

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)
T.A NO. 247 of 2010
WP(C) No.15293 of 2006 of Delhi High Court**

IN THE MATTER OF:

Nb Subedar Vijay Singh Jat**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

CORAM:

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

JUDGMENT

Date: 03.04.2012

1. This petition was originally filed on 29.09.2006 before the Hon'ble High Court of Delhi as WP(C) No.15293 of 2006. Thereafter, it was transferred to the Armed Forces Tribunal on 13.01.2010 and was registered as TA No.247/2010.

2. Vide this petition, the applicant has sought quashing and setting aside of impugned order dated 08.08.2005 and 16.09.2005 in the light of screening board proceedings dated 11.02.2005 (Annexure P-6) by which he was granted extension for two years of service to the applicant. The applicant has further prayed that the respondents may be directed to give effect to the order dated 11.02.2005 passed by a duly constituted screening board by the Commanding Officer for the applicant's extension of service from 16.09.2006 to 15.09.2008 in

keeping with the Government notification dated 03.09.1998 (Annexure P-3) and the policy of 14.10.1998 (Annexure P-5) and examine the board proceedings dated 19.06.2005 (Annexure P-8) by which the applicant's extension was cancelled and passed the order without assigning any reason. The applicant has prayed that proceeding dated 19.06.2005 be quashed and further prayed that he be granted extension and promotion to the next rank when due and with all other consequential benefits.

3. Brief facts of the case are that the applicant was enrolled in the Indian Army on 16.09.1980 and had completed 26 years of Army Service in September 2006 in the present rank of Nb Subedar. On 16.02.1985 the applicant was punished by the Commanding Officer under Section 40(a) of the Army Act and was awarded a red ink entry. Thereafter, he was also punished under different charges. Lastly, he was punished under Section 63 of the Army Act by Lt Col Rajesh Tyagi on 19.12.2003. It is submitted that the said summary punishment was set aside by the Reviewing authority vide order dated 02.07.2004 (Annexure P-1).

4. On the cancellation of the aforesaid summary punishment, the applicant was promoted to the rank of Nb Subedar w.e.f. 02.07.2004 and the applicant's service status was restored by the respondents as it was prior to the award of said summary punishment. The applicant was further selection for the post and vacancy of permanent instructor

at the Regimental Centre Bareilly and vide order dated 03.11.2004, the applicant was also transferred from Assam to Bareilly as a Weapon Instructor and accordingly the applicant reported to new station at Bareilly but was not accepted by Lt Col Rajesh Tyagi, the same officer who had punished him earlier, who was holding the post of Chief Instructor at the Regimental Centre and being biased and also having a personal disliking and ill will towards the applicant, ordered the applicant to return back to his parent unit. The applicant was again transferred to the same post on 20.12.2004 which was again refused by the said officer (Annexure P-2 colly).

5. In view of notification dated 03.05.1998 issued by the Government of India, the terms and conditions for retirement of JCOs/NCOs and OR was enhanced by two years and accordingly the existing provisions of Regulation 163 were amended. This came into force w.e.f. 30.05.1998 according to which the Nb Subedar's service limit was to be extended from 26 to 28 years as well as the age of superannuation was also enhanced by two years (Annexure P-3). The respondents issued letter of 21.09.1998 (Annexure P-4). In turn Army HQ issued a letter dated 10.10.1997 wherein the procedure and criteria for screening for extension was laid down. In that, the discipline criteria was also laid down which reads as under:-

“Discipline Criteria:-

3(a) An individual should not have more than three red ink entries (including recordable censure in the case of a red ink entry in the last five years. For promotion to the rank of Sub Maj there should be no red ink entry including recordable censure in the rank of JCO.

(b) A JCO/NCO who has been convicted for an offence mentioned in Appendix A to this letter will be permanently debarred for further promotion.

(c) A JCO who has been awarded recordable censure/red ink entry for any offence at Appendix B to this letter will not be eligible for further promotion for a period of three years from the date of the award of the recordable censure/red ink entry.

(d).....

