

**COURT NO. 2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
O.A. No. 511 of 2011**

IN THE MATTER OF:

Maj. Gen. S.P.Sinha

....Applicant

Through: Mr. S.S. Pandey, counsel for the Applicant .

Versus

Union of India & Ors.

.....Respondents

Through: Mr. R. Balasubramanian, ASG with Mr. J.S. Yadav, counsel
for the Respondents.

CORAM:

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

JUDGMENT

Date: 30.03.2012

1. The applicant had filed OA 511/2010 before the Armed Forces Tribunal against his non-selection for promotion to the rank of Lt Gen and prayed to quash order of respondents dated 27th Aug 2010 (Annx A-1) declaring him unfit for promotion. The applicant has also

prayed for re-constitution of Promotion Board as if the same met on 20 Aug 2010 for his re-consideration without comparing his profile with any other officer of his batch who were not promoted earlier to the rank of Lt Gen on the basis of results of Special Selection Board held in 7th Aug 2008. A further prayer has been made to promote the applicant to the rank of Lt Gen with all consequential benefits.

2. Brief facts of the case for the just disposal of the application are that the applicant was commissioned in the Army (AOC) on 24th Dec 1972. He claims that he was awarded COAS Commendation Card for three consecutive years in 1999, 2000, 2001 and was also awarded VSM in 2005. The applicant was promoted Major General on 20 Sept 2004. It is submitted that the first Promotion Board for considering his batch (1972 seniority) was held on 7 Aug 2008. There was one vacancy and one Major Gen Anil Swaroop was approved for promotion but could not be promoted due to administrative reasons. This officer (Anil Swaroop) however, retired in June 2009 and the applicant states that the vacancy was thus carried forward.

3. The first Review Selection Board, of the applicant, was held on 12 Aug 2009 where the applicant was considered along with officers of 1973 seniority. The applicant states that there were two vacancies against that Major General G S Narula (March 1972 seniority) and Maj General Pradeep Bhalla (1973 seniority)) were graded “fit for promotion” but the applicant was not empanelled. The result of Maj General G S Narula was however withheld.

4. The applicant states that subsequent to grant of relief that is after his two ACRs for 2007 – 08 and 2008-09 were set aside on 23 July 2010 a Special Review Board was held on 20 Aug 2010. The applicant claims that one vacancy existed and he was the sole candidate entitled to be considered. He was however, informed on 27 Aug 2010 that he had not been empanelled for promotion to the rank of Lt Gen.

5. The applicant states that in that respect he had preferred the following statutory complaints :-

(a) Dated 26 Feb 2009. Rejected 31 March 2009.

(b) Dated 02 April 2009. Rejected 20 Aug 2009.

(c) Dated 16 June 2009. Informed on 16 June 2009 that this statutory complaint was not tenable in terms of Para 152 of AO 45/2001/MS.

d. The applicant preferred a second statutory complaint dated 24.09.09 after directions from Armed Forces Tribunal. The same was rejected on 29.03.2010 (page 30).

6. The applicant retired from service on 31 Aug 2010.

7. The applicant states that he was rejected for promotion because comparison has been made of his profile with that of Maj Gen (Retd) Anil Swaroop. This was incorrect because Maj Gen Anil Swaroop was never finally approved or promoted and the panel of the Board held on 07 Aug 2008 was valid only for one year and thus was non-existent on 20 Aug 2010, when the applicant's Special Review Board was held. The applicant has also questioned if his profile in the special review board was compared after removing the record of two ACRs for 2007-08 and 2008-09 which had been set

aside, the applicant claims that this relief made his profile better than that of Maj Gen Retd Anil Swaroop and he should have been promoted against the single vacancy that existed.

8. The respondents in their counter affidavit have stated that the applicant was granted redress vide Govt Order dated 23 July 2010 wherein two ACRs for the period July 2007 to June 2008 and July 2008 to May 2009 were set aside on technical grounds. The applicant was considered by Special Selection Board on 20 Aug 2010 but not found fit for promotion even after removal of the two ACRs from his record. The respondents state that mere existence of a vacancy does not entitle an officer for promotion. At that time Maj Gen (Retd) Anil Swaroop remained on the panel for promotion but was not physically promoted because of a Disciplinary and Vigilance Ban (DV Ban). Maj Gen (Retd) Anil Swaroop would have been entitled to consequential relief, including promotion, if he had been absolved of his charges before retirement.

9. The Learned counsel for the respondent further submitted that the applicant had submitted a statutory complaint dated 16 June 2009 which was considered by the respondents pursuant to directions of the Armed Forces Tribunal. The same was however, rejected. The applicant was to retire on 31 Aug 2010 so the Special Review Board was held on 20 Aug 2010 and the result of the same was de-classified before retirement of the applicant. The respondents maintained that the applicant was considered along with the data of his original batch-mates(1972 seniority) as per prevailing practice and was not found fit for empanelment to the rank of Lt Gen. The results of the Special Selection Board were approved by the competent authority (Central Govt). The approval of the ACC was not required as the same is only taken in the case of officers approved for promotion.

10. In a rejoinder, the applicant has stated that Respondent No. 2 i.e. COAS was instrumental in getting him (applicant) rejected by submitting distorted facts to Respondent No. 1 (Union of India) to obtain approval of Board results. The applicant also restated the

grounds submitted earlier by him. During the course of hearing the applicant submitted several applications. We have perused the same along with replies filed by the respondents.

