

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

O.A NO. 300 of 2011

IN THE MATTER OF:

AVM N.M. Vaishnavi**APPLICANT**
Through : Mr. S.M. Dalal, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Mr. R. Balasubramanian Ld. Asstt. Solicitor General
alongwith Mr. J.S. Yadav counsel for the respondents

CORAM:

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

JUDGMENT

Date: 23.01.2012

1. The OA No.300/2011 was filed in the Armed Forces Tribunal on 02.08.2011.

2. Vide this OA, the applicant has prayed for quashing and setting aside of the impugned order of rejecting his statutory complaint by the GOI/MOD vide their letter dated 20.06.2011 (Annexure A-1). The applicant has also prayed for quashing and setting aside of the promotion list PO/208 dated 20.05.2011. He has further prayed that the Chief of the Air Staff (CAS) be directed to consider the Appraisal Report (AR) raised on the applicant covering the period from 18.10.2010 to 31.01.2011 by the Special Promotion Board 2011 for promotion to the rank of Air Marshal. The applicant further prayed that

CAS be directed to grant waiver as per para 15 of the policy dated 20.02.2008 (Annexure A-4). Lastly, the applicant has prayed that the Special Promotion Board 2011 be directed to re-consider the name of the applicant for promotion.

3. The brief facts of the case are that the applicant was commissioned into the Indian Air Force on 04.01.1977 in AE(L) Branch as a Pilot Officer. During the course of his services, he was promoted to the rank of Air Commodore on 01.02.2007 and was Commandant of the Software Development Institute (SDI), Bangalore. While as Commandant of SDI, the applicant suffered a heart attack (Coronary Artery Disease- Acute Anterior Wall Myo-cardial Infraction) on 29.08.2008 and was treated at Command Hospital, Bangalore. The disease was held aggravated by military service. He was subsequently placed in LMC as A4G4(T-24).

4. On 22.09.2008, the Promotion Board No.01/2008 was held and the applicant was approved to become Air Vice Marshal vide PO/226 dated 22.09.2008 (Annexure A-2) subject to fulfilment of other usual conditions.

5. It is further alleged that because of the over medicines that were prescribed, the applicant developed certain complications i.e. bleeding through his nose. As such, his medicine regime was changed. But he continued in the same LMC.

6. The applicant was once again cleared for promotion to the rank of Air Vice Marshall in the Promotion Board No.01/2009 vide Air HQ Signal No.PO/281 dated 09.03.2009 (Annexure A-3).

7. On 20.02.2008, a fresh promotion policy was issued (Annexure A-4).

8. The applicant underwent a Medical Board for review of his medical category on 12.3.2009 based on the general overall improvements and the recommendations of the Classified Specialist (Medicine and Cardiologist) his medical category was upgraded to A4G3(T-24) (Annexure A-5). However, the DGMS (Air) did not approve the upgradation quoting para 6.3.28(a) of IAP 4303, 3rd edition. This was conveyed vide signal MD/784 DATED 25.03.2009 (Annexure A-6). Thus, the applicant's medical category was maintained as A4G4(T-24) with next review due in August 2009.

9. On 17.04.2009 the applicant was diagnosed as Duodenal Ulcer with UGI Bleed and admitted to Hospital. Again the change in the regime of medicine was effected and he was discharged on sick leave (Annexure A-7). On 28.05.2009 after the sick leave and while undergoing re-categorisation medical Board, the applicant was recommended by the Gastroenterologist and the Cardiologist to be upgraded to A4G3(T-12). However, the higher authority i.e. DGMS (Air) once again did not upgrade the medical category of the applicant and maintained A4G4(T-12) (Annexure A-8).

10. Thereafter, the applicant was posted to Air HQ, New Delhi on 29.06.2009. The applicant consulted the Cardiologist regarding his medicines and the Cardiologist was of the opinion that in view of the Intra Coronary Stents, Ecosprin should be reintroduced into the medicine regime. At Delhi, he also consulted certain other specialists in Cardiology. The applicant was advised stopping of the medicine 'Ecospirin'.

11. On 17.08.2009, the applicant reported for re-categorisation medical board where it was detected that the Intra Coronary Stent was having some blockage and accordingly on 23.09.2009 the - **In Stent Restenosis of LAD, PTCA with Drug Eluting Stent to LAD** was performed at Army Hospital R & R, New Delhi and full medicines including the anti platelets and anti coagulant drugs, Clopid and Ecosprin were again prescribed.

12. The applicant once again started bleeding from the Nose and was referred to the ENT Specialist who performed an operation on the nose and the bleeding thereafter stopped. The Re-categorisation Medical Board in respect of the applicant was held on 23.09.2009 and the applicant was recommended for temporary medical category for A4G4(T-12).

