

**COURT NO.2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

T.A. No.333/2009

W.P.(C) No.5114/2008 of Delhi High Court

IN THE MATTER OF:

Col. Sisir Aich**Applicant**

Through: Mr. S.R. Kalkal, Counsel for the applicant

Versus

Union of India & Ors.**Respondents**

Through: Mr. R. Balasubramanian, Asst. Solicitor General for the
respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. Z.U. SHAH, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 29.07.2011

1. The petitioner/applicant filed the abovementioned writ petition before the Hon'ble High Court for quashing the policy letter dated 14.01.2004 (**Annexure P-5**) and order dated 12.03.2008 (**Annexure P-8**) by which his representation was rejected and subsequently intimated to him. He made further prayer in the petition that his case of promotion be considered as per policy of 1996 and he be awarded all

consequential benefits. Notice was issued. Reply as well as rejoinders were filed. Thereafter, the case was transferred on 09.09.2009 to this Tribunal on its formation.

2. Brief relevant facts for the just disposal of this case are in succeeding paragraphs.

3. The applicant was granted permanent commission in the army as Medical Officer in Army Medical Corps on 27.03.1976 in the rank of Lieutenant. It is stated that during the course of military service the applicant acquired a number of educational qualifications. A detailed narration of qualification is annexed at Annexure P-2A. The applicant further submitted that promotions to the rank of Colonel and above were granted in the Army Medical Corps as per seniority cum merit till 1984. In the year 1984 two separate streams were formed i.e. "administrative" stream and "specialist" stream. Again on 14.01.2004 (**Annexure P-5**) a new policy was brought into effect, under which additional marks were earmarked for the educational qualification, military decorations and an additional 5 marks had allotted to the members of the selection board.

4. It is stated by the applicant that his service record is excellent. He was regularly getting above average ACRs and was never conveyed

any adverse remarks in the ACR. He was due for promotion to the rank of Brigadier. The applicant's promotion boards No.2 were held on 07.12.2005, 27.11.2006 and 07.12.2007, but he was not selected for promotion and intimated vide letter dated 28.01.2008 (Annexure P-3).

5. It is submitted by the applicant that against his non-empanelment for promotion he filed a statutory complaint on 01.06.2007 (Annexure P-4) to the respondent authorities. This was rejected vide order dated 12.03.2008, which was communicated vide letter dated 25.03.2008 (**Annexure P-8**).

6. The applicant submitted that the respondent authorities while issuing policy letter dated 14.01.2004 had made the same applicable with immediate effect. The policy letter under which the marks for educational qualifications and marks to the members of the selection board were earmarked is totally arbitrary and unjust. It is stated that such type of policy for educational qualification for the officers, who have already completed more than 30 years of service, did not give affected officers the chance to qualify on the same. Moreover, any policy decision especially pertaining to educational qualification cannot be made applicable with retrospective effect. It was submitted that the qualifications mentioned in letter could not be acquired by prospective

candidate at this late stage of their career. It was contended that such policy decision could be made applicable for newly commissioned medical officers, but not for those who have already completed more than thirty years of service. It was also submitted that the policy decision submitted by DGAFMS, who himself was a specialist in the year 2004, was biased against the medical officers of administrative stream. It was contended that the applicant belongs to administrative stream. It was contended that the administrative stream officers are mostly deployed in the field or high altitude areas as they are posted as medical officers of the regiments or posted to field ambulance. They, thus, extend maximum medical cover to the troops in difficult areas in comparison to specialist officers, who are generally posted to the forward hospitals where all basic amenities exist. Further super specialist officers are mostly posted to large size zonal/command hospital or army hospital (R&R), which are located in metro cities with all amenities. In this way, the specialist and super specialist officers generally come in contact with the field commander officers or senior officers. The applicant submitted that in this way the policy letter dated 14.01.2004 has created a classification amongst the equals. This policy letter again has been amended from time to time. The applicant contended that he was denied promotion due to applicability of the said policy. It was submitted that earlier policy of 1996 was prevailing under

which he was eligible for promotion. The applicant further submitted that he submitted a demi official (DO) letter dated 01.10.2007 to Chief of Army Staff bringing out all the difficulties being faced by the officers of administrative stream and was informed that, with some suggestions, matter had been forwarded to DGPFMS for further action (**Annexure P-7**). It was also contended that his representation was not properly considered and rejected. Hence, he filed present writ petition.