(e)”

6. In the meantime, on 10.06.2005 Lt. Col. Rajesh Tyagi who was posted as Chief Instructor at Bareilly and who has refused the applicant to be absorbed as Instructor on permanent basis under the influence of personal ill-will and malafides, took over the command of the 4 Jat Regiment where the applicant was serving as Nb Subedar, ordered the applicant to move on permanent posting from the Unit to Ferozepur vide movement order dated 18.06.2005.

7. The Commanding Officer hold a screening board on 11.02.2005 and forwarded the applicant's name to the OIC Records. The OIC Records, however, did not process the Board in favour of the

applicant. Thus, depriving the applicant the privilege of extension of service (Annexure P-6). Accordingly, the applicant complied with the posting order (Annexure P-7). Further, Lt. Col. Rajesh Tyagi passed the impugned order against the applicant on 19.06.2005 by cancelling the extension orders without any jurisdiction and authority. The second screening board dated 19.06.2005 was held which is totally illegal and unconstitutional. Copy of the same is at Annexure P-8.

8. The applicant was not aware of the orders of the respondents regarding the cancellation of extension orders and therefore, it is clear from the screening of the orders that the applicant was not present in Bareilly on 19.06.2005 having been despatched to the new unit on 18.06.2005. Besides, it is pertinent that Lt Col Rajesh Tyagi in the capacity of the CO did not obtain the willingness of the applicant for extension in service.

9. Thus, by a general order dated 16.09.2005, the applicant's retention in service was not permitted by making the reference of 4 JAT Regiment Board proceedings dated 24.05.2005 and 26.06.2005 (Annexure P-9). On 10.01.2006 the applicant challenged the aforesaid impugned orders passed by the OIC Records, in connivance with Commanding Officer, respondent No.4 by filing statutory complaint dated 10.04.2006 demanding the following documents from the respondents :-

- (a) Communicating the reasons for denial of extension of service despite being fully qualified;
- (b) Copy of Army HQ letter dated 10.05.2002 as shown as mentioned in the impugned order dated 16.09.2005;
- (c) Supply a copy each of both the board proceedings dated 24.05.2005 and 26.06.2005 as shown in the impugned order dated 16.09.2005;
- (d) Pending supply of the aforesaid documents, requested the appropriate authorities that General Officer Commanding 2 Mount. Div. To review both the board proceedings as said before.

Copy of the statutory complaint is at Annexure P-10.

10. Dissatisfied with the inaction of the respondents, the applicant filed a civil writ petition No.4554/2006 in the Hon'ble High Court of Delhi and the same was dismissed as withdrawn vide orders of Hon'ble High Court dated 29.03.2006. Vide this order, the Hon'ble High Court directed the respondents to decide and dispose off the applicant's statutory complaint dated 10.01.2006 by passing a speaking order (Annexure P-11).

11. The applicant again challenged the validity of the impugned screening board proceedings dated 19.06.2005 by annexing the relevant copy of the board proceedings dated 11.02.2005 by filing a supplementary statutory complaint dated 21.06.2006 (Annexure P-12).

Again being aggrieved by inaction of the respondents, the applicant filed a second subsequent civil writ petition No.12088/2006 which also stands disposed off by the Hon'ble Delhi High Court vide order dated 31.07.2006 wherein the respondents were directed to dispose off the statutory complaint dated 10.01.2006 as well as 21.06.2006 within a period of four weeks. But the respondents have not complied with the said orders (Annexure P-13).

12. Meanwhile, the applicant received another transfer order dated 02.07.2006 issued by the OIC Records (Annexure P-14) and consequently, the applicant moved on posting to Bareilly where he moved an application dated 13.06.2006 seeking reasons for his repeated transfers. He was informed by the OIC Records vide letter dated 17.07.2006 that due to summary punishment awarded to the applicant under Section 40(a) on 16.02.1985, the applicant was not granted further extension for two years and he would retire w.e.f. 30.09.2006 (Annexure P-15). He was once again transferred from Bareilly to Assam vide movement order dated 24.07.2006 (Annexure P-16). On reaching his unit on 27.07.2006, he was ordered by Col. Rajesh Tyagi to return back from Assam to Bareilly on the same day by movement order dated 27.07.2006 (Annexure P-17).