13. On 29.12.2009 during the re-categorisation it was recommended that the applicant be placed in A4G4(P).

14. The applicant was further examined by the Cardiologist and his In-Stent Restenosis was also analysed. The Senior Advisor (Medicine) vide his opinion dated 24.12.2009 opined that the applicant was asymptomatic with good effort tolerance and in cardiac functional classification NYHA-1. Accordingly the applicant invoked the waiver clause para 5.4.13 IAP 4303 (Annexure A-10).

15. The applicant applied for a waiver of his medical category to DGMS (Air) vide his application dated 30.12.2009 under the provisions of para 6.3.30 of IAP 4303 (Annexure A-11 and A-12 respectively).

16. The applicant's request for waiver of his medical category was turned down by the DGMS (Air) on various grounds. Subsequently, the applicant sought the intervention of the CAS who prevailed upon the DGMS (Air) to put the applicant through a comprehensive medical evaluation. Consequently, in August 2010 i.e. one year after the last Angioplasty, the results of his evaluation were put up for consideration for the waiver under the Clause para 6.3.30 of IAP 4303.

17. On 11.02.2010 the results of the applicant's third Promotion Board 1/2010 were announced and the applicant was again placed in the Select List for the promotion to the rank of Air Vice Marshal (Annexure A-13).

18. After the comprehensive evaluation in August 2010, the medical category of the applicant was upgraded to A4G2(P) vide Air HQ Signal MD/219 dated 30.08.2010 (Annexure A-14). This upgradation of

medical category was through the one time waiver by the DGMS (Air) which was now granted to the applicant despite his request on 30.12.2009. Thus, causing a delay of about eight months.

19. Thus, having been upgraded, the Air HQ issued a promotion signal No.PO/277 dated 05.10.2010 after a delay of 35 days to the rank of Air Vice Marshal w.e.f. 18.10.2010 (Annexure A-15). Therefore, there was a delay of 48 days from the date the applicant was upgraded in acceptable medical category till the date of promotion on 18.10.2011. The applicant was granted notional seniority w.e.f. 01.04.2009 in terms of para 12 of the "Promotion Policy- Air Ranks" (Annexure A-16).

20. It is contended that the applicant thus became eligible for consideration to the rank of Air Marshall by the Special Promotion Board-2011. Accordingly, the applicant preferred an application to the authorities dated 08.11.2010 requesting that his rank with notional seniority entitled him eligible for consideration to the promotion (Annexure A-17). This request, however, was turned down by the Air HQ vide their signal dated 14.12.2010 stating that the applicant does not fulfil the eligibility criteria laid down vide Para 13 and 15 of the Promotion Policy (Annexure-A-4). As such, he was denied consideration. It is submitted that the Special Promotion Board for 2011 was held on 16.12.2010 which was contrary to the instant

Promotion Policy as that is scheduled to be normally be held in between January to March of the preceding the promotion year.

21. Feeling aggrieved, the applicant preferred a statutory complaint on 28.01.2011 (Annexure A-19). It has been stated that the officers who were junior to the applicant and had picked up their rank on 26.4.2010 were given a waiver by the CAS due to 'service reasons' since they had not completed one year physical/actual service in the rank as on 31.3.2011. On the other hand, the applicant was not granted a waiver as he was also similarly placed and had not put in one year of service in the rank of AVM as on 31.3.2011.

22. The statutory complaint was rejected by the Air HQ vide their letter dated 17.3.2011 stating that the applicant did not fulfil the criteria laid down in para 13 and 15 of the Promotion Policy (Annexure A-21). Not satisfied with the answers given by the Air HQ, the applicant again preferred a statutory complaint (Annexure A-22) which was also rejected vide government order dated 20.6.2011 (Annexure A-1/impugned order).

23. In the meantime, the applicant obtained an AR in the rank of AVM covering the period from 18.10.2010 and 31.1.2011 (Annexure A-23). The Air HQ vide announced the results of the Promotion Board on 20.5.2011 (Annexure A-1/one of the impugned order).

24. The respondents have filed their detailed reply to the present OA and refuted the allegations made therein and supported the orders passed from time to time.

25. We have heard the arguments advanced by learned counsel for both the parties and have also perused the relevant record rules and regulations and the judgments cited by parties. Based on the pleadings and arguments of the learned counsel for the parties, the following points emerge for consideration:-

(a) The delay in grant of waiver by the DGMS(Air) to the applicant for upgrading his category to acceptable level where he could be promoted to AVM.

(b) Conduct of the Promotion Board to the rank of Air Marshal in December as against the Policy dated 20.02.2008 (para 8) of the said Promotion Policy.

(c) Consideration of the AR obtained by the applicant covering the period 18.10.2010 to 31.01.2011 as AR of 2010.

