of other learned counsels representing all the sides, Mr. Rahul Kumar Singh, learned counsel for the Pvt. Respondents No. 8, 9 and 12 points out certain common errors/omissions in the order passed by this Tribunal on 21.11.2024 in O.A. No. 224 of 2019. Learned counsels representing other sides, having examined these errors/omissions as pointed out by Mr. Singh, agree that such errors/omissions need be corrected. In view of the errors/omissions pointed out and agreed by all the learned counsels, let these corrections be incorporated in the order dated 21.11.2024. After incorporating the required changes, the order dated 21.11.2024 be read as follows:

For recruitment to the post of Assistant Engineers (Mechanical and Electrical) under the Public Health Department (PHE), the West Bengal Public Service Commission published an advertisement no. 1/99. After completion of the recruitment process, the Commission on 16th November, 2000 recommended names of 8 candidates as the first list. The recommended candidates subsequently joined their respective places of postings during July – August, 2001. Finally, 5 more candidates were recommended, including the two applicants, Ritesh Paul and Sukanta Paul. Their

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appointment letters were issued by the Department on 8th July, 2002 and both joined their respective places of postings on 3rd and 2nd September, 2002 respectively.

Running parallel to the recruitment process as described above, the Commission, in compliance with the order of Hon'ble High Court in WPST 76(W) of 1998 issued another advertisement (10/2000 on 14th October, 2000) for filling 7 posts of Assistant Engineers (M & E) under the same Department. The written test under this advertisement was held on 24th October, 2000 and the interview was held during 16 – 17th July, 2001. After completion of this second set of recruitment, a total 7 candidates were recommended and 6 of them joined their respective posts during August, 2001 and January, 2002. The private respondents in this application were part of this recommendation by the Commission.

Later, the Department, in consultation with the Commission, recommended names of 8 Assistant Engineers for promotion to the post of Executive Engineer. In this list, names of Ashis Kumar Naskar and Nilanjan Saha were recommended for such promotion and joined their promotional post in December, 2007. The 2 applicants were promoted later in April, 2010 and January, 2011.

Gradation list

The applicants after joining their posts as Assistant Engineers furnished representations before the Department to fix their inter-se seniority. On 24th July, 2017, the Department wrote to the Commission seeking advice how to fix the seniority of the Assistant Engineers. After few more reminders, the Commission finally responded by stating that it has “no jurisdiction for determination of seniority”.

In consultation with the learned Legal Remembrancer and the Finance Department, a gradation list of Assistant Engineers was finalised and published on 22/03/2018, with effect from 01.01.2001. The 2 applicants were placed at serial 10 & 11, above the private respondents who were placed 12, 13 and 16. The learned L.R. had opined, “persons appointed from the result of an earlier selection shall be senior to those appointed on subsequent selection”. The Finance Department accepted this view. However, on 5th December, 2018, the Deputy Secretary vide PHE/Estt./2468/2E –

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25/02 dated 5th December, 2018 cancelled the Memo dated 24.11.2017. On 19th December, 2019, the Department issued a new gradation list which is being the subject matter for challenge in the Tribunal under MA – 30 of 2020. The Department had questioned the authority of the OSD and ex-Officio Special Secretary of having tampered with the seniority of the Engineers in the West Bengal Senior Public Health Engineering Service (Mechanical/Electrical) and publishing it in the official website without knowledge and approval of the competent authority. The Department felt that such unilateral and arbitrary action was taken by this OSD to help the applicants. The Department also went this far to deny the existence of such “illegal” Memo dated 24.11.2017. Further, it expressed that such Memo dated 24.11.2017 was not only illegal but also did not take into account the provisions of the West Bengal Senior Public Health Engineering Service. Thus, by such publication, the OSD and the applicants mislead the Tribunal and obfuscated the entire issue relating to seniority and promotion. Having realised such unauthorised action on part of the OSD, the Department issued Memo No. 2468 dated 5th December, 2018 and cancelled the Memo dated 24th November 2017. The contents of this Memo were also removed from the Department’s website.

The applicants had approached this Tribunal questioning the authority of the Deputy Secretary to cancel the Memo dated 24th November 2017. The Tribunal in its order dated 13th June, 2019 was not satisfied and held that the Deputy Secretary appears to have issued such communication under the instruction of the competent authority.

