

**COURT NO. 3, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

T.A. No. 410 of 2009

W.P.(C) No. 8906 of 2008 of Delhi High Court

IN THE MATTER OF:

Dfr Bhopal Singh**Applicant**
Through : Mr. D.S. Kauntae, counsel for the Applicant

Versus

Union of India and Others**Respondents**
Through: Mr. Anil Gautam, counsel for the Respondents no. 1 to 4.
Mr. Romil Pathak, proxy counsel for Dr. Ashwani
Bhardwaj, counsel for the Respondent no. 5.
None for Respondent nos. 6 & 7.

CORAM:

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

JUDGMENT

Date: 29.04.2011

1. The petition was filed by the applicant before the Hon'ble Delhi High Court on 15-12-2008 and thereafter it was transferred to the Armed Forces Tribunal on its formation on 23-11-2009. The petitioner/applicant vide this application has prayed for quashing the discharge order (**Annexure P-10**) and impugned order dated 22.02.2008 (**Annexure P-11**) by which his statutory complaint has been rejected. Further he has prayed for holding an order dated 07.10.2006 (**Annexure P-4**) and proficiency certificate issued on 31.05.2007 (**Annexure P-5**) by the respondents as absolute in terms

of Army Headquarters policy circular dated 10.10.1997 (**Annexure P-1**) and direct the respondents to reconstitute the Unit Promotion Board (UPB)/Departmental Promotion Committee (DPC) afresh by treating and taking into account the proficiency certificate of 31.05.2007 for consideration to the next higher promotion in favour of the applicant. He further prays that respondents be ordered to reinstate the applicant into service with all consequential benefits of pay, allowances and seniority.

2. The brief facts of the case are that the applicant was enrolled in the Indian Army on 27-12-1983. On successful commission of training and passing out from regimental centre, the applicant was posted to 13 Armoured Regiment.
3. In due course of time, the applicant was promoted as Dafadar (Dfr) on 24-06-2000. The applicant however was downgraded in Low Medical Category BEE (Permanent) (LMC BEE P) w.e.f 26.09.2000 as being a case of "Bronchial Asthama". The applicant was periodically reviewed after every two years by re-categorization medical board and he continued in LMC (BEE) (P). Consequently he was employed in a "Sheltered Appointment".
4. On 26/27.07.2004, the applicant was allowed to appear in the Promotion Cadre Test (PCT). The applicant passed the cadre and thus became eligible for consideration to the next higher promotion i.e. the rank of Naib Risaldar.

5. The applicant was regularly granted sheltered appointment being a permanent low medical category since 26.09.2006. The last certificate of retention was given by the Commanding Officer (CO) on 07.10.2006 (**Annexure P-4**).
6. Meantime, respondent no. 5 took over as a new CO in the month of December, 2006. The applicant continued to perform his duties satisfactorily and without any drop in performance. The CO issued a certificate (Annexure P-5) on 31.05.2007 certifying the applicant's proficiency is to his full satisfaction with regard to duties assigned to him and recommended the applicant for early review of LMC prior to the scheduled date which was on 26.09.2008.
7. On 01.09.2007, the applicant's name was considered for grant of next higher promotion to the rank of Naib Risaldar (Naib Subedar) but the applicant was not granted the next higher rank on the grounds of being LMC (BEE) (P) and was thus superseded. Being aggrieved, the applicant filed a representation (**Annexure P-6**) on 02.09.2007 which was addressed to the Colonel of the Regiment and Officer In-charge (Records). On 05.09.2007, the applicant was informed by the respondent no. 4 about the denial of his promotion to the next rank and rejecting his representation on grounds of non furnishing proficiency certificate by the CO (**Annexure P-8**).

8. On 14.09.2007 after the applicant filed the second representation requesting the CO to issue a proficiency certificate as desired by the OIC (Records). He also sought an interview with the CO.