(d) Consideration or grant of waiver by the CAS to the applicant for having less than one year of service in the rank i.e. AVM as on 31.03.2011 as it was granted to some other candidates.

26. We have considered all the above points separately and now deal with them one by one.

The delay in grant of waiver by the DGMS(Air) to the applicant for upgrading his category to acceptable level where he could be promoted to AVM.

27. Learned counsel for the applicant argued that on 30.12.2009, the applicant was recommended by the Cardiologist and the Senior Advisor (Medicine) for upgrading his medical category to A4G2(P). Accordingly, he made an application for grant of waiver to the DGMS (Air) in terms of para 6.3.30 of IAP 4303. However, the grant of waiver by the DGMS (Air) came through only on 30.8.2010 that too after the intervention of the CAS on the subject. The DGMS (Air) had declined to give a waiver despite the fact that he had not examined the applicant. Learned counsel for the applicant also argued that a delay of eight months was caused. The applicant suffered incalculable damage since his service in the rank of AVM was affected. He further argued that after the waiver was given on 30.08.2010, the respondents took 48 days to move him on promotion which also again added to his loss of service as AVM. Though the applicant was granted notional seniority from 01.04.2009, it was not counted towards the physical service in the rank of AVM. Thus, 48 days of delay after the applicant was upgraded and granted waiver by the DGMS (Air) has not been explained.

28. Learned counsel for the applicant further cited the judgment given in **Civil Appeal No.164 of 1993 arising out of SLP(C) No.4233 of 1992 in the matter of Ex Sapper Mohinder Singh Vs UOI** wherein

the Hon'ble Supreme Court has observed that "*it is essential for an individual to be examined by the higher medical authority before it can come to a different conclusion*".

29. Learned counsel for the respondents argued that the applicant was a case of "In-Stent Restenosis". It is accepted that the applicant had developed complications from the regime of medicines given to him which led to bleeding from the Nose and also bleeding in the duodenal ulcer. Since anti-coagulants were withdrawn, he developed blockage as on 23.09.2009 and In Stent Restenosis of LAD, PTCA with Drug Eluting Stent to LAD was performed. This clearly shows that the medical condition of the applicant was not stable. Under these circumstances, the DGMS (Air) had to exercise proper caution and give time for the new surgery (In Stent Restenosis) to become effective before any waiver could be granted. Waiver is given to those personnel who are absolutely free from the disease in question. Learned counsel also quoted other provisions of IAP 4303 which reads as under:-

"6.3.25 Ground Duty Branches.

(a) Xxxx

(b) Further upgradation to medical category A4 G2/BEE(P) may be considered as per parameters given in para 6.3.22 after a period of not less than 72 weeks after the acute episode. These cases will be followed up annually at AFCME/IAM/Cardiac Centre for a period of two years after upgradation to medical category A4G2/BEE and thereafter annually be a local medical specialist.

Their annual review will coincide with annual medical examination.

(c) Those who do not fulfil above criteria will be placed in medical category A4G3(P)/CEE(P) and reviewed annually at cardiac centre. Cases who had developed complications post MI will be categorised depending upon the clinical condition of the case with emphasis on residual cardiac function vis-a-vis performance of either restricted or sedentary duties. Some of such associated complications are cardiac arrhythmias, persistent or recurrent angina pain, ventricular dysfunction, ventricular aneurysm, cardiogenic shock, non-arrhythmic cardiac arrest, pericarditis, venous thrombosis and pulmonary embolism, systemic-arterial-embolism.”

30. Learned counsel for the respondents further argued that Restenosis have some additional instructions in the same IAP 4303 and can be given a waiver only under those circumstances which are as under:-

“6.3.30. Restenosis/Repeat CABG surgery/personnel on medical management. Restenosis can be expected in 30% cases after a period of 6 months after standard PCI but with the newer Drug Eluting Stents it is 10% with an additional higher risk of thrombosis upto one year post PCI. For aviators with “treated” SCAD the natural progressions of CAD is an important concern. New significant lesions (>40% stenosis) at other sites develop at rates of 7-15% per year as early as 2 years after interventional therapy. These lesions are often asymptomatic and are not reliably detected by non-invasive studies. In cases of CABGS the use of internal mammary artery grafting has reduced the occurrence of restenosis considerably with graft patency rates exceeding 90% at 10 years whilst with vein grafts

about 10% cases per year vein patency is lost. Complications of IHD. Such cases should be kept under closer observation and, if required, in a lower medical category than stipulated in the preceding paragraphs. However, cases with diabetes are at a higher risk to develop re-stenosis and other. Cases of re-stenosis or repeat CABG Surgery (higher mortality of 7-10%) will normally be kept in medical category (A4G4(P). A higher medical category will be awarded on the merits of each case through a waiver by DGMS (Air). Cases where only medical management has been recommended with good collateral circulation can be considered for higher medical category under waiver provided all conditions spelt out in para 6.5.22 are normal, cardiac biomarkers are normal, there are no modifiable risk factors, functional capacity is good and chances of an untoward cardiac event are minimal.”