In compliance to the order dated 27th July, 2017 passed in WPST No 184 of 2016, the State respondents made necessary changes in the existing draft gradation list of Engineers and such rectified draft list was issued by the Department on 19th December, 2019. The two applicants were placed at serial no. 24 and 23 respectively. The respondents were placed at serial no. 19, 20 and 17 respectively. In MA - 13 of 2020, the Tribunal passed an interim order to maintain the status quo with regard to the draft gradation list published on 19th December, 2019. This interim order of the Tribunal was assailed in Hon’ble High Court in WPST 66 of 2021, in which the Hon’ble Court directed the PHED to finalise the gradation list of 2019 after taking into consideration

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the objection, if any, raised by the applicants and finalise the list thereafter. The Hon'ble High Court also allowed the Department to give promotions to the deserving candidates. However, such promotions would abide by the result of the application being heard by the High Court.

In terms of such liberty given by the Hon'ble High Court while hearing the MA – 13 of 2020, the Department by Memo dated 29th January, 2021 promoted the respondent no. 12 to the post of Superintendent Engineer (M/E). Though a contempt application was filed against such order of promotion to the post of Superintendent Engineer but the Tribunal concluded that such contempt application being CCP 12 of 2021 did not have any merit in the light of orders passed by Hon'ble High Court in MA – 13 of 2020. This contempt application was disposed of without any orders.

Subsequently, the PHED published the draft gradation list of Engineer officers being Memo 2453 dated 8th October, 2021 in terms of a direction of the Hon'ble High Court passed in order dated 2nd September, 2021. The same draft gradation list was published in the official website on 8th October, 2021. The applicants did not object to the entries in the list. Therefore, the Department finalised this gradation list in Memo 2718 dated 18th November, 2021.

Argument on behalf of the applicants

The contention of the applicants is that though they participated in the selection process conducted by the Commission in 1999 but their names were not recommended in the first phase due to delay caused by the Commission. Therefore, it is to be accepted that they not only participated in the selection process of 1999 but were also successful. They argued that it is inconsequential whether their names were recommended in the first phase or at a later stage. To determine the seniority of the Assistant Engineers who had joined the Department, a final gradation list was published on 22nd March, 2018, in which the applicants were placed at serial no. 10 and 11. However, without any rhyme or reason and without any opportunity of hearing, the Deputy Secretary cancelled the Memo dated 24.11.2017. Their contention is that the Deputy Secretary had no authority to cancel such Memo which was published after

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considering comments and objections from all. Further, by such an arbitrary action, the views expressed by the learned Legal Remembrancer and accepted by the Finance Department were also ignored.

Response of the State respondent and Private respondents

The State's side in their replies emphasise that service matters of the Engineers in the Department is governed by the Rules of 1994, called the PHED Engineer Services Rule, 1994, which cover matters related to service of the Engineers. By this Rule, for the promotion to the post of Executive Engineer, an Assistant Engineer would become eligible only if he has completed 6 years of service as Assistant Engineer and passed the examination conducted by the Public Service Commission. Following this Rule, the private respondents became eligible for promotion to the post of Executive Engineer on 23rd August, 2007 after completing 6 years of service as Assistant Engineer. Accordingly, they were promoted to the post of Executive Engineer on 12th May, 2008, 3rd December, 2008 and 18th December, 2007 respectively. The State is also emphatic that on these dates, the applicants had not completed 6 years of service as Assistant Engineer and thus, not eligible for promotion to the post of Executive Engineer. Once, they had completed the required 6 years of service and passed the examination they were promoted in January, 2011 and April, 2010 respectively. Thus, after fulfilling such requirements, the private respondents were and remained senior to the applicants from the date when their names were recommended by the Public Service Commission. The draft gradation list published on 01.01.2012 had placed the applicants at serials 24 and 23 respectively and the private respondents were at serials 19, 20 and 16 respectively.

So far the issue relating to seniority and promotions are concerned, the Department is of the view that such issue should be counted from the date of actual joining of the service and not from the date of selection process. A person cannot said to have been recruited to the service only on the basis of any initiation of the process of recruitment. Thus, retrospective seniority should not be granted from a date wherein employee was not even borne in the cadre.

