

COURT NO. 1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

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OA 2637/2021

Maj Gen Anil Kumar

..... Applicant

Versus

Union of India & Ors.

..... Respondents

For Applicant : Mr. Indra Sen Singh &
Mr. Rahul Vyas, Advocates

For Respondents : Mr. Neeraj Sr CGSC

CORAM

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON

HON'BLE LT. GEN. P.M. HARIZ, MEMBER (A)

ORDER
19.12.2023

Vide our detailed order of even date, we have dismissed the main OA No. 2637/2021. Faced with this situation, learned counsel for the applicant makes an oral prayer for grant of leave for impugning the order to the Hon'ble Supreme Court in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007.

After hearing learned counsel for the applicant and going through our order, in our considered view, there appears to be no point of law much less any point of law of general public importance involved in the order, therefore prayer for grant of leave to appeal stands dismissed.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

[LT. GEN. P.M. HARIZ]
MEMBER (A)

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For Applicant:
For Respondents:

Shri Indra Sen Singh, Advocate
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HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT. GEN P M HARIZ, MEMBER(A)

ORDER

1. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, who is a serving Major General (Maj Gen) of the Remount Veterinary Corps (RVC) and is aggrieved by his non-empanelment by the Special Selection Board (SSB) to the rank of Lt Gen, only because of his medical category, even though the applicant is in a promotable medical category. He has made the following prayers:-

- (a) Call for the original proceedings of the Special Selection Board (SSB) held in respect of the applicant and other relevant records including the file note of office of

respondent No.1, 2 and 3 and , after perusal thereof, quash and set aside the decision of the Competent authority, including the impugned order dated 15.11.2021, whereby the applicant has been found/declared 'not empanelled';

(b) Direct the competent authority in the office of Respondent No 1 to reconsider the proceedings of the Special Selection Board (SSB) held in respect of the applicant in Feb 2021, with a further direction that in view of the respondents' policy dated 14.12.2012, the applicant shall not be declared 'not-empanelled' only on account of his present medical category of S1H1A1P(P)E1 with COPE-1 for 'HAIRY CELL LEUKEMIA (POST CLADRIBINE) (91.4)' which is a promotable medical category as per said policy;

(c) Direct the respondents to empanel and promote the applicant to the rank of Lt General against the vacancy of Director General RVS Army HQ which is already lying vacant since 01.08.2021;

(d) Issue any other order(s) and direction(s) as deemed appropriate by this Hon'ble Tribunal under the facts and circumstances of this case; and

(e) In the interim, to direct the respondents not to promote any officer from batch junior to the applicant against the line vacancy of Lt Gen in RVC pending disposal of OA.

Brief Facts of the Case

2. The applicant was commissioned into RVC on 10.08.1987 and based on his professional acumen, he was promoted from time to time till he was promoted as Maj Gen on 01.06.2017. In 2019, while being posted as Comdt RVC Centre & College, Meerut, the applicant was diagnosed with 'Hairy Cell Leukemia' and was placed in permanent low medical category P2(P) with COPE-1, which is a promotable medical category.

3. The applicant was considered for promotion to the rank of Lt Gen by SSB on 22.02.2021 against a single anticipated vacancy due on 31.07.2021 on the retirement of the then DG RVC. The applicant was the only officer under consideration for the single vacancy.

4. In the meantime, the applicant was examined by the Re-categorisation Medical Board held at Armed Forces Clinic on 24.06.2021 and the Medical Board retained the applicant in the same medical category of P2(P) with COPE-1 for 'Hairy Cell Leukaemia. It is the applicant's case that this was a promotable category, without having to be reviewed by a Special Review Medical Board (SRMB). A copy of the

Re-Cat Medical Board duly approved by the competent authority was forwarded to the MS Branch by DGMS (Army) vide letter dated 03.08.2021.

5. The results of the SSB were promulgated on 15.11.2021 and the applicant was not empanelled. The applicant is apprehensive that he has not been empanelled for promotion due to his medical category even though it is a promotable category as per the policy letter dated 14.12.2012 and 31.03.2015. Aggrieved by this, the OA has been filed.