31. Learned counsel for the respondents highlighted the words “A higher medical category will be awarded on the merits of each case through a waiver by DGMS (Air). Cases where only medical management has been recommended with good collateral circulation can be considered for higher medical category under waiver provided all conditions spelt out in para 6.5.22 are normal, cardiac biomarkers are normal, there are no modifiable risk factors, functional capacity is good and chances of an untoward cardiac event are minimal.” Thus, he argued that this decision has to be taken by the DGMS (Air) after having considered all the conditions laid down in this respect. He further submitted that a conference was called by the DGMS (Air) on 05 Jan 2011 to consider this case based on the application dated

30.12.2009 given by the applicant with the senior Cardiologist from the R&R Hospital and the medical specialist were summoned. They have discussed the case in great detail and they came to the conclusion that it was pre-mature to grant waiver at this stage. However, the waiver was given on 30.08.2010 after the applicant was comprehensively examined by a medical team.

32. Having considered the rival contentions of both the parties and having examined the documents in question, we are of the opinion that the waiver to be given by the DGMS(Air) had to be given after due caution and he has to satisfy himself on independent expert's reports. Therefore, the DGMS (Air) was well within his rights to wait for sometime after the Restenosis was carried on 23.09.2009. A person who had been given a stent first time i.e. on 29.08.2008 and thereafter he had suffered various complications and consequent to the change of medicine regime Restenosis had to be carried on 23.09.2009, any prudent medical officer would have waited for the Restenosis to be settle down before granting waiver which is his personal responsibility. In this case the DGMS (Air) had summoned a meeting of the Advisors on Cardiology and Medicine on 05 Jan 2011 to consider the case in great detail. We have seen the notings on file and are satisfied with non-grant of waiver which was based purely on proper evaluation of the medical history of the applicant. Waiver was given only after a comprehensive medical examination which took place in August 2010 and the waiver was given immediately thereafter. As such, we are of

the opinion that the waiver on 30.08.2010 was given in a fair manner by the DGMS (Air). No case of malafide has been made against the DGMS(Air) by the applicant and there is nothing on record to suggest that DGMS (Air) was biased. Although, the applicant has averred that on earlier two occasions while the Medical Board had recommended upgradation, the DGMS (Air) did not approve the upgradation and maintained a low category. The decision of the DGMS (Air) seems to have been correct while viewing the case in its hindsight because the applicant had to undergo Restenosis within a year of the first Stent (Surgery). Therefore, it is logical to say that the rank of AVM was picked up by the applicant on 18.10.2010 and the delay was not caused due to malice, bias or organisational reasons. The judgment cited by the applicant given in case of Mohinder Singh (Supra) thus does not help the contentions placed by the applicant.

Conduct of the Promotion Board to the rank of Air Marshal in December as against the Policy dated 20.02.2008 (para 8) of the said Promotion Policy.

33. The second issue is regarding the holding of the Promotion Board in December 2010 for the vacancies occurring for the period from 01.04.2011 to 31.03.2012. Learned counsel for the applicant argued that para 8 of the policy dated 20.02.2008 reads as under:-

*“8. The Promotion Boards shall assemble once a year or more, depending upon the specific requirement. The **first***

assembly of the Boards will normally be during Jan to Mar preceding the promotion year.

34. He emphasized on the words “first assembly” and “normally”. Therefore, he argued that the Board should have not been held in the month of December but should have been held later. The applicant has earned an AR on 31.01.2011 as the IO was retiring. The IO in the applicant’s case was the DCAS and his retirement age was known to all.

35. In support of his contentions, Learned counsel for the applicant cited **(2010) 4 SCC 290 in Union of India and Anr. Vs Hemraj Singh Chauhan and others**, wherein the Hon’ble Apex Court has observed that *“right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution”*. He also drew our attention to para 40 of the said judgment wherein the Hon’ble Court stated that *“word ‘ordinarily’ has been used in the context of promotional opportunities of the officers concerned. In such a situation the word ‘ordinarily’ has to be construed in order to fulfil the statutory intent for which it has been used.”*

36. He also cited **(2009) 13 SCC 758 in the matter of Swaran Singh Chand Vs Punjab State Electricity Board and Others**, wherein the Hon’ble Apex Court has observed that *“When state lays down rule for taking any action against an employee which would cause civil or evil consequences, it is imperative on its part to scrupulously follow the same”*. Citing the above judgment, learned

counsel for the applicant argued that the Promotion Board should have been held between January to March.