13. It has also been alleged by the applicant that in view of the ill-will and malafide intentions of the Col Rajesh Tyagi, Commanding Officer

4 JAT Regiment, the applicant apprehends that he was not given fair and judicious review by the Screening Board.

14. The applicant has now come to know vide general order dated 08.08.2005 that he has been deliberately made to retire from service w.e.f. 30.09.2006 (Annexure P-18).

15. On 19.09.2006, the applicant has filed a contempt petition being CCP(C) No.1234/2006 in the Hon'ble High Court and the Hon'ble High Court issued a notice to the respondents. The main grievance of the applicant for filing the contempt petition was to seek clarification for non-grant of his extension of service. The contentions with respect to punishment of 16.02.1985 are challenged by the applicant on the grounds that the said red ink entry dated 16.02.1985 lost its significance and it has no relevance and does not disentitle the applicant for consideration for two years extension of army service beyond the present date of retirement and accordingly the applicant stood already granted extension by a duly constituted screening board on 11.02.2005 but the respondents have failed to consider these aspects before passing the impugned order dated 16.09.2005.

16. On immediately filing the contempt petition on 19.09.2006, the applicant was informed by the OIC Records vide letter dated 20.09.2006 that the COAS has considered the objections of the applicant but has rejected the same and no redressal is granted. The order dated 20.09.2006 is at Annexure P-19.

17. In support of his contentions, Learned counsel for the applicant relied upon the citation **AIR 1997 SC 1623, Mediwell Hospital and Health Care Vs UOI & Ors.**, submitted that the ratio of this case law would also be applicable to the present case wherein the impugned order dated 19.06.2005 passed by the Army HQ resulting in various adverse consequences against the applicant resulting in his discharge from army service without extension. He also drew our attention to para 9 of the Manual of Military Law Rules and other subordinate legislation provides that certain rules and other matters being made in pursuance of the Army Act by authorities have a complete statutory force and Section 191 of the Army Act empowers the Central Govt. to make rules with regards to discharge/dismissal or removal in respect of the PBORs but the said impugned order does not bear the concurrence of the Central Govt. as provided in the Act and therefore, the impugned order dated 19.06.2005 is wholly unconstitutional and lacks jurisdiction.

18. Learned counsel for the applicant also argued that para 7 of the Manual of Military Law provides that the discharge or dismissal etc. in every case must be authorised by the competent authority as provided in the Army Act and Rules but in the present case the said impugned orders has not been passed by the competent authority.

19. He further argued that the doctrine of pith and substance also applies to the case of the applicant wherein the enactment and an

effect of the said impugned order dated 16.09.2005 makes the entire subsequent administrative action alter the spirit of Regulation 163 and Rule 13 of the Army Rules, 1954.

20. He also argued that the orders of OIC Records are not maintainable. In support of his contentions, learned counsel for the applicant relied upon the citation **(1999) 4 SCC 448 State of Haryana Vs Naresh Kumar Bali**.

21. Learned counsel for the applicant further argued that Government notification as well as administrative orders specifically enforced w.e.f. the dates of their origination as shown in the said administrative instructions dated 14.10.1998, meaning thereby the effect to the impugned order dated 16.09.2005 cannot be allowed to create any effect in the manner as mentioned in the said impugned order. Therefore, the said impugned order is wholly illegal, unconstitutional and liable to be cancelled. He further contended that the powers to make rules and regulations and their publication in the gazette are provided under the Army Act, 1950 and power to make rules and regulations are vested in the Govt. is not in dispute. Thus, the reply of the respondents dated 20.09.2006 (Annexure P-19) whereby the extension for two years being denied to the applicant due to red ink entry awarded under Section 40(a) of the Army Act on 16.02.1985 whereas the applicant was already elevated to two successive promotions from Naik to Havildar and Havildar to Nb

Subeder, meaning thereby the said red ink entry which took place in the year 1985 may be deemed to have lost its significance after a period of three years i.e. till 1988.

22. Learned counsel for the applicant lastly contended that the ill-will and malafide on the part of Lt Col Rajesh Tyagi who subsequently became the Commanding Officer of 4 JAT Regiment was clearly discernible from the postings that he received and therefore, the applicant was forced to come to the Court for justice.

