

North Block, New Delhi
Date: 3rd January, 2018

OFFICE MEMORANDUM

Sub: Ante-dating of promotion of Scientists on the direction of CATs/High Courts – reg.

Department of Personnel & Training (DOP&T) is receiving various proposals seeking comments/approval of DOP&T for implementation of order of Hon'ble CATs/High Courts in the matter of anti-dating of in-situ promotion of Scientists working in various scientific Ministries/Departments/Organizations.

2. Hon'ble Supreme Court in Dr. S.K. Murti's case had uphold the decision of Hon'ble Delhi High Court that in the cases of promotion under MFCS delayed due to administrative reasons, benefits of promotions would be granted from the date the candidate became eligible for promotion. However, Hon'ble CAT Principal Bench, New Delhi in its order dated 29.05.2014 in OA No. 1926/2013 filed by Dr. A. Duraiswami, Scientist 'F' working in Ministry of Environment Forests and Climate Change held that the directions of the Hon'ble Apex Court was *in personam* in respect of 10 similarly situated co-applicants of Dr. S. K. Murti in the OA No. 826/2003, and cannot be meant to be extended *in rem* to the Scientists of all the Scientific Ministries/Departments.
3. Various court cases have been filed before Hon'ble CATs/ High Courts seeking promotions with retrospective effect referring the order of Hon'ble Supreme Court in the Dr.S.K. Murti case. As per MFCS scheme issued by DOP&T vide OM No. AB-14017/37/2008-Estt. RR dated 10.09.2010 and DOP&T OM No. AB-14017/36/2011-Estt. RR dated 21.09.2012, the Competent Authority are required to ensure that no promotion under FCS/ MFCS is granted with retrospective effect.
4. The issues relating to ante-dating of promotion of Scientist in the Ministry of Electronics & Information Technology (MietY) was examined by MietY in consultation with Solicitor General of India in connection with a case filed by Shri Vinay Kumar, Scientist 'E' NIC, in CAT, Principal Bench, New Delhi. In this case, the petitioner also sought ante-dating of his promotion to Scientist 'D' and Scientist 'E' due to delay in considering review promotion.
5. Subsequently MeitY has filed SLPs before Hon'ble Supreme Court challenging the order of Hon'ble High Court in the following cases wherein a prayer has been made for ante-dating of promotion in case of :-

- (i) SLP CC No. 4155/2016 (Union of India and Ors Vs. Vinay Kumar)
- (ii) SLP CC No.7196/2016 (Union of India and Ors Vs. Santosh Wadhwa, Scientist-E and Ors.)
- (iii) SLP CC No.26757/2016 (Union of India and Ors Vs. Iqbal Hasan and Ors)

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4. Hon'ble Supreme Court in its order dated 08.07.2016 has directed in the SLP No. 4155/2016 that the impugned judgment shall remain suspended during the pendency of the appeal.

5. In the light of above, all scientific Ministries/ Departments/Organizations are advised to defend the court cases on the subject matter in view of the laid down policy of DOP&T, on the basis of advice of Solicitor General of India and the stand taken in the SLP filed by MietY till the final decision of the Apex Court in this case on the issue of ante-dating of promotion of scientist. A copy of the opinion of Ld. Solicitor General is also enclosed for ready reference in this case

(Encl: As above)



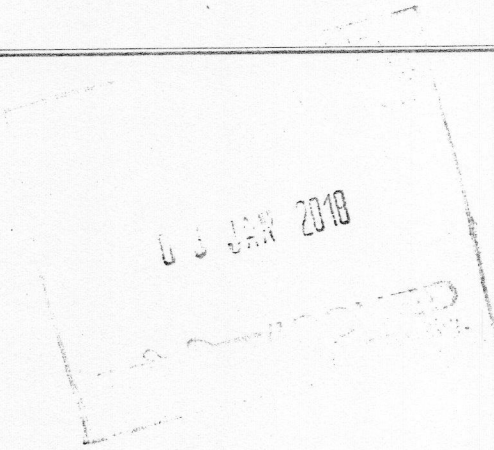
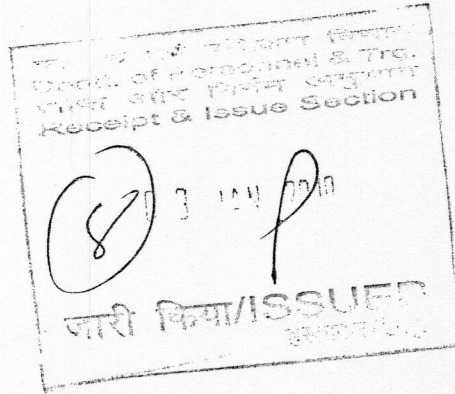
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To,