Arguments by Counsel for the Applicant

6. The counsel took us through the service profile of the applicant and the case at hand. He further elaborated that it was not in dispute that the applicant was the only Maj Gen of RVC in his batch (1987) to be considered for empanelment to the rank of Lt Gen for the single vacancy of Lt Gen in RVC, arising on 01.08.2021. It was also not in dispute that the applicant had an excellent & unblemished record of service and there was nothing adverse against him on record. He further added that it was also an admitted fact that the applicant was in medical category S1H1A1P2(P)E1 with COPE-1 for HAIRY CELL LEUKEMIA (POST CLADRIBINE), which was a promotable medical category in accordance with respondents' own policy dated 14.12.2012 (Annexure A-3). The counsel further argued that therefore, there was no reason for the SSB

not to have recommended the applicant for empanelment to the rank of Lt Gen. He further added that though, no reason has been communicated to the applicant for his non-empanelment he believes that the only reason why he has not been empanelled for promotion to the rank of Lt Gen is that he is in low medical category S1H1A1P2(P)E1 with COPE-1 for 'HAIRY CELL LEUKEMIA (POST CLADRIBINE).

7. The counsel then drew our attention to Order dated 10.08.2022 in this case and vehemently averted that the applicant had been recommended by the SSB as well as the DMA. He added that the Cabinet Secretariat had sought some clarifications from the office of DMA on 06.04.2022, all of which were replied by the DMA and the case was then referred to the ACC on 07.07.2022. The counsel further stated that though DMA had recommended the applicant to be empanelled, the ACC did not approve the recommendations, as intimated vide PMO's Office Note dated 28.07.2022. The counsel then emphasised that, while the ACC had not approved the case, they had not ascribed any reason for rejecting the recommendations of the DMA, nor was any reason intimated to the applicant. He then added that in case there was any uncommunicated adverse/ advisory remarks, or any negative recommendation in the applicant's record of service, the Selection Board was duty bound to ignore the same, in view of the well settled principle

of law that legally no such un-communicated remarks/negative recommendation can be acted upon.

8. The Counsel then drew our attention to the proceedings of Re-Cat Medical Board dated 24.06.2021 (Annexure A-5) and asserted that the Board in its recommendations had clearly recorded that the applicant was asymptomatic and that he had no physical disability. The Medical Board had further opined that the applicant was fit to be employed in all climates and terrain less altitudes above 15000 feet. The counsel then stated that RVC has only one post of Lt General i.e. DG RVS at the Army HQ, and that the applicant had successfully and efficiently officiated as the DG RVC since 02.08.2021, to the entire satisfaction of his superior officers. He further added that if the applicant was promoted to the rank of Lt Gen and appointed as the DG RVC, he would continue to function from New Delhi, as hitherto, except when he would be required to visit various RVC units/establishments located across the country. The counsel then emphasised that none of the RVC units/establishments were located above 15000 feet, which would have placed a restriction on the applicant, and that the applicant's medical category and status will have no adverse impact on his ability to discharge his duties as DG RVS. The counsel further emphatically stated that hence the denial of promotion to the applicant on the ground of his medical category was

completely arbitrary, unjustified and unreasonable, besides being contrary to the respondents' policy dated 14.12.2012. The counsel further stated that in the past, no officer in Low Medical Category SIH1A1P2(P) E1 with employability code COPE-1, and positive recommendations for promotion by the IO/RO/SRO in the CRs had ever been denied promotion on medical grounds. The counsel vehemently asserted that it must thus be seen as if the applicant alone had been discriminated and denied promotion without assigning any reason, while in past other officers in similar situation/medical category have been empanelled and promoted to higher ranks. Therefore, the applicant's non-empanelment was completely unjust, illegal and against the extant policy on the subject.

9. The counsel further added that in view of the respondents policy dated the 14.12.2012, and keeping in view his unblemished and outstanding record of service, and the fact that the applicant was a single candidate of his batch to be considered by the SSB, the applicant had a '**legitimate expectation**' that he would be promoted to the rank of Lt Gen, particularly in view of the positive recommendations from his Reporting Officers (i.e. IO, RO & SRO). The '**Doctrine of Legitimate Expectation**' is by now a settled constitutional principle to enforce the

fundamental rights of the public servants. The counsel relied on the following judgements of the Hon'ble Supreme Court :-

(a) **Jitendra Kumar & Ors** Vs. **State of Haryana & Anr** (2008) 2 SCC 16.

