

COPY OF LETTER NO. AGF/31/66/4843/(9) DATED 10TH AUGUST, 1966  
FROM THE ATTORNEY GENERAL OF INDIA.

Re. The question whether a permanent government servant can be de-confirmed-

-----

The present position in law as I understand is as a result of Dhingra's case, A.I.R. 1958 S.C. 36 and Motiram against N.E.F. Railway, A.I.R. 1964 S.C. 600, is that any termination of service of a permanent government servant who is entitled to a stipulated period of service under the rules earlier than the date of expiry of that period is a dismissal. The Government servant has a security of tenure which cannot be disturbed unless the procedure of an enquiry and a reasonable opportunity of being heard has been gone through. The question here is what is called deconfirmation, i.e., the setting aside of reversal of a confirmation made in error. That error may arise either because of ignorance and so non-compliance with a rule having statutory force or with departmental instructions regulating the matter of promotion or confirmation. There is no ruling which bears absolutely directly on the point but this much I think is clear that if the person who effects the confirmation as the authority to do so, but acts in disregard of a statutory bar or condition, his action can have no effect and the confirmation could be reversed as soon as the error is discovered. If, of course, there is some rule which enables the confirming authority to exercise his discretion in a particular case notwithstanding the bar or condition, then I think the action once taken would very well be attributed to the exercise of such a discretion and it would not be possible to treat the confirmation as of no effect. If, however, there is no statutory bar but only departmental advice and the confirming authority is the authority to confirm then I doubt whether that confirmation could be reversed on the ground of a mistake. In the case of State of Punjab against Jagdeep Singh, the Supreme Court held that the order of the Financial Commissioner confirming certain Tehsildars had no legal foundation because the Financial Commissioner was not empowered by any rule to create the post of a Tehsildar, the fact in that case being that there were no substantive vacancies and the Commissioner had no power to create new posts. It appears therefore that if confirmation is made when there are no substantive vacancies the act of confirmation would be invalid. Further, that a confirmation contrary to statutory rules would be liable to be reversed or cancelled. The test is whether the government servant acquired a right to hold the post substantively or permanently by reason of the confirmation. If the confirming authority had the power and no statutory rule was transgressed and there existed the necessary substantive vacancy I think it would not be possible to reverse the action.

2. As to administrative instructions, they are no doubt pieces of guidance or advice. They have no mandatory force. If the confirming authority either knowingly or unknowingly acts in defiance of any such instructions, it may be a matter between him and the Government, but I think the person confirmed would have a right to say that he cannot be de-confirmed, assuming that the confirming authority if there is no substantive vacancy has the right at his option to create an additional post.

3. There has been in the decisions above mentioned a good deal of discussion as to what is removal. Whether a de-confirmation is reduction in rank or not must depend on circumstances of each case. If the confirmation cannot be justified as being strictly according to the statutory rules, or is in fact contrary to any such rule, there can be no question of the de-confirmation being a reduction in rank or removal. In the case of a person who is de-confirmed because he was confirmed in breach of some administrative instructions, is it a reduction in rank or removal? No doubt the element of punishment has been emphasised in certain decisions, but the case of Motiram against the N.E.F. Railway would appear to have held (and that to some extent is supported by Dhingra's case) that the deprivation of a government servant of what he has a right to hold for a specific term earlier than that term is in itself a termination or in a given case reduction in rank. It may be asked how is it possible to hold an enquiry in such a case since there is nothing to be enquired ~~xxxxxx~~ into. No charge can be framed and no evidence can be led. The answer, I think, is that since there is no power at all to remove or reduce in rank in such a case as has been mentioned, no question of any enquiry arises. The de-confirming in such a case is ab initio wrong and the government servant acquires the right to have himself put back where he was. I do not think the case of Devasaharam against the State of Madras has any relevance to the matter in hand. That was a case of refixation of seniority and the question was whether a refixation whereby a government servant lost some seniority was a reduction in rank. In that case the question was whether article 311(2) was attracted. Surely, where there is purported deconfirmation because the authorities think there has been a mistake reliance would be placed by the government servant affected not on article 311 but on his substantive right to hold the post without interference except in the case of misconduct. He need not plead article 311 at all. I agree with the view indicated in the last part of the Statement of the case that 311(2) would come in only if there was the intention to penalise the government servant. To put it finally if the confirmation has been contrary to statutory rules de-confirmation is merely putting the matter right and requires no proceedings under 311. If the de-confirmation is because there was a mistake in not observing administrative instructions, obviously no action under 311 is called for, but the de-confirmation would be wrong and the government servant would be entitled to be put back where he was.

4. There may be other circumstances leading to a mistake which could justify de-confirmation, for instance, if the error is in naming the wrong person - mistake in identity.

5. I answer the questions as follows:-

- (1) If the government servant acquired a right to the post he is confirmed in, then de-confirmation resulting in his being in a lower post would be reduction in rank. As to the application of article 311 I do not see how charges can be framed. If in confirming there was non-compliance with a statutory rule, no question of charges arises and even otherwise, it is difficult to see how an enquiry can be held. The basis of the decisions seems to be that the article applies when action is taken which is by way of punishment or results in some slur on the government servant's character. If there was breach of a

x

statutory rule then clearly there was no reduction in rank. If it was otherwise, then the government servant will have his own remedy.

(2) See above. He can be de-confirmed if there was such a mistake as justifies it.

(3) See above.

---  
-----