All Scientific Ministries/Departments/Organizations.



OFFICE OF SOLICITOR GENERAL OF INDIA
SUPREME COURT
NEW DELHI

My opinion has been sought by the Department of Legal Affairs on behalf of the Ministry of Communications & Information Technology, Department of Electronics & Information Technology, National Informatics Centre, for reconsidering the opinion of the then Ld. ASG Shri L. Nageswara Rao, dated 17.11.2014 regarding the feasibility of filing an SLP, in which the Ld. ASG had advised the Government to not file an SLP in the Supreme Court.

Background:

Before proceeding with the query, it would be relevant here to extract the facts of the present case in brief.

- i) Shri Vinay Kumar (hereinafter referred to as "Applicant"), Ex-Scientist - E, National Informatics Centre (hereinafter referred to as "NIC") had filed O.A No. 1111 of 2012 before the Hon'ble Central Administrative Tribunal, Principal Bench, New Delhi, seeking promotions from retrospective effect as per the order dated 2.05.2011 of the Hon'ble Supreme Court passed in SLP CC No. 6864/2011 titled S.K Murti v. Union of India. The Supreme Court in S.K. Murti's case had affirmed the decision of the Division Bench of the Delhi High Court holding that for promotions under the Flexible Complimenting Scheme ('FCS' in short), the benefits would be granted from the date the candidate became eligible for promotion
- ii) The Flexible Complimenting Scheme, which is a promotion policy for Scientists in various scientific departments, was modified on 9.11.1998 on the recommendations of the 5th Central Pay Commission. This modified scheme, inter alia, provided for the minimum period of residency to be undergone before a scientist became eligible for promotion to the next grade.

Designation	Minimum Residency Period linked to performance
Scientist B - Scientist C	3 Years
Scientist C - Scientist D	4 years
Scientist D - Scientist E	4 Years
Scientist E - Scientist F	5 Years
Scientist F - Scientist G	5 Years

- iii) The Applicant had been working with NIC and was promoted as Scientist - C under the Flexible Complimenting Scheme (hereinafter referred to as "FCS") on 1.01.1999. He became due for promotion to grade of Scientist - D on 1.01.2003 and thereafter to the grade of Scientist - E on 1.01.2007. However, he was actually promoted on 29.12.2003 and 1.06.2010 to the grade of D and E

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respectively due to delay in conducting review promotions. Thus, being aggrieved, the Applicant had filed an OA before the Hon'ble CAT praying for ante dated promotions from 1.01.2003 and 1.01.2007 and the consequential benefits and arrears thereupon. The Hon'ble CAT, placing reliance upon *S.K Murti* (Supra), allowed the application and directed the Government to consider granting promotion to the applicant from the due dates with all consequential benefits. In the Writ Petition filed before the Hon'ble High Court of Delhi, the judgment of the Tribunal was upheld and the Government was directed to grant the relief to Shri. Vinay Kumar from the date he became eligible.