7. Respondents in their counter affidavit denied the allegations levelled in the petition and submitted that the applicant became due for promotion in the year 2005 for the rank of Brigadier and at that time the new promotion policy dated 14.01.2004 had come into existence and his promotion was considered as per prevalent policy as amended from time to time. In reply it was submitted that before issue of new promotion policy of 2004 the procedure for promotion in AFMS was governed under the Government of India letter No.9(2)/92-D (Med) dated 26.02.1996 (**Annexure R-I**). It was submitted that this promotion policy of 1996 was valid only for three years and in that policy at para 15 it was mentioned that the policy letter would be reviewed after three years. It was submitted that though subsequent extensions were given to the policy letter dated June, 1999 and till that time promotions were considered as per policy of 1996. Thereafter, promotions were

considered as per new policy. It was submitted that the existing policy of 2004 had been prepared after due deliberations and application of mind by the different authorities involved in chain of execution of such important policy, which relates to career advancement and selection of the best in the next higher rank within the cadre. It was further submitted that the policy had concurrence of MSAC (Medical Services Advisory Committee), PPOC (Principal Personal Officer Committee), COSC (Chief of Staff Committee) and finally by the Central Government. It was stated that the allegation of bias and arbitrariness is nowhere sustainable and the policy is just, fair and objective. In reply it was denied that in the new policy concerned, the officer do not get equal opportunity to obtain additional qualification for their career advancement particularly in reference to applicant. It was submitted that the applicant preferred to go on posting abroad i.e. Sultanate of Oman (Muscat) in 1979 and, thus, he could not complete any of the required post graduation qualifications at the time when he was eligible to do the same. However, he completed his DNB (Ortho), but was later found wanting due to age stipulation to become a specialist officer. In this reference in reply the respondents also cited the example of Lt. Gen. N.K. Parmar, AVSM, VrC, VSM, who himself was stated to be administrative officer, who had made it to the highest rank in AMC. It was submitted that the process of policy review involved taking

cognizance of a number of factors like technology advancement in general and advancement in medical science in particular, operational requirements and provision of medical cover in the context of advancement in medical sciences and the requirement of trained personnel to fulfil these requirements. All these inputs culminated in the formulation of promotion policy of 2004. On the basis of these requirements, additional terms were enumerated in the new policy. Initially 5 marks were to be allotted by the board for military awards, decorations and exceptional achievement by considering the overall profile of the officer, but thereafter it was amended on 17.05.2006 with regard to allocation of 5 marks to the board members. In reply, looking at the exigencies of the service and narrating the details, the respondents justified the amendment in the new policy.

8. It was submitted that the applicant was considered for promotion to the rank of Brigadier, but he could not make the grade in all the three chances purely due to comparative merit and limited vacancies in the cadre. In reply it was submitted that the applicant was having above average and outstanding ACRs, but he was not promoted on comparative merit. The respondents in their reply also gave gist of consideration held by Selection Board No.2 on 07.12.2005, 27.11.2006

and 05.12.2007 to show the relative low position of the applicant in the merit list. The same is reproduced hereunder:

Promotion Board (Med) No.2	No. of officers considered by the board	Merit position of the officer last empanelled by the board	Merit position of the petitioner	Grading awarded by the Board	No. of officers higher in merit to the petitioner who could not make it to the grade due to comparative merit
07 Dec 2005	100	28	78	'NS'	49
27 Nov 2006	106	28	81	'NS'	52
05 Dec 2007	98	26	61	'NS'	34

9. In reply the respondents also stated that the applicant filed two statutory complaints, but they were rejected by the Central Government vide order dated 27.04.2007 and 12.03.2008. The respondents also denied the allegation of bias towards general duty medical officers of administrative stream in comparison to specialist doctors. It was submitted that AMC officers were given equal opportunity to obtain additional qualification for their career advancement. The allegation of discrimination amongst the batch-

mates was also denied. Along with the reply the respondents annexed the policy of 1996 (Annexure-I) and with reference to para 15 where it has been provided that this policy be reviewed after three years.

