

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A NO. 118 of 2010

IN THE MATTER OF:

Hav/TCM (Radar) Dhan Pat Singh**APPLICANT**
Through : Mr. D.S. Kauntae, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Mr. Anil Gautam, counsel for the respondents

AND

OA No.99 of 2010

Hav/Tech. Harihar Suresh Nivrutti & Anr.**APPLICANT**
Through : Mr. D.S. Kauntae, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Anil Gautam, counsel for the respondents
CORAM:

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

JUDGMENT

Date: 14.05.2012

1. The OA No.99/2010 was filed in the Armed Forces Tribunal on 16.02.2010 whereas OA No.118/2010 was filed on 22.02.2010 respectively. By way of this common order, we shall hereby dispose off both the above mentioned OAs bearing OA No.99/2010 and 118/2010 as facts and circumstances of both the cases are common in nature

and points in dispute are similar and the reliefs sought in both the cases are also similar in nature. Arguments were heard together with the request of both the parties.

2. The OA No.118/2010 filed by Hav Dhan Pat is being taken first. The applicant in this OA has prayed for quashing and setting aside of the impugned order dated 20.08.2009 (Annexure P-1) by which the applicant was discharged w.e.f. 30.09.2010 and order dated 28.08.2009 (Annexure P-2) vide which he was denied promotion as they are alleged to be violative of para 6(a), (b) as well as para 9 of the promotion policy dated 10.10.1997 (Annexure A-3). He has further prayed that the respondents be directed to reconstitute a DPC to reconsider afresh the case of the applicant and grant of next higher rank, if so approved, with his original seniority which was due from 01.04.2009.

3. Brief facts of the case are that the applicant Hav Dhan Pat was enrolled in the Army on 25.09.1984 in the Corp of EME. His date of birth is 10.06.1965. During the course of his service, he rose to the rank of Havildar w.e.f. 12.02.2007 with ante dated seniority of 01.12.2006. He became due to retire on 30.09.2010.

4. It has been alleged by the applicant that on 10.10.1997 (Annexure P-3), a policy was issued regarding eligibility criteria for promotion to the rank of Nb Subedar. Vide this policy, last five ACRs

were to be considered out of which three reports should have been in the rank of Havildar and in case of shortfall, rest should have been taken in the rank of Naik. Of the five reports, at least three reports should have been of 'above average' with a minimum of two in the rank of Havildar while remaining should be not less than 'high average'. As per para 9 of the said policy, the recommendation for promotion to the next rank could be in the lower rank provided the individual was approved for promotion.

5. It has further been contended that a DPC was held on 01.04.2009 when there were six vacancies for promotion to the next higher rank i.e. Naib Subedar. Though the applicant was fully eligible for grant of next higher rank, the applicant was denied his promotion and that too for no fault of the applicant whatsoever because the applicant had become overage w.e.f. 10.06.2010.

6. It has been submitted that meanwhile the respondents realised that because of the implementation of the said policy dated 10.10.1997, several NCOs were being denied promotion as they had less number of ACRs than what was mandatorily required. Hence an amendment was issued on 19.11.2008 to be applied on all DPCs held from 01.01.2009. Para 2 of the said revised relaxation policy states that "*Where shortfall in ACR occurs due to organisational constraint, request for inclusion of one additional CR in the lower rank to make up*

the required mandatory number of ACRs may be projected to IHQ.

Such request will be routed through departmental channels duly vetted by OIC Records" (Annexure A-4).

7. Accordingly, the case was taken up by the unit in view of this policy for waiver of one ACR on 18.07.2009 (Annexure A-5). However, the respondent No.5 did not deal with the case properly and replied vide letter dated 21.07.2009 stating that the case for grant of waiver and shortfall of one ACR was rejected by the DGEME, Head Quarters New Delhi (Annexure A-6).

8. It has further been contended by the learned counsel for the applicant that a joint statutory complaint was submitted by the applicant and Hav Harihar Suresh Nivrutti & Anr. (applicant in OA No.99/2010) on 12/24.10.2009 which was not disposed off till application is filed (Annexure A-7).

9. On 07.10.2009, a circular was issued (Annexure A-8) which further delegated the powers of waiver to OIC Records. Therefore, the case of the applicant should have been decided by the OIC Records rather than the case be forwarded to the AHQ.

