

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

T.A. No.374 of 2009

W.P.(C) No.3045 of 1997 of Delhi High Court

IN THE MATTER OF:

Warrant Officer R.C. Sharma**Applicant**
Through: Mr. D.K. Sharma, Counsel for the applicant

Versus

Union of India & Ors.**Respondents**
Through: Mr. Ankur Chibber, Counsel for the respondents

CORAM:

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

JUDGMENT

Date: 12.08.2011

1. The petitioner/applicant filed the aforesaid writ petition before the Hon'ble High Court for quashing the adverse recommendations in ACRs for the years 1994-95 and for further directions for promotion to the rank of Master Warrant Officer (MWO) w.e.f. 1995 with all consequential benefits. He has also prayed that the order of rejection dated 08.09.1997 (**Annexure P-2**) passed on his representation dated

20.01.1997 be set aside. Thereafter, vide order dated 14.09.2009 the case was transferred to this Tribunal on its formation.

2. Brief facts of the case are enumerated in the foregoing paras.

3. The applicant was enrolled in Indian Air Force on 27.09.1961 as WOM-II. In due course he was also promoted to the rank of Warrant Officer in the year 1987. It is submitted by the applicant that during service period he participated in a number of courses and was also awarded a number of medals such as Raksha Medal, Samar Sena Star, Independence Medals, SSM Nagaland Hills, 30 Years Long Service Medal etc. He has further stated that he was due for further promotion to the rank of Master Warrant Officer (MWO), but was not promoted in the years 1994-95, and in panel against his name a remark "below grade" was endorsed. He submitted an application on 08.11.1995 and reminder on 26.06.1996 for redressal of his grievances. He also sought interview of Station Commander.

4. The applicant submitted that between 1991 to 1995 he was posted to 772 SU (Signal Unit). In 1995 one Flight Lt. Sanjeev Kumar, who was a psychiatric patient and mentally sick person was his Commanding Officer. He was annoyed and biased against the applicant, therefore, he spoiled the ACRs of the applicant for the years

1994-95. The applicant has further stated that due to the adverse remarks in the ACRs for the years 1994-95 he was not promoted. He was subsequently considered for promotion in the years 1995-96 and 1996-97, but again was not promoted. He filed representation on 20.01.1997, but despite that no action was taken thereon. The applicant further submitted that as per Air Force Confidential Order (AFCO) 2/91 para 12, that if any adverse remarks given to a personnel, there is a requirement of prior counselling and warning. Then only the remarks can be endorsed. Applicant further states that in his case no counselling or warning was given to him prior to adverse remarks nor any adverse remarks were communicated to him. After passage of reasonable time when no action was taken on his representation, the applicant filed the present writ petition before the Hon'ble High Court on 28.07.1997 alleging that representation filed in this respect for quashing the adverse remarks and for promotion had not been considered. The Hon'ble High Court vide order dated 31.07.1997 and amended on 01.09.1997 considered the facts and directed the respondents that the applicant's representation be disposed of within four weeks from the date of receipt of the order. The Hon'ble High Court further directed that if the representation of the petitioner was not disposed of, as ordered, or the petitioner was not satisfied with the order of the

respondents, he had liberty to get this petition revived. With these directions, the writ petition was disposed of.

5. It is submitted by the applicant that in compliance of the Hon'ble High Court's order his representation was disposed of vide order dated 08.09.1997 (**Annexure P-2**) while rejecting the same. Thereafter, the applicant made an application for revival of the said writ petition and also prayed for setting aside the said order of rejection of his representation dated 08.09.1997. Vide order dated 23.01.1998 the Hon'ble High Court revived the writ petition which was disposed of earlier. It was alleged that his representation was not properly examined in the light of allegations made therein and decided hastily.

6. The respondents filed counter affidavit denying all the allegations made in the application and submitted that the applicant was considered for promotion to the rank of Master Warrant Officer (MWO) during 1995-96, 1996-97 & 1997-98, but he could not make the grade for promotion, therefore, he was not promoted. It was submitted that for promotion to the rank from Warrant Officer (WO) to Master Warrant Officer (MWO) in Air Force there is a policy letter i.e. Air HQ/S.40651/3/PA(CPC) dated 31.01.1995 (**Annexure R-1**) and as per that policy 495 marks out of 660 marks i.e. 75% are required to be

