

**COURT NO. 3, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
T.A. No. 281 of 2009
W.P.(C) No. 570 of 1997 of Delhi High Court**

IN THE MATTER OF:

Nb Sub Kali Ram Phogat**Applicant**

Through : Mr. Puneet Verma, counsel for the Applicant

Versus

Union of India and Others**Respondents**

Through: Mr. Ankur Chhibber, counsel for the Respondents with
Capt. Sunil Thakur

CORAM:

**HON'BLE MR JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT GEN M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 08-04-2011

1. The petition was filed before the Hon'ble Delhi High Court on 17-10-1996 and was transferred to the Armed Forces Tribunal on its formation on 16-11-2009.

2. The applicant vide this application/petition has prayed that remarks for "not recommending" to the next post of Subedar endorsed by the Reviewing Officer (RO) be expunged. He has further prayed that the retirement of the applicant be revoked and respondents be directed to promote the applicant to the next rank and grant extension

of service as would have authorized had he been promoted to the rank of Subedar.

3. The applicant was enrolled in the army on 19-11-1969 as a clerk and was promoted to the rank of Nb Sub (clerk) on 01-11-1990 while serving in the Army Headquarters (AG's Branch). In 1992, the applicant applied for posting to NSG on compassionate ground however his request was turned down and he was asked to report back to the unit to be eligible for selection to the post of Sub. He was thereafter posted to the record office at the paratroops centre. Meanwhile Major Sansar Chand was posted as Senior Record Officer (SRO). He persuaded the applicant who was still at the Army Headquarters in January, 1993 to find out the reasons for his non approval for promotion to the rank of Lt Col. The applicant was reluctant to do so since it was a confidential matter. This annoyed the SRO Major Sansar Chand and he started looking upon the applicant unfavourably. In March, 1993 the applicant was posted to the Record office in order to complete his regimental tenure. Again the applicant had to decline the desired information of SRO Maj Sansar Chand. This further annoyed Maj Sansar Chand against the applicant.

4. The promotion board was held in November 1994 and applicant found that he had been superseded. Later he was given to understand

that in his ACR for 1994, he was not recommended for further promotion.

5. Aggrieved by this, the applicant filed a Writ Petition (Civil) bearing no. 3834/1995 before the Hon'ble Delhi High Court which was disposed of by the Hon'ble Court vide order dated 12.02.1996 suggesting that proper procedure (departmental process) should be followed and statutory complaint filed by the applicant. The applicant preferred a statutory complaint on 19-09-1995 which was rejected without giving any opportunity of being heard vide impugned order dated 01.08.1996 (**Annexure H-1**) communicated vide letter dated 29.08.1996 (**Annexure H-2**).

6. Learned counsel for the applicant stated that principles laid down in AO 5/90 were not adhered to. No counselling/warning was given to the applicant. Also the adverse remarks and adverse report in terms of not recommending for next rank was not conveyed to the applicant. He only came to know about non recommendation for promotion when his representation was rejected in 01.08.1996. Thereafter, again he filed the present petition before the Hon'ble Delhi High Court.

7. Learned counsel for the respondents stated that the applicant has made serious allegations against SRO Maj Sansar Chand and he

has not even been made a party to the proceedings in his writ petition filed before the Hon'ble Delhi High Court, thereafter on the direction of the Hon'ble Delhi High Court on 18-10-2001, the name of Maj Sansar Chand was impleaded as Respondent no. 3 as per order dated 15-02-2002. Accordingly, notices were sent to the Respondent no.3, but despite service, none has appeared on behalf of Respondent no. 3 nor any reply was filed, but the alleged allegations are baseless. During the course of arguments before this Tribunal, learned counsel for the applicant stated that as per his information, Respondent no. 3 Maj Sansar Chand has expired in 2008. This fact was also admitted by the respondents. Accordingly, at his request, name of Respondent no. 3 Maj Sansar Chand was deleted from the array of parties vide order dated 09-03-2011.