10. The statutory complaint was disposed off by the respondents vide their letter dated 23.11.2009 in which they directed the unit to ensure that the policy letter of 10.10.1997 be adhered to. The unit in

turn responded to the applicant by the letter of 10.12.2009 (Annexure A-10).

11. In their reply, the respondents have stated that the applicant was falling short of one ACR out of three mandatory ACRs in the rank of Hav for promotion to the rank of Naib Subedar. The applicant became overage before he would have earned requisite number of ACRs in the rank of Hav for promotion as his next ACR was due on 01.10.2009 and he became overage on 10.06.2009. Hence the applicant was not considered by the DPC. It has further been stated that the applicant was promoted as Naik w.e.f. 01.11.1994 and Havildar from 01 December 2006 alongwith his batch mates. But since the applicant did not have the requisite number of ACRs in the rank of Havildar i.e. minimum of three ACRs, hence he was not eligible for consideration. The case for waiver of one ACR in the rank of Havildar when taken up with the MOD vide letter dated 17.04.2009, it was turned down by the Army HQ vide their letter dated 25.05.2009 with the reason stating *"relaxation may be granted in very exceptional circumstances such as where an ACR(s) is/are set aside/dispensed with. There is no provision to waive off the mandatory number of ACRs in normal course of action."*

12. OA No.99/2010 was filed by Hav. Harihar Suresh Nivrutti who has jointly filed the statutory complaint dated 12/24.10.2009 alongwith Havildar Dhan Pat Singh (applicant in OA No.118/2010).

13. Brief facts of OA No.99/2010 are that the applicant was born on 01.06.1965. He was enrolled in the Army on 11.04.1984. He was promoted to the rank of Naik on 01.10.1993 and Substantive Havildar on 12.02.2007 with ante date seniority from 01.06.2006. The applicant was discharged vide impugned order dated 09.04.2009 (Annexure P-1) as Havildar w.e.f. 30.04.2010 on having completion of 24 years of service in the rank of Havildar. It was contended that applicant was due for promotion to the rank of Nb Subedar. He became overage on 01.06.2010. Therefore, he was also denied promotion to the rank of Naib Subedar.

14. Learned counsel for the applicants during course of submissions argued that a plain reading of para 6(a),(b) and para 9 of the promotion policy dated 10.10.1997 is clear that where an individual lacks number of ACRs in that particular rank, the ACR of the lower rank will be considered and should there be a shortfall, there is a provision for waiver of one ACR.

15. He further argued that the vacancy for promotion came up on 01.04.2009. On this date the applicants were fully eligible and qualified for the promotion to the higher rank. But he was not considered by the

DPC since he was lacking requisite number of ACRs as a Havildar.

Subsequently, the applicants became overage on 10.06.2009.

16. Learned counsel for the respondents submitted that as per policy of 10.10.1997, para 6(a) states that only last five ACRs are to be considered for promotion to the rank of Nb Subedar and in case of shortfall, rest in the rank of Naik. During the DPC, his batch mates were ordered for promotion to the rank of Nb Subedar w.e.f. 01.10.2009 subject to earning the third ACR due on October 2009 with acceptable gradings as required for the promotion to the rank of Nb Subedar vide their letter dated 20.08.2009. He further argued that the applicants could have been promoted to the rank of Nb Subedar on 01.10.2009 when they had earned the required 3rd ACR in the rank of Havildar on 01.10.2009, had they been within the permissible limits of age criteria. Resultantly, the applicants could not be promoted to the rank of Naib Subedar. Hence their discharge order on completion of their normal terms of engagement was issued on 28.09.2010. The applicants were not eligible for promotion after attaining the age of 44 years as per Government of India policy dated 04.05.1999 (Annexure R-1).

17. Learned counsel for the respondents further submitted that the case of the applicants for waiver of one ACR was duly taken up by the unit with the Records and Army HQ but the waiver was not granted

because there were no exceptional circumstances as laid down in the policy. In the normal course, since the applicants would have earned the 3rd ACR on 01.10.2009, a waiver could not be granted as the entire batch to which the applicants belong was affected on similar lines.