9. On 26.06.2007 the CO rejected the applicant's representation stating that promotion of the applicant cannot effected due to policy constrains. Being aggrieved and dissatisfied with the decision of respondent no.5, applicant filed a statutory complaint on 28.09.2007. On 31.12.2007, having reached the service limit (on completion of 24 years of service) in the rank of Dfr, the applicant was discharged from service. The applicant was later informed by OIC (Records) (Respondent no.4) vide letter dated 22.02.2008 that the statutory complaint has been rejected by the Chief of Army Staff.

10. Learned counsel for the applicant stated that the words of the certificate issued by the CO on 31.05.2007 are very revealing which reads as under :

*"It is certified that No 1079241P Dfr Bhopal Singh, 13 Armoured Regiment, whose present medical Cat is **P2(Permt.) (diagnosis Bronchial Asthma) wef 26 Sep 2000**. His last medical board was held on **26 Sep 2006 and next medical board is due on 26 Sep 2008**. He has performed his duties in 13 Armoured Regiment with **full satisfaction** and there have been **no med complaint** from the individual while performance of his assigned duties in the Regt. The case for **early review of his***

present med cat prior to the normal review date is strongly recommended under the provision of Army HQ letter No. 76086/DGMS-5A dated 19 Oct 2000."

11. Learned counsel for the applicant further argued that Army Headquarters policy letter dated 10.10.1997 clearly lays down that LMC (BEE) (P) is not a bar to promotion to the rank of Naib Subedar, however it lays down that :

"Eligible upto Medical Category 'BEE' : Personnel placed in medical category 'BEE' will be eligible for promotion to the next higher rank. This will include both temporary and permanent low medical categories. This will be irrespective of whether or not the disease, sickness or injury is attributable/non-attributable to or aggravated by service conditions. However, cases of medical category 'BEE' (both temporary and permanent) due to psychological causes, mis-conduct or self inflicted injuries will not be eligible for promotion."

12. Learned counsel for the applicant further stated that since the NCO was performing his duties satisfactorily and he was not ill because of his ailment there was every reason for him to be reconsidered by a medical board even before due date i.e. on 26.09.2008. Therefore, he contended that there was every reason for the CO to give proficiency certificate (sheltered appointment) to the applicant so that he could have been promoted to the next rank of Naib Risaldar.

13. The learned counsel for the applicant argued that response of the CO vide his letter dated 26.09.2007 is conflicting with the policy laid down by the Army Headquarters wherein the CO says that *"after due deliberation and re-consideration as well as consultation with CRO I have decided that there will be no change in the policy of the next promotion of LMC to the rank of JCO"*. That clearly indicates policy of the regiment is in conflict with the policy laid down by the Army Headquarters policy circular dated 10.10.1997 which lays down as under :

"18. The promotion criteria given in para 3 to 17 above will apply uniformly to all Regts/Corps and no relaxation, deviation deferment or additional conditions for normal promotion of JCOs and NCOs will be laid down by Regts and Corps without formal approval of this HQ (AG/PS-2)."

14. Learned counsel for the respondents argued that the applicant was a LMC (BEE) (P). The certificate issued by the CO on 31.05.2007 was an effort by the CO to pre-pone the medical re-categorization board to ensure that if there was any possibility of the individual being upgraded, it could have been so. However, the board was not reconvened perhaps because of the stance taken by the medical authorities. There is no record to suggest as to why the early re-categorization board was not held. However there are records to suggest that applicant was put through a Release Medical Board before he had discharged from service and in RMB again he was confirmed LMC (BEE) (P).

15. Learned counsel for the respondents further argued that a sheltered appointment to LMC personnel is conditional. It depends on the proficiency of the individual and appointment available for which the individual can function in the larger interest of the unit. The CO had granted sheltered appointment to the applicant in the rank of Hav commencing from September, 2000 till the date he was discharged on completion of his terms of engagement. The CO clearly indicated his inability to grant the applicant sheltered appointment in the next higher rank i.e. Naib Risaldar and in his detailed comments, he has given out the reasons for not doing so. He has said so in his affidavit *"the applicant is a low medical category for Asthma. He is susceptible to dust and other allergens and needs to be employed suitably where he is not exposed. Thus CO is required to certify that a suitable sheltered appointment is available in the rank that the individual is proposed to be absorbed"*. Further, *"however there is no scope for sheltered appointment in the rank of Naib Subedar in a war. Hence the same could not apply for Dfr Bhopal Singh"*.