11. We have heard the arguments and perused the records. The applicant maintains that he was the only officer considered by Special Selection Board for a clear vacancy that existed on that day. A bench mark had to be established and thus his data was compared with that of his approved batch mate, Maj Gen Anil Swaroop (Board result of 07 Aug 2008). The contention of validity of Board being one year is inconsequential. The applicant maintains that Maj Gen Anil Swaroop (Retd) could not be considered on the panel of selected officers since his Board results were never declassified. The applicant maintains that until results of Selection Board are declassified, the same has no legal validity. The applicant still maintains that his service profile was better than that of Maj Gen (Retd) Anil Swaroop. He claims that he was a recipient of a VSM. Maj Gen (Retd) Anil Swaroop had never received such an award.

12. The applicant maintains that in a vacancy based promotion system the only criteria is to compare the merit of all eligible officers viz a viz the number of vacancies available at the time of consideration. The applicant maintains that in the absence of any of the officers having been promoted to the rank of Lt Gen consequent to holding of the Selection Board in 2008 there was no justification what so ever for respondents to carry out any comparisons of profiles with batch mates.

13. During the course of arguments the applicant brought out that when he was under consideration by Special review (Fresh) there existed only one vacancy and he alone was in the zone for consideration. Considering his submissions the respondents were directed on 19.04.2011 to bring on record the following :

(a) How many vacancies existed at the time when 1972 batch officers were considered for promotion from Maj Gen to Lt Gen.

(b) What was vacancy position when the appellant was considered by Special Review (Fresh).

14. In pursuance of Armed Forces Tribunal order dated 19 April 2011, the respondents in their additional reply stated that the applicant was of 1972 batch and was considered as fresh case by Special Selection Board on 20 Aug 2010 with cut off ACR for 1972 batch up to 30 June 2008. Only one vacancy existed. The applicant was the sole candidate but was not graded fit on account of comparative merit of his profile viz a viz his batch mate of 1972 batch considered on 07 Aug 2008. Despite his changed profile, after setting aside his two ACRs for the period July 2007 to June 2008 and July 2008 to May 2009, the applicant was not empanelled for promotion as his profile was still not at par with that of Maj Gen Anil Swaroop.

15. The applicant during the course of arguments stated that the respondents do not have any policy specifically related to comparison of merit with previous batch mates. The applicant maintains that the respondents in a similar case of Brig Jaideep Mitra did not compare the latter's profile with another officer (Brig P S Gill) who had been classified fit earlier by a Promotion Board but not

promoted because he was under DV Ban. The applicant maintains that the respondents have therefore taken two different stands on the matter. In support of this contention, the applicant has drawn attention to MS Note dated 24 Sept 2010.

16. The respondents in their reply have stated that Maj Gen Anil Swaroop was graded fit by Special Selection Board. Subsequent to the approval the officer was placed on DV Ban and de-classification of his result was withheld. This did not cancel or revoke the result of the selection. The respondents have explained that in the case of Brig P S Gill the officer was placed on DV Ban before his recommendation for promotion was approved by competent authority. The officer subsequently retired from service. The profile of Brig Jaideep Mitra was compared with the profile of Brig N L Malhotra and not Brig P S Gill as averred by the applicant.

17. In a subsequent order MoD however ruled that Brig J P Mitra's profile be compared with the profile of Brig P S Gill who could not be

empanelled being on DV Ban. The applicant therefore, can not draw any strength from MS Note dated 24 Sep 2010.

18. In his reply, the applicant has stated that MS policy dated 27 July 1995 no way contemplates any comparison of profiles.

19. We have considered the rival submissions. The applicant is of 1972 batch and has a high profile. He is a recipient of COAS commendation of three occasions and has also been awarded the VSM in 2005. In that respect, Maj Gen (Retd) Anil Swaroop, with whom his profile was compared, did not have the same award. We have also compared the ACR profiles of both the officers and find that the ACR and career course profile of Maj Gen (Retd) Anil Swaroop is better. At every stage of his career in the Army, Maj Gen Anil Swaroop was detailed for career courses whereas the applicant was not selected for the same. Selection for such career courses does give an indication of the standing and relative position of an officer within his batch.

20. MS Policy dated 27 July 1995 nowhere lays down that for Special Selection Boards the profile of officers under consideration must be compared with the profile of his batch who have been approved. This policy however, has been traditionally followed since there is no other method of establishing a bench mark for evaluation. In fact the applicant has referred to the same in his reference to the procedure followed in the earlier case of Brig (later Maj Gen) J P Mitra and Brig P S Gill. In absence of any specific direction on this issue the prevailing practice of comparing an officer's profile with that of an approved officer of his batch is not against the principle of natural justice and was in no way unfair and unjust. This procedure has been ratified by the MoD, the final decision making authority on matters of promotion and we find the same is justified.

21. The contention of the applicant that in his Special Review Board one vacancy existed and he was the lone candidate and should therefore, have been promoted. This argument is not tenable since it is not necessary for the respondents to promote an unsuitable

candidate. In this case, the profile of the applicant was correctly compared with the profile of his batch mate Maj Gen (Retd) Anil Swaroop in terms of the ruling given by the MoD in the case of Brig (later) Maj Gen J P Mitra.

22. In view of the above facts we are of the view that no irregularity or illegality was committed by the respondents in comparing the profile of the applicant with the profile of Maj Gen (Retd) Anil Swaroop. No injustice has therefore been caused to the applicant. Application dismissed. No costs.

Z. U. SHAH
(Administrative Member)

MANAK MOHTA
(Judicial Member)

Announced in the open Court
on the 30th day of March, 2012

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