(b) **Chanchal Goyal (Dr.)** Vs. **State of Rajasthan** (2003) 3 SCC 485,

(c) **Union of India** Vs. **Hindustan Development Corporation** (1993) 3 SCC 499

(d) AFT (PB) Order dated 11.07.2022 in OA 1944/2019 **Hav Manoj Kumar** Vs **Union of India & Ors.**

10. The counsel then stated that in view of the above admitted/uncontroverted facts, it was obvious that the ACC/MoD had not accepted the positive recommendations of the SSB/DMA for some extraneous and irrelevant reasons. It is a well-settled principle of administrative law that all decision of the Govt., including those pertaining to the career progression of public servants, are to be based on relevant considerations and that any decision based on irrelevant consideration shall be void-ab-initio for being arbitrary and hence against Article 14/16 of Constitution of India. The promotion policy currently invoked lays down detailed guidelines and definitive criteria/parameters on the basis of which, the selection board/approving authority are supposed to select or reject an officer for promotion to higher ranks. The counsel further added that it was not the case that

the applicant did not meet the criteria/parameters for promotion, rather it has been amply proven that the applicant met all laid down criteria/parameters and accordingly he was recommended by the SSB for empanelment. The stated purpose of introducing the Quantified System of Selection in the Army in 2009 was to bring transparency in the selection process and to do away with arbitrariness on the part of the members of selection board and the approving authority. Apparently, non-empanelment of the applicant was in complete negation of the aforesaid twin objectives of 'transparency and fairness' in the selection process.

11. The counsel then emphasised that the following issues are required to be considered by the Tribunal to ensure that the ends of justice are met.

(a) Whether Constitutional protection against arbitrary acts of the State and its instrumentalities, done with "malice in law", can be denied to members of the Armed Forces on the spacious plea that 'such acts are beyond the judicial review by this Hon'ble Court or that 'considerations which apply to other Government servants in the matter of promotion may not be held to be applicable in the Army Service'?

(b) Does the burden lie on the Government/its sub-ordinate officers or on the aggrieved employee to show that the act of the Government by which the public servant feels aggrieved was done with or without lawful excuse or for a reasonable/probable cause, when the said act of the Government/its sub-ordinate officers is shrouded in absolute secrecy and the information in respect thereof is denied to the public servants?

(c) Whether the reason, if any, on basis of which the respondents had not empanelled the applicant, and thereby denied him his well-deserved promotion is relevant and meets the test of rationality and is in consonance with the respondents policy in vogue?

(d) Whether the ratio of "malice in law", as laid down by the Hon'ble Supreme Court in the case of **Kalabharati Advertising Vs Hemant Vimalnath Narlchania & Ors.** (2010) 9 SCC 437, **Riivi Cashwant Bhoir Vs Dist. Collector Raigarh & Ors,** (2012) 4 SCC 407 and **State of AP & Ors Vs Goverdhan Lal Pini** (2003) 4 SCC 739, is attracted in the facts and circumstances of the case?

(e) Whether the act of Government, being a model employer, in denying promotion to an employee who has been considered by

the Government for a selection based promotion, despite admitting that the employee has a clear 'outstanding'/ 'nearly-outstanding' service profile with nothing adverse against him on record, admittedly being in promotable medical category and being the only candidate of his batch being considered against a single vacancy/post, will amount to an act done wrongfully without a reasonable or probable cause?

(f) Whether in a merit-cum seniority cum-vacancy based selection system as practiced in the Indian Army, an officer who admittedly has a outstanding/ nearly-outstanding' record of service with nothing adverse against him on record, is in a promotable medical category as per relevant policy and is the only candidate of his batch who is being considered for a single vacancy can still be denied promotion in an opaque manner without any reasonable or probable cause and on the ground of extraneous consideration?