37. Learned counsel for the respondents stated that the entire policy of 20.02.2008 was approved by the GOI. This policy lays down certain parameters. In the instant case, the Promotion Board can assemble once a year or more depending on the specific requirement. When it says that first assembly will normally be held that means it can be held during this period. It is not sacrosanct that first assembly should convene in January to March period. Since the special Promotion Board considered promotion from AVM to Air Marshall and in turn they generate the chain vacancies that are likely to take place. Besides, the Special Promotion Board results are required to be cleared by the Appointments Committee of the Cabinet (ACC). Thus, the entire process takes about six months. Keeping in view the time that is taken for the Board proceedings to be approved, the Special Promotion Board from AVM to Air Marshall has been traditionally held in the month of December. Learned counsel for the respondents also gave out the dates of the last three years when the promotion board held, which are as under:-

Year/Date	Branch	Promotion Year
10.12.2008	Flying, AE and Adm	2009
18.12.2009	Flying and AE	2010
16.12.2009	Flying and AE	2011

38. Learned counsel for the respondents also placed reliance on the judgment in the matter of **Union of India Vs Hemraj Singh Chauhan (Supra)** wherein in para 41, the Hon'ble Apex Court has held that "*The word 'ordinarily', of course, means that it does not promote a cast iron rule, it is flexible (See Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed and Others - (1976) 1 SCC 671, at page 682 (para 35). It excludes something which is extraordinary or special [Eicher Tractors Limited, Haryana vs. Commissioner of Customs, Mumbai - (2001) 1 SCC 315, at page 319 (para 6)]. The word 'ordinarily' would convey the idea of something which is done 'normally' [Krishan Gopal vs. Shri Prakashchandra and others - (1974) 1 SCC 128, at page 134 (para 12)] and 'generally' subject to special provision [Mohan Baitha and others vs. State of Bihar and another - (2001) 4 SCC 350 at page 354]*".

39. Having considered the contentions placed by both the counsel at length on this point, we are of the opinion that the policy letter issued on 20.02.2008 contains certain guidelines which indicates that the Air HQ should hold the Board well in time before the promotion year which commences in first quarter of the next year and in this case 01.04.2011 so that there may be enough time for meeting the administrative requirements. We have also seen that in the past three years after the issuance of policy of 20.02.2008, the special Promotion Board for AVM to Air Marshals have traditionally been held in December. Had the Promotion Board be delayed, it would have upset the chain vacancies requirement and caused impediment to man management of Air Rank officers. The request of the applicant was

only his individual requirement. It is not possible for an organisation to change the dates of Promotion Board to accommodate individual requirements and thus, holding of the Promotion Board in December 2010 has not been done in any malafide manner to deprive application from consideration. Besides, no malafide has been alleged by the applicant against the respondents on this count. Contentions placed by the applicant's side are not tenable and the judgments cited do not help their contentions.

Consideration of the AR obtained by the applicant covering the period 18.10.2010 to 31.01.2011 as ACR of 2010.

40. Learned counsel for the applicant argued that that he was eligible for an AR on 31.01.2011. This report was for the period from 18.10.2010 to 31.01.2011. It was initiated consequent to the retirement of the IO who was the DCAS and had superannuated on 31.01.2011. Para 13 of Appendix A to the policy letter of 20.02.2008 states that "**An officer should have at least one appraisal report in the rank held by him at the time of his consideration for promotion.**" He further argued that an AVM has a report due on 30th November of the year which is vide para 6(a)(d) of the AFO/02/2008 (Annexure A-22). Para 7 of the same AFO states that "**The period of report shall always be from the date of submission of the previous AR to the occasion of raising the current AR. This total period should not exceed twelve months. Whenever an AR is raised on an occasion other than the**

annual AR and the period of report is ending within three months after the due date for submission of annual AR, this AR shall be considered as a part report for the same annual reporting period. Example of part report is given at Appendix 'A' to this order." As such, he argued that this report would have counted towards the report of 2010 since the report was initiated on 31.01.2011 which is within three months of the due date i.e. 30.11.2010. As such, he was having one report which was the basic requirement for consideration vide para 13 of the said Promotion Policy Letter.

41. Learned counsel for the applicant further argued that para 59(d) of the same AFO maintains that AR should reach to the AOP by 31st January of that year. Holding of Board before 31st January cannot be insisted upon. Therefore, it is all the more reason that the Board should have been held after January and had this been done, the applicant would have had one requisite report covering the period 18.10.2010 to 31.01.2011 for the year 2010.