- iv) Thereafter, the opinion of the then Ld. ASG Shri L. Nageswara Rao was sought as to the feasibility of filing an SLP in the said matter, to which the Ld. ASG had opined in the negative.
- v) Meanwhile, on the dictum of the judgments of the Supreme Court in *S.K. Murti* (Supra) and the applicants case in the Ld. Tribunal, several other cases were dealt with by the Tribunal and similar reliefs of retrospective promotions were granted to the said applicants therein. The details of such cases have been provided @ **Pg. 26 - 27/N**. Apart from the instant case - *Vinay kumar*, and out of all the cases decided by the Ld. Tribunal, the Department preferred Writ Petitions in two other cases viz. Iqbal Hassan and Santosh Wadhwa, which were dismissed by the Hon'ble High Court of Delhi. Thereafter, the opinion of the Ld. ASG - P.S. Narasimha was sought about the feasibility of filing an SLP in the said two cases, to which the Ld. ASG declined.
- vi) Subsequently, on 12.01.2015, the Department of Personnel and Training (hereinafter referred to as "**DoPT**") agreed to implement the order of the Hon'ble Tribunal in Vinay kumar's case and the approval of the Hon'ble Minister for Communications & IT was also granted on 19.02.2015 for implementing the said order. As already detailed at Para 3 @ **Pg. 26 - 27/N** of the Notings, there were a total of 11 OAs in the matter of ante-dated promotions and the consequential benefits thereupon, out of which the Department has already issued orders of implementation of 9 OAs covering 147 applicants for first level ante dating, wherein the applicants have been extended the benefit of shifting of dates to the year on which they were eligible for promotion and for which the prescribed process of screening and interview as per the FCS policy had been conducted. It is also to be noted that applicants in 5 OAs have filed contempt petitions in the CAT for early implementation and the same are currently pending.
- vii) The proposal regarding implementation of the orders of the CAT for grant of ante-dating promotion to Shri Vinay Kumar in O.A. No. 1111/2013 was submitted to the Department of Expenditure. Thereafter, detailed reasons @ **Pg. 20-21/N** were provided by the Department of Electronics & Information Technology for the delay in conducting Review Promotions beginning with the year 2002.

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Keeping in view the larger implications involved in the cases granting ante-dating promotions to Scientists under the FCS in NIC, the Department of Electronics & Information Technology proposed to seek the advice of the Learned Attorney General for challenging the orders of the Hon'ble CAT in O.A. No. 1111/2012 (Vinay Kumar v. UOI) and the order of the Hon'ble High Court in W.P. (C) No. 2357/2014 (UOI v. Vinay Kumar).

It is with the above background that the file has been submitted to me, for reconsidering the opinion of the former ASG - Shri L. Nageswara Rao.

ANALYSIS

The question before me is with regard to the feasibility of filing an SLP against the orders of the Hon'ble CAT in O.A. No. 1111/2012 (Vinay Kumar v. UOI) and the order of the Hon'ble High Court in W.P. (C) No. 2357/2014 (UOI v. Vinay Kumar).

The Ld. ASG - Shri L. Nageswara Rao had advised the Government against the filing of an SLP in the present matter as he was of the opinion that the decision of the Hon'ble Supreme Court in S.K. Murti's case, which was relied upon by the Tribunal and the Hon'ble High Court of Delhi, covered the present matter and also that the Office Memorandum dated 17.07.2002 was considered by the High Court in S.K. Murti.

While it cannot be doubted that the Division bench of the Delhi High Court in S.K. Murti's case did consider the Office Memorandum dated 17.07.2002 (which provides that promotions under the FCS will only be prospective), there are several other factors which need to be looked at in the present matter.

At the outset, I would like to state that I am of the opinion that an SLP should be filed in the present case, the reasons for which are the following:

- The order of the CAT dated 27.09.2013 in O.A. No. 1111/2013 which was affirmed by the Delhi High Court vide order dated 30.07.2014 in W.P. No. 2357/2014 has given rise to a peculiar situation, leading to the procedure evolved in the Flexible Complementing Scheme to be bypassed and thus, making redundant, the policy decision of the Government. The Tribunal and the High Court have granted ante-dated promotions to Vinay Kumar from 29.12.2003 to 1.01.2003 for the post of Scientist-D and from 1.06.2010 to 1.01.2007 for the post of Scientist-E.

The FCS provided for a minimum period of 4 years of residency to be undergone for a scientist to be eligible for promotion from Scientist C-D and another 4 years from Scientist D-E. While in Vinay Kumar's case, the minimum residency period for the block of Scientist C-D was fulfilled, and thus ante-dating his promotion to 1.01.2003 from 29.12.2003 was in consonance

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with the policy of the Government, the second ante-dating from 1.06.2010 to 1.01.2007 is where the problem would arise. If such an action is taken, the said scientist would be promoted before the minimum requirement of 4 years of actual residency work is completed. Vinay Kumar had started work as Scientist-D only on 29.12.2003, thus making him eligible for promotion to Scientist-E only on 29.12.2007. As a result, ante-dating his promotion to 1.01.2007 would be in violation of the clear policy laid down by the Government in this behalf.