23. Learned counsel for the respondents argued that the applicant was enrolled in the Army on 16.09.1980 and on completion of training was posted to 4 JAT Regiment. In due course he was also promoted to higher ranks. He was awarded a punishment of 28 days RI on 16.02.1985 for committing offence under Section 40(a) of the Army Act. He was again awarded a reprimand on 01.06.1994 for committing offence under Section 42(e) of Army Act, 1950. On 26.04.1995 the applicant was awarded 'severe reprimand' for committing offence under Section 48 of the Army Act. The applicant was also awarded severe reprimand, reduction of grade pay for one year and deprivation of 'good service pay' on 23.12.1998 for committing offence under Section 36(d) of the Army Act. On 19.12.2003, the applicant was awarded severe reprimand and deprived of appointment of Regimental Police Company Havildar Major (RP CHM) for committing offence under Section 63 of the Army Act.

24. Learned counsel for the respondents argued that despite all this, the applicant was promoted to the rank of Paid Acting Naik w.e.f. 18.08.1990 and Paid Acting Havildar w.e.f. 24.10.1992. He was not considered eligible for further promotion to Nb Subedar as he was awarded punishment under Section 63 of Army Act 1950 on 19.12.2003. Aggrieved, he filed a WPC No.3180/2004 which was disposed off by the Hon'ble High Court of Delhi on 12.05.2004. In compliance of the judgment, the case was re-examined and punishment awarded to the applicant was cancelled on 02.07.2004 and he was promoted to the rank of Nb Subedar w.e.f. 02.07.2004.

25. Learned counsel for the respondents further submitted that the policy for extension of JCOs/Ors was issued by the MOD vide notification dated 03.05.1998. It was followed by Army HQ letter dated 21.09.1998 (Annexure P-4) which partly modified the existing rules as contained in para 163 of the Regulation for the Army, 1987 which governs the terms of service/tenure limits of retirement of JCOs and NCOs. In accordance to the provisions contained therewith, pensionable service in respect of personnel holding the rank of Nb Subedar have been made extendable by two years by screening or 52 years of age whichever is earlier. The applicant has submitted his willingness for extension of service by two years. He was thus screened two years prior to original date of normal retirement as Nb Subedar i.e. before 30.09.2004.

26. Learned counsel for the respondents further argued that as per rules contained in Government notification, the applicant was not eligible for extension for two years service as he was punished on 16.02.1985 under Section 40(a) of the Army Act 1950. This was as per policy letter dated 21.09.1998. However, he was erroneously recommended for grant of two years extension by Screening Board conducted on 11.02.2005.

27. Learned counsel for the respondents further submitted that the Record Office has raised observations and directed that a fresh Screening Board be held. The Screening Board was re-conducted on 19.06.2005 wherein he was not recommended for extension of service due to his punishment under Section 40(a) of the Army Act which was given to him on 16.02.1985. Therefore, the applicant was required to be discharged on pension w.e.f. 30.09.2006.

28. Learned counsel for the respondents also argued that on 10.01.2006, the applicant filed a statutory complaint against his non-extension of service. It was immediately followed with Civil Writ Petition No.4554/2006. However, the same was dismissed as withdrawn by the Hon'ble High Court of Delhi vide order dated 29.03.2006 with the directions to the respondents to dispose off his statutory petition within a stipulated time. Since the said statutory complaint was not found signed by him and nor submitted to his CO as per rules laid down vide para 364 of the Regulations for the Army

1987, the same was rectified and resubmitted vide supplementary statutory complaint dated 29.04.2006. Vide this petition, the applicant sought redressal alleging military wrong in connection with allotment of Family Accommodation, punishment awarded under Section 63 of Army Act, extension of service for further two years and posting orders. He also contended therein that these actions at the behest of Col Rajesh Tyagi who as Officiating Commanding Officer awarded him a punishment on 19.12.2003 which had later been set aside by Commander 107 Mountain Brigade. When the said rectified petition was under examination, the applicant again filed civil writ petition No.12088/2006 which was disposed off vide order dated 31.07.2006 with directions to decide and dispose off the said statutory complaint. In compliance of both the judgments, the COAS disposed off the statutory complaint dated 29.04.2006 in the light of policy on the subject. The decision of the Army Chief was communicated to the applicant vide reasoned speaking order dated 20.09.2006.