42. Learned counsel for the respondents stated that the calculation of the period to be covered by the AR is done by para 7 of the same AFO. In this case the report would have been counted for 2011. As such, the applicant does not have a report for 2010 and was thus was lacking of required one AR in that rank and was not eligible for consideration for the Special Promotion Board for 2011 in December 2010. He further argued that the applicant was not due for an AR. It

was initiated because the IO retired from service on 31.01.2011. As such, to calculate that he is likely to earn a report by 31.03.2011 was not possible for the organisation and thus, the Special Promotion Board 2011 which was held in December 2010 at that time, the applicant was not having one AR which was mandated by the Policy.

43. Having considered the contentions of both the counsel on the issue of AR, as the facts are not disputed qua period of service as AVM, therefore, we called for Appendix 'A' which gives out the example of part report vide para 7 of the AFO in question. The example applied in Appendix 'A' to para 7 of the AFO is as under:-

"AR: PART REPORTS
(Sqn. Ldr and above)

EXAMPLES

1. **Case I** *Last AR raised on posting of appraisee on 15 Feb 07. Certificate in lieu of AR raised from 16 Feb 07 to 30 Jun 07 at the new unit. IO gets posted out on 01 Aug 07. AR is due from 16 Feb 07 to 31 Jul 07. This would be considered as part AR for 2007. In case the IO is posted out from 01 Dec 07, the AR is due from 16 Feb 07 to 30 Nov 07. This AR would be a part AR for 2008."*

44. From the analysis of the example and having gone through the para 7 of the AFO, it is abundantly clear that this report would have counted for 2010. Thus, the applicant was eligible as far as the AR is concerned. His AR was initiated on 31.01.2011 would have counted to be as AR of 2010 in the rank of AVM if it was available at the time of consideration.

Consideration or grant of waiver by the CAS to the applicant for having less than one year of service in the rank i.e. AVM as on 31.03.2011 as it was granted to some other candidates.

45. Learned counsel for the applicant argued that since the applicant was promoted on 18.10.2010, he did not have the service in the rank of AVM for one year upto 31.03.2011 and therefore, he was not eligible as per the policy letter dated 20.02.2008 for consideration in the Special Promotion Board for 2011. He argued that the delay in promoting him despite the senior advisor in Cardiology and Medicine recommending his case for upgradation in December 2009, delay in granting the waiver by the DGMS(Air) was responsible for delay in his picking up the rank. He was denied the waiver and thus could not serve in this rank for one year as mandated by para 15 of the Appendix 'A' to the policy letter of 20.02.2008. He further argued that the applicant was posted as Commandant SDI on 01.02.2007 in the rank of Air Commodore. He remained as a Commandant till 29.06.2009. On promotion to AVM, he was once again posted in the same appointment in the rank of AVM. Therefore, he had the requisite experience of being Commandant of SDI which was now upgraded to AVM. To say that he lacked experience of one year in the rank is incorrect because he was performing the same duties as Air Commodore from 01.02.2007 to 29.06.2009. He further stated that the applicant was given notional seniority from 01.04.2009 and notional seniority means that his seniority will be taken up for consideration for qualifying service.

46. In support of his contentions, Ld. Counsel for the applicant relied upon the citation **AIR 2000 Supreme Court 1819 in the matter for Union of India & Ors. Vs K.B. Rajoria**, wherein the Hon'ble Apex Court has observed that "*Regular Service cannot be construed as actual physical service. More so, when notional promotion was given to candidate for compensating wrong done to him earlier by supersession by his junior.*" In the present case, on the similar analogy, the applicant had been granted ante-dated seniority, he had also served in the same appointment earlier for two years. So, in fact the applicant had the requisite experience of more than one year. More so, he applied for waiver for the same but was wrongly denied without applying mind. It was also contended that similarly situated candidates were given waiver as they had also not completed one year physical service in the said rank. Thus, discrimination was done with the applicant.

47. Learned counsel for the applicant argued that there were four additional officers included in the Board for consideration to the rank of AVM Special Selection Board which was held in December 2010. These officers had not completed one year of physical service as on 31.3.2011. In each case, the CAS granted waiver after due consideration which he was also entitled under para 15 of the Policy Letter of 20.02.2008. The applicant had also applied for the same but the CAS had declined to grant a waiver to the applicant. Thus, he did not become eligible for consideration by the Special Selection Board.