In my opinion, this aspect would require clarity and adjudication and keeping in mind the large number of applicants in similar placed situations (totalling 2723 at present), this could lead to a cascading effect within the administrative department and will also have repercussions on other Ministries/Departments.

- In addition to the above, it is also to be noted that under FCS, promotion is not effected upon arising of vacancy. Pursuant to becoming eligible, the Scientists are screened on the basis of gradings in the Annual Confidential Reports on a 10 point scale and thereafter are called in for an interview. The performance of the interview is also graded similarly and only after the above process is completed and the candidate found suitable, is promotion granted. The guidelines lay down that the assessment norms under the FCS should be rigorous with due emphasis on evaluation of scientific and technical knowledge so that only scientists who have to their credit demonstrable achievements or higher level of technical merit are recommended for promotion. Giving the benefit of promotions from a retrospective date or from the date of completion of residency period without timely assessment as prescribed in the guidelines would dilute the spirit of FCS instructions on rigorous assessment. The above mentioned view point had been submitted at para 12 of the reply submitted by the Department in response to the O.A. No. 1111/2012 filed by Shri Vinay Kumar in CAT, New Delhi. The same was reiterated by the OM dated 21.09.2012 issued by the DoPT. It is important that the applicant actually performs the work in the previous grade to be entitled/considered for promotion to the next higher grade. The validity of this OM has not been challenged by any of the applicants in the OAs filed nor quashed by any Court.

Merely stating that the applicants are to be granted retrospective promotions from the date of their eligibility would be contrary to the emphasis laid down in the FCS guidelines with regard to evaluation of scientific and technical knowledge. Mere eligibility does not give a right to be promoted.

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- The primary ground for the Applicants challenge before the Tribunal was the delay in conducting the annual review promotions by the Department, which led to the Applicant and other similarly placed individuals being denied promotions on the date they had become eligible for the same. While this is true, I am of the opinion that the reasons for the delay as have been enumerated by the Department of Electronics & Information Technology @ Pg. 20-21/N appear to be genuine, and it cannot be said that the entire blame lies with the Administrative Department for the delay in conducting the annual meetings for promotions with some of the delay being attributable to the order of the High Court of Orissa at Cuttack dated 26.09.2008 in Dr. Manjurani Routray v. Union of India & Ors. - W.P. (C) No. 7080 of 2005, wherein the High Court had declared the percentage fixed for passing an interview under FCS to be excessive and thus invalid. This had led to the promotion process being put on hold, and NIC was only allowed to continue with the promotions on 17.07.2009 by virtue of an interim order passed by the Hon'ble Supreme Court in Union of India v. Dr. Manjurani Routray in SLP (C) No. 7100/2009.

Further, in view of the larger implications involved in the present scenario and especially keeping in mind the enormous financial ramifications, with an estimated expenditure of Rs. 60 Crores being projected for grant of ante-dated promotions to the officers, and coupled with the reasons already highlighted by me above, I am of the considered opinion, that the present case is fit for filing an SLP. The matter is very delayed as the order of the High Court is dated 30.7.2014 and therefore adequate grounds for condoning delay will be required failing which the matter is likely to be dismissed on the ground of delay especially when the order is in the process of implementation in this case and various other cases.

I have nothing further to add.

(Kumar)
(Ranjit Kumar)
Solicitor General of India
18.01.2016

Additional Secretary & Incharge, CAS

Sh. D.C. Malwa
Addl. Secy.

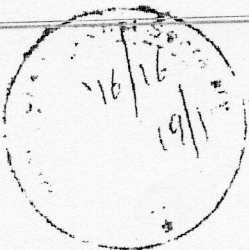
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SUSHMA SIROHI
Additional Secretary/Incharge, CAS
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Mr. Srinivas
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