18. It was further submitted by the learned counsel for the respondents that the respondents have also replied to the statutory complaint filed by the applicants on 12/24.10.2009 vide letter dated 28.10.2011 consequent to the directions issued by this Tribunal in OA No.118/2010. A copy of the said reply is also placed on record.

19. Learned counsel for the respondents also submitted additional documents to show that vide their statement of case dated 17.04.2009, the OIC Records approached the Army HQ for waiver of mandatory requirement of one ACR in the rank of Havildar for promotion to the rank of Nb Subedar in respect of six Havildars TCM(Radar) and Hav Limb Maker Trades. Both the applicants were included in that statement of case. However, the case was turned down by the Army HQ since they held that vide para 40 of the Army Order 1/2002/MP, the date of assumption of higher rank is the benchmark to decide whether a JCO/NCO is entitled to earn ACR in the present or previous rank. In both these cases, the applicants had been promoted to the rank of Havildar on 12.02.2007. Therefore, they were entitled to ACR in the rank of Havildar only on 01.10.2007. The AHQ

turned down the request of the OIC Records vide their letter dated 25.05.2009 stating that as per para 12 of letter dated 10.10.97 *“Relaxation may be granted in very exceptional circumstances such as where an ACR(s) is/are set aside/dispensed with. There is no provision to waive off the mandatory number of ACRs in normal course of action.”*

20. Having heard both the parties at length and having examined the documents on record, we are of this opinion that the policy letter dated 10.10.1997 lays down criteria for waiver of one ACR. Para 12 of the said policy is reproduced as under:-

“12. Relaxation in ACR criteria:- No relaxation in quality of ACR criteria is permissible. However, in exceptional circumstances such as where an ACR(s) is/are set aside/dispensed with, request for relaxation of only one ACR out of the mandatory number of ACRs may be projected to Army HQ (AG/PS 2(C)). Such requests will be routed through departmental channels duly vetted by OIC records.”

21. The above policy has subsequently been amended vide letter dated 19.11.2008 in which the authority for dispensation has been given to OIC records. The amendment is reproduced as under:-

“Where shortfall in ACR occurs due to organisational constraint, request for inclusion of one addl CR in the lower rk to make up the reqd mandatory no of ACRs may be projected to IHQ of MoD (Army) (AG/PS-2(c)). Such request will be routed through departmental channels duly vetted by OIC Records. This CR will pertain to the year imdt preceding the CR being considered. In the event of shortfall of Regimental CRs, it will be the Regimental CR immediately preceding to CRs being considered.”

22. The amendment implies that where a shortfall occurs “due to organisational constraints”, could be considered for waiver by OIC Records. In this case the applicants were not able to obtain the requisite number of three ACRs in the rank of Havildar because they had become Naik (substantive) on 01.11.1984 (Hav Dhan Pat Singh) and on 01.10.1993 (Hav Harihar Suresh Nivrutti). The applicants were promoted to the rank of Substantive Havildar on 12.02.2007 with ante dated seniority of 01.12.2006. Both these promotions were alongwith their batch mates. Therefore, the applicants were not entitled for an ACR in the rank of Havildar in the year 2006, even if their ante dated seniority is taken into account. It is apparent that in these cases the entire batch was affected by this provision. Therefore, no relaxation

could be given to a single individual and the relaxation would have had to be given to the entire batch.

23. As regards their getting overage on 10.06.2009 in the case of Hav Dhan Pat Singh and 01.06.2009 in the case of Hav Harihar Suresh Nivrutti is concerned, restrictions are laid down in the Government of India letter dated 04.05.1999. Exceptions to this can be given in certain cases under exceptional circumstances. It is not the case of the applicants. Further, the applicants do not fall in the category of those exceptions that are listed for waiver of age criteria.

24. In view of the foregoing, we are of the opinion that the respondents have correctly applied the policy regarding promotion from the rank of Havildar to Nb Subedar. It is unfortunate that the applicants had become overage when they were due for promotion and therefore, they were not considered by the DPC. There was no case for grant of waiver in ACR for the applicants only as the entire batch was affected similarly. The applicants could have applied for grant of waiver in the age criteria but there were no exceptional circumstances to facilitate their case.

25. In view of the above discussion, we find no merit in both the cases. Both the OAs are hereby dismissed. No orders as to costs. A copy of this judgment be kept in OA No.99/2010 also.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 14th day of May, 2012.