48. Learned counsel for the respondents stated that service is to be put **“in the rank”** as each rank of the Armed Forces carries certain additional and different operational/administrative/ financial responsibilities. These responsibilities cannot be exercised by any other rank including the officiating incumbent. It also cannot be exercised if the incumbent is a permanent appointee but having lesser rank. As such, the spirit behind this requirement is to assess as to whether an individual has been able to carry out his responsibilities in the manner befitting of that rank for one year. He further stated that the applicant had been the Commandant of SDI in the rank of Air Commodore from 01.02.2007 to 29.06.2009. The SDI has since grown and the responsibility of the Commandant had since increased and as such his previous tenure cannot be compared with his present tenure. Besides, the policy clearly lays down experience **“in the rank”**. The appointment is immaterial. As regards the grant of waiver as per para 15 is concerned, it is given to those officers who have for ‘service reasons’ not been able to have the experience of the rank for one year. In this case, the applicant has no ‘service reasons’ for not having picked up his rank earlier. The applicant was unable to pick up his rank earlier and picked up his rank only on 18.10.2010 because he was LMC. He further stated that seniority of the applicant is not in dispute. However, the applicant has not been superseded for promotion because he has still not been considered for promotion.

49. The learned counsel for the respondents argued that the CAS was empowered to grant a waiver to candidates for “service reasons”. The clause at para 15 of the policy of 20.02.2008 reads as follows-
“Exceptions in qualifying service may be due to any service reasons. Such exception will be required to be authorised by the CAS”.

50. He submitted that service reasons imply in the interest of service. He explained that as per policy of 20.02.2008 at para 11 lays down the zone of consideration. It reads as under:-

“Zone of consideration.

- (a) *Zone of consideration will be 3 times the number of vacancies occurring. However, if Zone of consideration extends to the next course then all officers who have retained their seniority from that course would be considered.*
- (b) *All the second and third timers will necessarily form part of zone of consideration, irrespective of the number of vacancies.*
- (c) *In cases where available officers in any branch from which promotions are to be made is less than the stipulated zone of consideration of 3 times, the actual number of officers available will form the zone of consideration.*
- (d) *In exceptional circumstances where officers appearing in the zone of consideration are retiring before the occurrence of the first vacancy in the promotion year, thereby reducing the effective consideration ratio, the zone will be extended by including as many eligible officers as are retiring before the occurrence of first vacancy. In such exceptional cases the provision contained in para 11(a) regarding extension of*

consideration zone to the next course will not be applicable.”

51. The learned counsel for respondents further submitted that in the instant case there were three vacancies taking place in 2011 and as per the listing only four candidates were available for consideration by the Special Promotion Board to the rank of Air Marshal. Therefore, the CAS exercised his powers to grant waivers to four officers who were lacking one year experience in the rank by a couple of days. He emphasised that in these cases the officers had not been promoted to the rank of AVM because of organisational reasons and also that they were lacking the one year in the rank by a few days but they were having one AR in the rank of AVM. The case of the applicant was distinguishable as he was lacking an year in the rank criteria because of being LMC and was not having an AR in the rank of AVM at the time of consideration of waiver.

52. In order to support his contention, learned Counsel for the respondents has cited **Civil Appeal Nos.5410 of 1992 decided by the Hon'ble Apex Court on 06.05.1996 in the matter of Union of India and Anr. Vs M. Bhaskar and Ors.**, wherein the Hon'ble Apex Court has observed as under:-

“14. In this appeal, a separate argument was advanced on behalf of respondent No.1 Prakash Chandra Ojha, who had approached the Patna Bench of the CAT with the grievance that he was unjustly and illegally denied promotion to Grade-I Commercial Inspector in 1990, despite his having been promoted as Commercial Inspector Grade-II by an order dated

21.9.1989, which was made effective from 11.10.1988, because of which he had become eligible for promotion to Grade-I on 11.10.1990, as the eligibility condition was completion of 2 years of experience in Grade-II. The Patna Bench held that the exclusion of this respondent from the list of eligible candidates for the selection meant for 1990 was wrong.

15. The aforesaid decision has been challenged in this appeal by the Union of India by contending that 2 years' period of experience has to be reckoned, not from 11.10.1988, but from 21.9.1989. There is no dispute that the eligibility condition is 2 years experience in Grade-II. Now, this respondent having really started working in Grade-II pursuant to the order of 21.9.1989, he could not have gained experience prior to the date he had joined pursuant to this order. The mere fact that his promotion in Grade-II was notionally made effective from 11.10.1988 cannot be taken to mean that he started gaining experience from that day, because to gain experience one has to work. Notional promotions are given to take care of some injustice, inter-alia, because some junior has come to be promoted earlier. But we entertain no doubt that the person promoted to higher grade cannot gain experience from the date of the notional promotion; it has to be from the date of the actual promotion."

53. Having considered rival contentions of both the counsel at length and having examined the documents we are of the opinion that the applicant was not having one year of service in the rank of AVM as on 31.03.2011. Although some officers were given a waiver by the CAS, three of whom were short by four days and the fourth one was short by 25 days and all of them were having one AR in the rank of AVM. In this case the applicant was required to be given a waiver of more than six

months (6 months and 13 days), besides he was not having an AR in that rank.