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From the documents produced by the Public Service Commission during hearing of O.A. 224 of 2019, a particular File No. 1S – 56/98, it was discovered that the applicants were recommended against future vacancies up to 31st December, 2001. As per rule 17 of WBPSA (Rules of Procedure, 1982) this fact was recorded in the note sheets at pages 23, 24 and 30 and from the two page annexure at page 23. Statements made in this note sheets revealed that the Department had requisitioned 5 posts on 4th February, 2002, which were lying vacant up to 31st December, 2001. The applicants were recommended against vacancies lying vacant up to 31st December, 2001. Therefore, the applicants cannot be termed as candidates of the 1999 selection process as they were appointed against future vacancies up to 31st December, 2001. Further, against the 9 advertised vacancies of 1999 selection process, 7 candidates had joined by June, 2001 and only 1 UR vacancy and 1 ST vacancy remained unfilled in the 1999 selection process. Thus, 5 persons could not have been requisitioned by the PHED on 4th February, 2002 for the 1999 selection process. Therefore, the applicants having been appointed against such future vacancies cannot claim seniority over the private respondents who were recommended, appointed, confirmed and promoted to the senior PHE service prior to that of the applicants. None of the PHED and WBPSA files inspected show that the unfilled ST vacancy was sought to be de-reserved and the applicants recommended against the 1999 vacancy. In fact, the requisition from dated 4th February, 2002 for 5 posts categorically mention that such requisition was being made after excluding the unfilled vacancy reserved for ST candidates.

Tribunal's Observations:-

The service of the Engineer officers in the PHED is governed by the Rules of 1994 in the Engineering Services. The Rules clearly state that an Assistant Engineer becomes eligible for promotion to the rank of Executive Engineer after he has completed 6 years of service as Assistant Engineer and also passed the professional and Departmental examinations conducted by the WBPSA. The Private respondents having joined the post of Assistant Engineer on 23rd August, 2001 became eligible for promotion to the post of Executive Engineer on 23rd August, 2007, that is after

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completing 6 years of service as Assistant Engineer. On the other hand, both the applicants who had joined the service as Assistant Engineer in September, 2002, had not completed 6 years of service as Assistant Engineer and thus, they were ineligible for promotion to the post of Executive Engineer. They were later promoted to such post in January, 2011 and April, 2010 respectively after completing their six years A.E. tenure.

The other requirement of rule 5 (2) of the Recruitment Rules is the passing of the Departmental and professional exams conducted by WBPSA. The Private respondents had cleared these examinations on 8th October, 1998, 29th July, 1998, 8th September, 1997, 28th July 1997, 24th November, 2002 and 13th December, 2002 respectively during their service pursuant to their appointment made in 1995, 1996 and 2001. They were not required to clear these examinations once again.

The private respondents became senior to the applicants since they were appointed 13 months prior to that of the applicants. Besides, it is apparent that the applicants were recommended by WBPSA against future vacancies up to 31st December, 2001.

Culled from all the submissions and records presented, the only core issue in this application is regarding promotion; promotion to the post of Executive Engineer and Superintendent Engineer.

Rule 4 of West Bengal Services (Determination of Seniority) Rules, 1981, cited by the applicants is silent on the question we are dealing with it. Though it clearly assigns seniority to an employee on the basis of his year of selection, but remains silent and does not address a situation like ours, where final result of such selection and subsequent appointment were delayed resulting in delay in joining the posts. In this case, though the selection process started in 1999 and a list of names recommended by the Commission but names of applicants featured only in the next list in 2001. Meanwhile, by another selection process in 2000, of which the result and recommendations preceded the 1999 selection process, names of private respondents were sponsored and they joined earlier.

If Rule 4 is to be followed strictly and the applicants are placed higher to the private respondents in seniority, it will lead to a complex situation when it comes to

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promotion to the post of Executive Engineer. By the PHED Engineer Services Rules, 1994, as observed earlier, an Assistant Engineer becomes eligible for such promotion provided he has completed six years of service as Assistant Engineer and successfully passed the Departmental Exam. On the day the private respondents were promoted to the post of Executive Engineer, our applicants had not completed the mandatory six years of service as Assistant Engineer, because their joining dates were later.