29. Learned counsel for the respondents further contended that the applicant was found unsuitable for instructor duties on account of his disciplinary record. He was thus reverted back to his unit when he was posted to the Regimental Centre at Bareilly. The allegation that Lt Col Rajesh Tyagi was responsible for sending him back is thus not tenable. The allegations made against Lt Col Rajesh Tyagi are also of imaginary nature and baseless. He further submitted that Lt Col Rajesh Tyagi has not been impleaded as a party by name in this writ

petition. Even though all allegations of malafide have been levelled against him and thus the petition is liable to be dismissed on this ground alone.

30. Learned counsel for the respondents further argued that consequent to the Government notification dated 03.05.1998, the Army HQ issued a letter on 21.09.1998 which laid down the procedure and criteria for screening of personnel below officer rank. Appendix-A to the said letter lays down that the “*offences permanently debarring for extension*” and at serial No.9 it says Section 40(a) “*Using criminal force to or assaulting his superior officer*”. Learned counsel for the respondents states that applicant had been punished for this offence on 16.02.1985 and thus he was not eligible for extension. The earlier recommendation by his unit on 11.02.2005 was objected by the Record Office and based on the directions of the Record Office, it was reconsidered and forwarded to the Record Office.

31. Having heard both the parties at length and having examined the documents, we are of the opinion that the issue in front of us is of grant of extension to the applicant from 01.10.2006 to 30.09.2008.

32. Having examined the documents and the record which were produced before us in original and having considered the citations cited by the learned counsel, we find that the COAS has disposed off both the statutory complaints on 12.09.2006 which was conveyed to the applicant vide letter dated 20.09.2006. So the allegation that the

statutory complaints have not been disposed off by the competent authority are incorrect. Director (Inf.) in his letter clearly stated that a decision has been taken by the COAS. In Para 2 of the said letter, it has been stated that ***“The Chief of the Army Staff has examined your Statutory Complaint dated 29 Apr 2006 as per the direction dated 29 Mar 2006 and 31 Jul 2006 given by the Hon’ble High Court of Delhi. After considering the facts and circumstances of your case in the light of policies on the subject, your Statutory Complaint has been disposed off by the Chief of the Army Staff on 12 Sep 2006. The detailed analysis/reasoned order is given in the succeeding paras.”***

33. We have also observed that the applicant has not agitated against the punishment which was awarded to him on 16.02.1985 which was coming in his way for grant of extension. Since this punishment for an offence committed under Section 40(a) of the Army Act was coming in his way which debarred him from grant of extension vide Appendix-A to policy letter dated 21.09.1998 issued by the Army HQ, there is no malafide in not granting extension to the applicant.

34. We have also examined the two Boards of Officers conducted by the Commanding Officer for grant of extension. The first Board was held on 11.02.2005. The Commanding Officer recommended his case for extension. Perhaps the Commanding Officer was not aware of the applicant being debarred on the ground of discipline for grant of extension as per policy letter dated 21.09.1998. The Record Office

having observed the shortcomings in the Board proceedings referred it back to the Unit and the Unit was directed to hold a fresh Board. The fresh Board was held on 19.06.2005. By that time the new CO, Col Rajesh Tyagi had taken over the Unit as a Commanding Officer and therefore, had to preside over the Screening Board as directed by the Record Office. But no malafide can be construed on the part of Col Rajesh Tyagi.

35. The judgments cited by the learned counsel for the applicant do not help the case of the applicant in the light of the facts of the case.

36. In view of the foregoing, we are of this opinion that the applicant was not eligible for extension w.e.f 01.10.2006 as per the relevant policy dated 21.09.1998 since he did not qualify in the discipline parameters having been punished under Section 40(a) of the Army Act on 16.02.1985. That punishment had already attained finality. The contentions that after that punishment the applicant was promoted to higher rank would lost the significance of punishment is not sustainable. Thus, he was not entitled for extension.

37. In the light of above discussion, we are not inclined to interfere in the matter. The TA is hereby dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)
Announced in the open Court
on this 3rd day of April, 2011.

(MANAK MOHTA)
(Judicial Member)