10. Rejoinder to the counter was filed reiterating the grounds stated earlier and applicant again stressed that any promotion policy, if formulated, should be made applicable prospectively and not retrospectively as made in the instant case. In rejoinder again a prayer was made that the new policy of 2004 was arbitrary and unjust and the same should be quashed and the applicant be considered for promotion as per earlier prevailing policy of 1996.

11. Arguments were heard and record was perused.

12. During the course of arguments, learned counsel for the applicant again submitted that the impugned policy dated 14.01.2004 is arbitrary, unjust and illegal. It was submitted that though it has been made applicable with immediate effect, but virtually it was made effective from retrospective effect. It was contended that in the new policy there is a provision of marks for additional qualifications, but at the stage of more than 30 years of service it is impracticable to get these additional qualifications. The applicant, who belongs to

administrative stream, virtually would be prejudiced if such marks were awarded and would be denied promotion for no fault of his. It was contended that such type of policy should be made effective prospectively. A contention was raised that the criteria laid down in this policy for educational degrees and qualifications are impracticable for the persons who have already completed a long service tenure. In this way, the new policy should have been applied to the new entrants, but it had wrongly been made applicable to applicant and other like personnel. A request was made that his policy should be declared null and void and his case should be considered as per the earlier policy of 1996. In support of this contention learned counsel for the applicant has placed reliance on the judgment given by Hon'ble Court No.1 of this Tribunal in **Col. A.P. Padhi Vs. Union of India & Ors.** T.A. No.191/2010 decided on 04.01.2011. It was also contended that it is well settled that no such policy can be made effective for retrospectively, by which the promotion of the applicant is denied. In support of his contentions he also cited judgments passed in **Anil Chandra & Ors. Vs. Radha Krishna Gaur & Ors.** (2009) 2 SCC (L&S) 683 and **Havildar Clerk Hans Raj Sharma Vs. The Union of India & Ors.** 1994 (4) SCALE 105. Learned counsel for the applicant further submitted that he has served in the army for more than 30 year. He

prayed that the said policy of 2004 be quashed and he be considered for promotion under the prevailing policy of 1996.

13. Learned counsel for the respondents rebutted the contentions raised by the applicant and submitted that with regard to the concerned policy before new policy came into existence was of 1996, but initially that policy was meant for three years. Though that was continued after 1999, but thereafter considering the requirements of the service the said policy was changed and a new policy was introduced on 14.01.2004. It was also contended that the said policy was formulated after due deliberation. Under the provision of the new policy total requirement aspect for the smooth running of the organisation were considered. It was contended that the said policy is reasonable in all respects. Learned counsel for the respondents in this way supported and justified the formulation of the new promotion policy. During the course of arguments it was also refuted that the policy is suffering from bias and arbitrariness. It was submitted that the said policy was considered and approved by the Central Government. In this aspect it was also contended that once a policy is approved by the Central Government then the applicant has no right to challenge the same.

14. Learned counsel for the respondents further submitted that the applicant became due for promotion for the first time in the year 2005. At that time new policy of 2004 was in force, therefore, he was considered for the first time as per policy of 2004 and thereafter with the amendment in his subsequent consideration, but could not be empanelled due to low relative merit.