The core issue in this litigation being promotion, the PHE Department would not have promoted the applicants to the post of EE without their having completed six years of service as AE. Therefore, the relevant point to be considered is, could they be promoted to the post of EE without completing six years of service as AE? Certainly not. Such promotion to the applicants in the post of EE would have been not only illogical, preposterous but violation of the PHED Rules, 1994. The PHED Rules, 1994 does not give any room for such relaxation. Since Rule 4 of WBS (Determination of Seniority) Rules, 1981 is rather silent on this front, as described above and whereas the PHED Engineer Services Rules, 1994, on the contrary, is very clear on issue of promotion, therefore, this Tribunal is compelled to rely more on the PHED Rules, 1994. Since the core issue revolves around promotion, reliance on the PHED Rules 1994 also make sense. Had the PHED Rules 1994 not been in existence and there was no other rule prescribing such experience of six years for promotion to the post of EE, then, perhaps, it would not have been difficult for the Department to grant promotion to the applicants before the private respondents.

It would be also necessary to point out here that promotion to the post of EE given to the private respondents was in terms of a direction of the Hon'ble High Court in WPST 66 of 2021. Such promotion was not struck down by any court of law. Since such promotion of the private respondents to the post of EE could not be assailed successfully, it is the view of this Tribunal that by such promotion, the issue of seniority has already been settled. In the face of such confirmation to promotion, the preceding issue of seniority cannot be questioned and challenged.

Keeping the PHED Service Engineer Rules, 1994 in view, the Tribunal is also of the considered opinion that the promotion from Assistant Engineer to Executive

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Engineer can not be granted unless one has completed the service of six years as an Assistant Engineer. The respondents were not in a position to deviate from this rule and grant such promotion to the post of EE to the applicants without their completing six years service as AE.

By all rationale and logic, seniority should be counted from the day an employee is borne in a cadre by joining a post. Only and only after he has gained sufficient experience in the field should he be considered for promotion to a higher post. It would not be, not only undesirable, but against public interest, for an employee to be handed the responsibility of an E.E. and tasked to execute schemes in the field without his having sufficient experience as an A.E. Further worrying part is, whether as an unaccomplished and inexperienced E.E., will he be competent to supervise over his junior A.Es?

It is also clear now to the Tribunal that the primary objective of the applicants is their promotion to the posts of E.E., S.E. and further up. By agitating before courts of law and relying on the issue of their seniority, they expect to be treated as seniors to the private respondents. But it is also important to understand that as per the promotion rules, being PHED Rules, they could not be promoted before the private respondents for they had neither completed six years service as A.E. nor cleared the required professional examinations. Such promotion would have not been in conformity with the PHED Rules.

Hon'ble Supreme Court in **K. MEGHACHANDRA SINGH v. NIGAM SIRO (2020) 5 SCC 689** observed that,

“28. Before proceeding to deal with the contention of the applicants’ counsel vis-a-vis the judgement in N.R. Parmar, it is necessary to observe that the law is fairly well settled in a series of cases, that a person is disentitled to claim seniority from a date he was not borne in service. For example, in Jagdish Ch. Patnaik the Court considered the question whether the year in which the vacancy accrues can have any bearing for the purpose of determining the seniority irrespective of the fact when the person is actually recruited. The Court observed that there could be time-lag between the year when the vacancy accrues and the year when the final recruitment is made. Referring

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to the word “recruited” occurring in the Orissa Service of Engineers Rules, 1941 the Supreme Court held in Jagdish Ch. Patnaik that person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment but he is borne in the post only when, formal appointment order is issued.

29. Having regard to the similar provisions, the Court approved the view that seniority is to be reckoned nor from the date when vacancy arose but from the date on which the appointment is made to the post. The Court particularly held that retrospective seniority should not be granted from a day when an employee is not even borne in the cadre so as to adversely impact those who were validly appointed in the meantime.

30. We may also benefit by referring to the judgment in State of U.P. v. Ashok Kumar Srivastava. This judgment is significant since this is rendered after the N.R. Parmar decision. Here the Court approved the ratio in Pawan Pratap Singh v. Reevan Singh, and concurred with the view that seniority should not be reckoned retrospectively unless it is so expressly provided by the relevant Service Rules. The Supreme Court held that seniority cannot be given to an employee who is yet to be borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.”

In view of above findings and relying on the cited judgements, the Tribunal does not find any merit in the prayers of the applicants and therefore, this application is disposed of by directing the respondent authority to consider promotion to the post of Executive Engineers and Suptd Engineers strictly in accordance with the PHED Engineer Service Rules, 1994.

Accordingly, with the above direction, this application is disposed of.

**SAYEED AHMED BABA
OFFICIATING CHAIRPERSON & MEMBER(A)**

A.K.P