16. Learned counsel for the respondents stated that the Army Headquarters policy dated 10.10.997 is clear that LMC (BEE) (P) will be eligible for promotion to the next higher rank. However this condition is subject to the criteria laid down in para 4 (C) (i) & (ii) of the policy letter. That is reproduced as under :-

"Para 4 (c) (i). Eligibility at (a) and (b) above is subject to proficiency of the affected personnel being of a

specifically high standard and suitable appointments being found for them within the Regiment/Corps.

(ii). The yardsticks will apply uniformly to all categories of JCOs/NCOs and no consideration will be given to categories like clerks, storemen etc on the ground that a particular disability (hearing, eye-sight and so on) does not interfere in the performance of their duties."

17. Learned counsel for the respondents further argued that the certificate issued earlier on 17.10.2006 was given by the CO to the applicant in his rank of Dfr. This was consequent to the re-categorization medical board held in September, 2006. The certificate was essential for individual to be retained in service despite his medical category BEE (Permanent). In this manner the CO helped the individual in completing his pensionable service. However he was constrained in not providing proficiency certificate in May, 2007 when the applicant was due for promotion to the rank of Naib Risaldar. The CO was unable to provide a sheltered appointment to the applicant in the rank of Naib Risaldar because of the constraints of having limited JCOs in the regiment of all them have specific task assigned to them in the regiment. It involved JCOs moving in tanks as the tank commander. The applicant was suffering from "Bronchial Asthama" with advice for him not to be exposed dust and other allergens which was not possible for the CO to ensure. Thus giving him a sheltered appointment in the next higher ranks, was not feasible.

18. Having heard both the parties at length and examined all the documents, we are of this opinion that the certificate for offering a sheltered appointment to Hav Bhopal Singh by his CO on 17.10.2006 was for a sheltered appointment in the same rank i.e. Dfr. This certificate cannot be held as absolute because the applicant was a Dfr and was being employed as a "NCO" in the regiment. After due promotion when the applicant would have become a Naib Subedar there was no sheltered appointment available with the CO to be offered to the applicant. It is in view of this constrain, the CO was unable to render the proficiency certificate that was required by the OIC (Records) for promoting the applicant to Naib Risaldar.

19. As regards the conflict in the interpretation of policy letter issued by Army Headquarters dated 10.10.1997 and the response of the CO to the representation by the applicant in which the CO stated that "*I have decided that there was no change in the policy of non promotion of LMC to the rank of JCO*", he has amplified it in the appendix to that letter at para 8 which reads as under :

"Para 8 Being the Comdt it is my prime duty to make suitable Junior Leader in the interest of the org. SHAPE-I JCO is a better option in comparison with a Low Medical Category JCO in comb arms."

20. We have also seen that the applicant was put through RMB which has also confirmed the contention of the medical authorities that applicant was suffering from the disease and had a disability. It is quite

well understood that the RMB is not tasked to upgrade the applicant's medical category but the findings of the board confirmed the medical state of the applicant and thus he was a LMC, which warranted a sheltered appointment in his next rank when promoted. That, the CO had provided a certificate to the applicant to say that there has been no complaint from the applicant regarding his medical condition and, therefore, the Review Medical Board should have been held earlier than scheduled in April, 2006. This recommendation of the CO was not agreed to by the medical authority which had correctly assessed the applicant's medical condition to be such that he was not fit for upgradation.

21. It is evident from the foregoing that there was no sheltered appointment for the applicant in the rank of Naib Subedar. The applicant was LMC (BEE) (P) till September, 2008. The applicant was discharged from the Army on having completed terms of engagement on 31.12.2007 i.e. after 24 years of service in the rank of Dfr.

22. We are thus not inclined to interfere in the matter. The T.A. is dismissed. No orders as to costs.

M.L. NAIDU
(Administrative Member)

MÁNAK MOHTA
(Judicial Member)

**Announced in the open Court
on this 29th day of April 2011**