scored in the preceding five years' ACRs to make the grade for promotion to the rank of MWO, failing which candidate will be categorised as Below Grade (BG). It was further stated that in the instant case at all the times the applicant was not making the grade, therefore, he was shown as "below grade" in panel lists. In reply it was also submitted that as per Air Force Confidential Order (AFCO) 2/91 (**Annexure R-2**) para 12, which deals with endorsement of ACRs, in case of any adverse report, counselling or warning is a pre-requisite and further adverse remarks are to be communicated. It was submitted that none of the reports of the ACRs in question was adverse, therefore, there was no requirement of communicating any remarks. In reply it was also submitted that endorsement of 'BG' does not mean that individual had any adverse remarks in ACR. As per para 15(d) and 15(e) of the AFCO 2/91 reports of "below average" (score of 44 to 65 marks out of 132 marks) and "inferior (43 marks and below out of 132 marks) in a particular year of ACR will be treated as "adverse report". It was also contended that applicant's representation dated 20.01.1997 was examined by the competent authority and rejected on merit and the same was communicated to the applicant vide headquarters letter dated 08.09.1997. A recommendation was made to dismiss the application.

7. Rejoinder to the counter was filed by the applicant reiterating the grounds stated earlier.

8. Arguments were heard and record perused.

9. During the course of arguments learned counsel for the applicant submitted that due to attitude of bias on the part of the C.O. the ACRs for the years 1994-95 were spoiled and downgraded. The service record of the applicant was excellent. It was also submitted that before downgrading the ACRs no counselling or warning was ever given to him. The Commanding Officer was under a wrong impression that the applicant has made a complaint against him, therefore, he got annoyed. A request was made that concerned ACRs be perused and downgrading remarks be quashed. It was also contended that it is settled position of law that adverse ACRs should not be taken into consideration if their contents had not been communicated. Learned counsel for the applicant, in this respect, also referred the decision given in ***U.P. Jal Nigam Vs. Prabhat Chandra Jain*** JT 1996 (1) SC 641. He contended that the applicant had been wrongly denied promotion and his representation had also not properly dealt with. A request was made to promote the applicant w.e.f. the date when for the first time his batch-mates were promoted.

10. On the contrary, learned counsel for the respondents refuted the contentions made by learned counsel for the applicant and submitted that none of the concerned ACRs was “adverse” as per relevant policy AFCO 2/91. In ACR of 1994-95 the applicant scored 89 marks out of 132 marks, thus, his ACR was “average” as per record. As per AFCO 2/91 (**Annexure R-2**) adverse remarks in ACR are required to be communicated. In support of his contention he relied upon the judgment passed in the case of ***Union of India & Anr. Vs. S.K. Goel & Ors.*** AIR 2007 SC 1199. He further contended that the ACRs are based on the overall profile of the concerned years. On the basis of preceding 5 years ACRs the applicant could not make the grade, therefore, he was not promoted in the concerned years. He contended that no irregularity has been committed and prayed that the application be rejected.

11. We have heard the rival submissions and perused the material as well as the judgments cited by learned counsel for the parties. The applicant was considered for promotion to the rank of MWO during the years 1994-95, 1995-96 and 1996-97, but he was not empanelled. He filed representation on 20.01.1997, which was not decided upon, therefore, writ petition was filed. From a perusal of record it is revealed that vide order dated 31.07.1997 amended on 01.09.1997 writ petition

was disposed of with the directions that the representation filed by the applicant on 20.01.1997 should be disposed of within a period of 4 weeks. It was further ordered that if the representation is not disposed of as ordered or the applicant was not satisfied with the decision on the representation then the writ petition can be revived on the application of the applicant. The relevant portion of the order dated 31.07.1997/01.09.1997 is reproduced hereunder:

“I feel it is a fit case where directions should be given to respondents to dispose of the representation of the petitioner within a period of four weeks from the date of receipt of this order. It is, however, clarified that in case the representation of the petitioner is not disposed as ordered or the petitioner is not satisfied with the order of the respondent, he is given liberty to get this petition revived.”

12. Thereafter, the applicant had filed an application for revival of his petition after rejection of his representation dated 20.01.1997 vide order dated 08.09.1997 (**Annexure A-2**). The main writ petition was revived vide order dated 23.01.1998 by the Hon'ble High Court.