15. Learned counsel for the respondents has also contended that the new policy was made effective from 2004. Therefore, it cannot be said of retrospective effect. Since it merely affected adversely on the applicant the policy could be classified in as a retrospective one. It was submitted that the applicant was considered under the prevailing policy of 2004 as amended from time to time, therefore, there was no question for applicability of the policy of 1996. It was contended that on account of the formulation of the new policy there was no discrimination amongst the equals. It was contended that it is incorrect to say that officers do not get equal opportunities to obtain additional qualifications for their career advancements. In fact as per Training Grading & Classification (TGC) Rule 2000 as amended from time to time all regular officers in AMC are given equal opportunities for PG entrance.

16. All the prospective candidates were examined on the guidelines under policy of 2004. It was also submitted that the applicant filed a representation against the non-empanelment for promotion. The same was considered at length and it was rejected by a speaking order and was conveyed to the applicant. In support of his contentions learned counsel for the respondents cited the judgment passed by this Tribunal in **Maj. Gen. Hardev Singh Vs. Union of India & Anr.** in T.A. No.541/2010 dated 26.04.2010 and the judgments passed by Hon'ble Supreme Court in **Union of India & Ors. Vs. S.L. Dutta & Anr.** (1991) 1 SCC 505, **A.V. Raghuraman & Ors. Vs. Presiding Officer, National Industrial Tribunal, Bombay & Ors.** (1981) 3 SCC 546 and **K. Jagadeesan Vs. Union of India & Ors.** (1990) 2 SCC 228. On the basis of aforesaid submissions, a prayer was made to dismiss the main application.

17. We have considered the rival submissions and perused the record of the case as well as the judgments cited by learned counsel for the parties. It is not disputed that before the introduction of policy of 2004, the policy of 1996 was prevailing. There is a specific provision in para 15 of the policy of 1996 (Annexure R-1) that it would be reviewed after three years. Though it was continuing thereafter, but on 14.01.2004, a new policy was introduced. We have examined the

contents of that policy. Some additional marks for specific educational qualifications had been awarded along with initial 5 marks, which were allotted to members of the selection board, though that was amended later on in the year 2006. The major marks were intact with the service profile as prevailing earlier. With regard to the educational qualifications equal opportunity was provided to the prospective candidates, thus, merely because the applicant could not obtain the requisite qualification for which marks were earmarked under the said provision, this policy could not be treated as discriminatory. It was also viewed from this angle whether there was any discrimination amongst the equals, but from the perusal of the policy this is not so. On the contrary, the qualification, which the applicant was holding at the time of promotion was diploma in Orthopaedics. As per the reply by the respondents, the applicant was given due consideration for that. The concerned policy had been made effective from 2004, therefore, it cannot be said to be of retrospective effect though it may have adversely affected the applicant. On this count it cannot be termed as arbitrary and unjust. The contention of the applicant that at this juncture he could not procure the requisite qualification is also not correct, he could have obtained the same and merely on that basis it had adversely affected him, the policy cannot be said to be retrospective. In this respect, the judgments cited by learned counsel for the applicant also do not help his contentions. In

case of **Anil Chandra** (supra) the petitioner challenged the validity of the notification of 14.09.2007, which was made effective from 17.06.1995. With that background, the Hon'ble Lucknow Bench of Allahabad High Court passed an interim order restraining the operation of the seniority list prepared subsequently. Considering these facts the Hon'ble Apex Court maintained that order while dismissing the SLP. In case of **Havildar Clerk Hans Raj Sharma** (supra) the petitioners were selected by the board and their names were forwarded for final selection, but thereafter by letter dated 05.05.1987 the eligibility of the candidates was further made subject to their performance in Board. In that background on the basis of amendment in the policy that was held to be retrospective, but that is not the situation in the present case.