54. As regards the 'service reasons', we feel that any reason for which an individual is not to be blamed and/or was delayed in picking up his rank because of operational or organisational or administrative management reasons can be termed as 'service reasons'. In this case, the delay in picking up the rank of AVM by the applicant was caused due to medical category which the applicant was suffering from. The day he was upgraded to acceptable medical category for promotion, he was promoted within a period of 48 days. The delay of 48 days is explainable because the final clearance of the appointment is required to be taken from the GOI. The delay upto 18.10.2010 in picking up his rank cannot be ascribed to 'service reasons'. At best 48 days could be ascribed to service reasons. But they are not of much help to the applicant in calculating the length of service in the rank of AVM as on 31.3.2011. Whatever be the case, a waiver for more than 6 months does not appeal to reason or logic and in this case the waiver was required for 6 months and 13 days. Thus, denial of waiver cannot be said discriminating.

55. We have considered the arguments of the counsel for the respondents who has clearly stated that in the armed forces, the powers and responsibilities of an individual increases with rank in terms of operational, administrative and financial responsibilities. As such, the tenure of the Commandant of SDI from 01.02.2007 to

29.06.2009 in the rank of Air Commodore is of no consequence. The post was upgraded consequent to the cadre review and increased role and responsibilities of the SDI. Therefore, the role of the applicant as a Commandant of SDI as AVM in his second tenure from 18.10.2010 cannot be compared with his earlier tenure of 01.02.2007 to 29.06.2009 in the rank of Air Commodore.

56. We have considered the citations preferred by the learned counsel and we are of the opinion that the respondents were within their right to hold "ordinarily" the Board in December for the next year i.e. in December 2010 for promotion for the year 2011. There is no malafide established as even in the past the special Promotion Board for the years are held in December.

57. We have given our best consideration to the issue of 'experience in the rank' also. It clearly defines that the experience was required as an AVM. In this case the applicant picked the rank of AVM on 18.10.2010. The delay that took place from the date the applicant took up his rank was because of medical reasons as he was LMC. He obtained the waiver from the competent authority i.e. DGMS (Air) only on 30.08.2010 after a comprehensive evaluation of his medical condition and thus became eligible to be promoted. The delay of 48 days which took place in his promotion as AVM was due to organisational constraints. As such, as on 31.3.2011, the applicant did not complete one year of service in the rank of AVM.

58. As regards grant of waiver in terms of qualifying service is concerned, the CAS is entitled to grant the waiver for 'service reasons'. In this case there were no service reasons which call for grant of waiver. The delay was caused due to the applicant being a LMC. In any case, grant of waiver for more than 50% of the designated time does not appear to be reasonable.

59. Learned counsel for the applicant had also stated that there was no hurry for the Board to be held in December 2010 because the first vacancy in the rank of Air Marshal was arising only on 01.09.2011. The second vacancy was to come on 01.10.2011 and the third vacancy on 01.03.2012. By deciding to hold the Board in December, the respondents were forced to include additional AVMs for consideration based on the policy 1: 3 and thus were forced to give waivers to four of them. However, we observe that the situation would not have altered had the Special Promotion Board been held in January-March, 2011 because the requirement of 'experience in the rank' was reckonable on 31 March 2011. Considering that the applicant would have earned one AR for 2010, but still he would have not earned required one year experience in the rank.

60. We have also noted the contention of the learned counsel for the respondents that the applicant has not impleaded the officers who were junior and were granted waiver for qualifying service by the CAS, as some of them would be adversely affected. We have also noted the contention of the learned counsel for the applicant that it is not mandatory for him to list the said officers as respondents because he has sought the quashing of the result published on 20th May 2011

consequent to the Special Promotion Board of December 2010. We consider that the affected officers need not be impleaded looking at our consideration of the other issues in the case.

61. We have perused the original record placed by respondents' side. Based on the rationale of having candidates according to vacancy, requirement of candidates 1:3 during the consideration of the Board, the panel had to include those officers who had not completed one year of qualifying service but had met all other eligibility criteria. The record also contained the names of other AVMs who were retiring before the vacancies were to arise and therefore, four additional AVMs had to be considered. We find no dichotomy in this action.

62. In view of the foregoing, we are of the opinion that the applicant did not meet the complete requisite criteria as laid down in the said policy letter dated 20.02.2008 for being considered to the rank of Air Marshal by the Special Promotion Board held in December 2010 for the vacancies occurring in 2011-2012. Had the Promotion Board been delayed which was as per his request to the CAS, he still would not have met the criteria of qualifying service.

63. In view of the above, we are not inclined to interfere in the matter. The OA is dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

**Announced in the open Court
on this 23rd day of January, 2012.**