13. The promotion from the rank of WO to MWO is governed by Air Force Policy dated 31.01.1995 (**Annexure R-1**), wherein the criteria for promotion has been laid down by which a WO is required to score 495 marks out of 660 marks for the eligibility for next promotion to the

rank of MWO failing which he will be declared as "Below Grade" (BG). In the instant case, applicant was considered for promotion in the years 1994-95, 1995-96 and 1996-97, but in all the three years he could not make the requisite grade, therefore, he was not promoted. This policy is applicable to all and seems to be more scientific as on the basis of preceding 5 years ACRs 75% marks are required for next promotion. It is our view that "Below Grade" means below the "cut off" specified for promotion and can, in no way, be considered "Below Average". Relevant portion of the policy dated 31.01.1995 is reproduced as under:

"Criteria for Promotion"

4. One of the main criteria laid down in the AFIs governing the terms and conditions of service of airmen stipulates that an airman should be considered otherwise fit/suitable in all respects to hold the higher rank. The promotions are authorised in order of seniority in their trade. Airmen of the same seniority will be granted promotion as per their order of merit. Accordingly, an airman to be eligible for promotion is required to attain the minimum grade as per the assessment criteria given below: -

(a) **Assessment/ACR marks**: The minimum marks required for promotion to various ranks are: -

Promotion Stage	Maximum marks against Assessment/ ACRs	Minimum marks for making the grade	Percentage
Cpl to Sgt	500	300	60%

Sgt to JWO	500	350	70%
JWO to WO	660	479	72.5%
WO to MWO	660	495	75%

(b) Weightage for Honours & Awards

.....

(c) Negative Marks

.....

All airmen who fail to meet the minimum grade are placed Below Grade “BG” in that promotion year.”

14. We have considered the contentions of the applicant with regard to concerned reports of 1994 and 1995. The respondents, in their counter, have stated that in the said year the applicant was assessed as “average” and he was given 89 marks out of 132 marks based on his performance, but the award of “average” grade does not come within the purview of adverse remarks. The contentions of award of adverse remarks by Commanding Officer are not sustainable. In this respect, there is policy letter i.e. AFCO 2/91, wherein in para No.12 it has been provided that in case of any adverse report or remarks the authority is under an obligation to provide counselling or warning to the personnel and communication of the adverse remarks were required. Further, in the said policy in para 15 gradings have been elaborated and

as per that criteria “below average” has been shown from marks (44 to 65 marks) and “inferior” has been shown (as 43 marks and below) and they have been treated as “adverse remarks”. For ready reference the relevant para 12 onwards of AFCCO 2/91 are reproduced hereunder for ready reference:

“12. Under no circumstances, the Confidential Report is to be shown to the MWO/WO/JWO reported upon. However, before the Adverse Report is rendered, the particular aspect of the failings leading to the adverse comments/assessments is to be brought to the notice of the MWO/WO/JWO concerned, in writing by the officer rendering Adverse Report. A copy of the same duly signed by the MWO/WO/JWO is to be attached to the IAFF (P) 12 (Revised). As far as possible, the failings are to be brought to the notice of the individual concerned well before the report is due, in order to give him a chance to improve himself. If at the time of the rendition of the report it is felt that the warnings administered have been of no avail, this point is to be specifically mentioned in the Report as per Appendix ‘C’ to this order and is to be treated as adverse comments on the performance of the JWO/WO/MWO concerned.

13. Part V – The specialist officer at Command/Air Headquarters, will confine his remarks to the assessment in paras 10(a) and 12 of Form IAFF (P) 12.

14. Part VI – the AOC-in-C/PSO at Air HQs, if he wishes to comment.

15. Gradings – While rendering reports, Warrant ranks are to be graded in the following manner.

(a) Exceptional – From 121 to 132 marks.

All Commanding Officer are to ensure that reports in this category are not to exceed 10% in each rank.

(b) Above Average – 100 to 120 marks.

Reports in this category are not to exceed 35% in each rank.

(c) Average – From 66 to 99 marks.

(d) Below Average – 44 to 65 marks. This grading will be treated as 'Adverse Report'.

(e) Inferior – 43 marks and below. This Grading will be treated as 'Adverse Report'.

16. Confidential Report is a privileged document, which is strictly Confidential. Under no circumstances, copies of the same are to be made.”

15. Thus, on the basis of the above mentioned categorisation, the judgment given in case of **U.P. Jal Nigam** (supra) cited by the applicant does not help his contentions and the same does not have universal applicability. In this case, as there was no adverse remarks, therefore, giving prior counselling or warning was not required. In the judgment cited by the respondents passed in **S.K. Goel & Ors.** (supra) it has been observed that only adverse remarks are required to be

communicated. During the pendency of this writ petition as per the direction of the Hon'ble High Court the representation by the applicant was considered and dealt with all aspects raised by him and vide order dated 08.09.1997 the same had been rejected.

16. On the basis of the aforesaid discussion, we do not find any irregularity, infirmity or illegality in the impugned orders. The application of the applicant is liable to be dismissed. The same is, thus, dismissed. No orders as to costs.

Z.U. SHAH
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Announced in the open Court
on this 12th day of August, 2011