8. Learned counsel for the respondents further stated that the applicant was considered for promotion by the DPC. However he was graded average in 1994 and the weak points endorsed in his ACR for the year 1994 was communicated to the applicant. However the applicant chose not to represent against the SRO's endorsement till such time he was superseded. The applicant was superseded for the promotion to the rank of Sub as he was "not recommended" for promotion in his ACR for the year 1994.

9. Learned counsel for the respondents argued that the applicant submitted a non statutory complaint on 28-11-1994 against his supersession. This was rejected by the Chief of Army Staff on 22-08-1995. Thereafter the applicant submitted another statutory complaint on 19-09-1995. His subsequent complaint was also examined by the Chief of the Army Staff and rejected on the grounds that the impugned ACR is in order and does not merit any interference. This was again communicated to the applicant on 29-08-1996.

10. Learned counsel for the respondents further argued that promotion to the rank of Sub as per the policy following guidelines are mandatory:

“(a) Three out of the last five reports rendered on an individuals should be ‘High Average’ out of which at least ONE should be on Regimental Duty or as an Instructor in any Army School of Instruction in the rank of Nb Sub.

(b) No report should be lower than ‘Average’ in the last three years.

(c) Should have been recommended for promotion in the last three reports.”

11. Amplifying the above policy, the counsel for the respondents stated that since the promotion board was held in November 1994, therefore, the last ACR which came under consideration was covering

the period from 01-06-1993 to 31-05-1994. Admittedly, the applicant was qualifying for consideration in terms of obtaining “Above Average” and “High Average” ACR commencing from 1990 to 31-05-1994. However he was not recommended in the report initiated on 31-05-1994 and thus he was superseded.

12. Learned counsel for the respondents stated that the applicant was issued with performance counselling on 26-10-1993 (Annexure R-1). This clearly brings out the lapses on the part of the applicant as also unsatisfactory performance.

13. The remarks endorsed by Maj Sansar Chand, the RO was communicated to the applicant on 30-08-1994 (**Annexure R-2**). In his endorsement, RO had quote “just average JCO who is professionally weak”. Based on these remarks, the RO had not recommended the JCO for further promotion thus debarring the applicant for consideration to the rank of Sub. Vide Paragraphs no. 41 and 42 of the AO 5/90, the weak points/adverse remarks of the Reporting Officer in the CR have to be communicated to the JCO in writing which was done. However non recommendation for promotion by RO is not to be communicated to the concerned JCO. Para 42 of the AO 5/90 reads as under:

“42. Non re-commendations for promotion by reporting officers will not be communicated to the concerned JCO”

14. We have heard both the parties at length and summoned the original documents and examined the position of the applicant's grievance. From the ACR commencing 1990 to 31-05-1994, it is observed that the applicant obtained 'Above Average' to 'High Average' grading with recommendation for promotion right up to 1993. However in the ACR covering the period from 01-06-1993 to 31-05-1994 the IO endorsed the remarks "High Average" while not recommending the JCO for the promotion. RO endorsed "Average" while not recommending the applicant for promotion to the next rank. Thus the RO has merely endorsed the remarks of the IO for recommendation to promotion in his ACR. While the RO has also justified himself by supporting his recommendation with the remarks in the pen-picture showing that applicant is an average JCO. Thus effectively down grading their "High Average/Average" given by the IO.

15. The contention of the applicant that there was malice on the part of RO has not emerged in clear cut terms. Therefore, the contention that there was some malafide in reporting by the RO cannot be sustained. Further we also examined subsequent ACRs of the applicant up to 1995. The performance of the applicant in 1995 was again "average" and he was not recommended for promotion by the RO. As such, we feel that reporting of the RO has not been unfair

keeping in view the performance of the applicant during the period of report.

16. In view of the foregoing, the O.A. is dismissed. No orders as to costs.

M.L. NAIDU
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Announced in the open Court
on this 08th day of April, 2011