18. In case of **Col. A.P. Padhi** (supra) the petitioner was denied promotion on the ground of a new policy, which came into force on 14.01.2004 changing the criteria of promotion, but in that matter the case of the petitioner was deferred in the year 2002 when the same came for consideration as fresh case at that time because of not having the requisite three ACRs in the rank of Colonel, but it was found that for that he was not at fault and should be considered as a fresh case. In that reference it was observed that new policy will not affect the applicant's consideration and he will be considered under the earlier

prevailing policy of 1996. In the present case, however, the applicant was considered for the first time in 2005 and at that time the policy of 2004 was in force. Therefore, this judgment does not help the applicant. Relevant portion of **Col. A.P. Padhi** (supra) is extracted hereunder:

“Thereafter, a Selection Board was held in December, 2002 for promotion to the rank of Brigadier. However, the case of the petitioner was deferred on the ground that he had not earned minimum three ACR’s in the rank of Colonel as per the policy of 1996. The petitioner was informed that his seniority would remain protected on selection by the next Selection Board after having earned the minimum number of ACRs.”

19. On the contrary, judgments cited by the learned counsel for the respondents are more relevant. In case of **S.L. Dutta** (supra) the Hon’ble Supreme Court observed that reducing the chances of promotion by way of policy was not held affected conditions of service. Relevant para is quoted as under:

“14. In connection with the question as to whether the conditions of service of respondent No. 1 could be said to be adversely affected by the change in the promotional policy, our attention was drawn by learned Additional Solicitor General to the decision of this Court in *State of Maharashtra and Anr. v. Chandrakant Anant Kulkarni* (1981) 4 SCC 130. There it was held by a Bench comprising three learned Judges of this Court that mere chances of promotion are not conditions of service, and the fact that there was reduction in the chances of promotion did not tantamount a change in the conditions of service. A

right to be considered for promotion is a term of service chances, of promotion are not. (See SCC p. 141, para 16). Reference was also made to the decision of this Court in K. Jagadeesan v. Union of India and Ors. (1990) 2 SCC 228 where the decision of this Court in State of Maharashtra and Anr. v. Chandrakant Anant Kulkarni (1981) 4 SCC 130 was followed.”

20. In case of **Maj. Gen. Hardev Singh** (supra) the petitioner was due for promotion, but during that period new policy which came into force when Board was convened on 09.01.2009 by which the mode of assessment for the purpose of promotion was changed from “value judgment” to “quantification method”. While disallowing the contentions with regard to non-applicability of the new policy, the Hon’ble Court No.1 maintained the applicability of the new policy.

21. In case of **A.V. Raghuraman** (supra), the Hon’ble Supreme Court observed that *“In absence of any undertaking to the contrary, held, management competent to alter and relax eligibility conditions for incumbents belonging to one cadre without awaiting completion of promotion of all the empanelled promotes of other cadre – Adverse effect, if any, of the alteration and relaxation would only be on the chances of promotion of the remaining persons in the panel and that*

would not afford any right to challenge the action taken by the management.”

22. In case of **K. Jagadeesan** (supra) the Hon’ble Supreme Court has held that the Rule framed under Article 309 as amended requiring Engineering degree qualification for promotion from Mechanical Engineer (Senior) to Director (ME); the appellant who was a diploma holder in Engineering, was eligible under the un-amended rule, became ineligible under the amended rule. The amended rule was held valid. It was further observed that merely because it adversely affected appellant’s chances of promotion or his right to be considered for promotion, it cannot be said to have retrospective effect; merely because for the higher post of Deputy Director General (Engineering Service) a graduate degree was not necessary, it cannot be held that the requirement of graduate degree for Director (Mechanical) under the amended rule was unreasonable or bad.

23. Thus, on the basis of the aforesaid discussion, after considering the judgments of both sides and rival submissions made by parties, we do not find any element of bias and arbitrariness in the said policy of 2004 nor do we find it of retrospective nature.

24. We have also seen the records. The applicant has also filed a representation against the non-empanelment for promotion, the same was properly dealt with considering all issues raised therein.

25. In the net result, we do not find any force in the contentions raised by learned counsel for the applicant. The impugned orders do not require any interference and there is no ground to quash the policy dated 14.01.2004. The application is, accordingly, dismissed. No orders as to costs.

Z.U. SHAH
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Announced in the open Court
on the day of 29th July , 2011