12. To substantiate his submissions, the counsel also relied on the following decisions of the Supreme Court of India:

(a) **Prithi Pal Singh Bedi Vs. Union of India and Ors** [(1982) 3 SCC 140],

(b) **Suman Gupta and Others Vs. J & K and Others**. [(1983) 4 SCC 339],

(c) **A L Kalra** Vs. **Project and Equipment Corporation of India Ltd** [(1984) 3 SCC 316],

(d) **Kumari Shrilekha Vidyarthi and Others** Vs. **State of U.P. and Others** [(1991) 1 SCC 212]

(e) **State of Orissa and Anr** Vs. **Mamta Mohanty** [(2011) 3 SCC 436],

(f) **Brig Nalin Kumar Bhatia** Vs. **Union of India and Ors** [(2020) 4 SCC 78],

(g) **Cdr Amit Kumar Sharma etc** Vs. **Union of India and Ors** 2022 [SCC OnLine SC 1570]

Progress of the Case

13. The case was first heard on 29.11.2021 when notice was issued and the interim prayer was rejected. Thereafter, the applicant filed MA 108/2022 with the prayer that respondents be directed not to declare result of SSB held on 23.12.2021 pending final disposal of the OA and also direct the respondents to produce all the records pertaining to the SSB held in respect of the applicant. While MA 108/2022 was reserved for orders on 09.08.2022, respondents were also directed to submit record from the Cabinet Secretariat regarding the consideration of the SSB held on 02.02.2021. These files were submitted on 23.03.2022 and examined. It was seen that the SSB consideration had been submitted to the Cabinet Secretariat for consideration and approval by the Appointments Committee. Here the case was returned by the Cabinet

Secretariat without any confirmation. Accordingly, MoD intimated the status of case to MS Branch with instructions that SSB be held afresh from the next available batch. The results of the SSB held on 23.02.2021 were promulgated on 15.11.2021 indicating that applicant was not empanelled. Since the record of consideration did not indicate the reasons for non-confirmation. Respondents were given further 10 days to produce the relevant records.

14. MA 108/2022 was finally heard and disposed of on 10.08.2022.

Relevant extracts are reproduced below:

"2. The applicant, a 1987 batch RVC Officer, was considered by a SSB held on 22.02.2021 as a fresh case to assess his suitability for promotion to the rank of Lt. Gen in RVC and the SSB had recommended the officer for empanelment, if found fit. The recommendations of the SSB were submitted to the Cabinet Secretariat for the consideration and approval by the ACC. However, the case was returned by the Cabinet Secretariat without confirmation. Accordingly, MoD intimated the status of the case to the MS Branch with instructions that the SSB be held afresh from the next available batch. The result of the SSB held on 22.02.2021 was promulgated on 15.11.2021 indicating that the applicant had not been empanelled.

3. The matter was first heard on 29.11.2021 and notice was issued. The question of interim relief was heard and keeping in view the facts and circumstances of the case and the policy, no interim relief was granted. However, Respondents were directed that any promotion or orders passed during the pendency of the matter shall be provisional and subject to final outcome of this OA. The matter was heard subsequently and in our Order dated 23.03.2022 we had observed that the record of the consideration indicating the reasons for non-confirmation by the Cabinet Secretariat and the consequent nonempanelment of the officer were not found. The Respondents were given time to produce the relevant records/ seek instructions and the matter was then heard on 25.05.2022. Since no records were produced on 25.05.2022, the Respondents were directed to submit the case to ACC for their consideration and endorsement. On 29.07.22 we were informed that in pursuance to the observations made and the orders passed on 25.05.2022 the matter was pending consideration before the ACC and the decision of the ACC was awaited. The matter was therefore adjourned to 31.08.2022 to

enable the ACC take a decision. On 03.08.2022 the Respondents made a mention that the decision of ACC had since been received and that the Respondents be permitted to submit the records. Accordingly, the records were produced on 10.08.2022 and perused.

4. On perusal of the records, it is seen that Dept of Military Affairs (DMA) referred the case back to the Cabinet Secretariat on 06.05.2022 for their reconsideration, and based on the directions of the Cabinet Secretariat the DMA submitted a self-contained proposal. Certain clarifications were sought by the Cabinet Secretariat, all of which were replied to by the DMA and the case was then referred to the ACC on 07.07.2022. The case was considered by the ACC and vide PMO's Office Note dated 28.07.2022 it was intimated that the proposal of the DMA for empanelment of Maj Gen Anil Kumar for promotion to the rank of Lt Gen was not approved. This was then intimated to the DMA by ACC vide their Note dated 28.07.2022. Since the recommendations of the SSB has now been considered by the competent authority, and has not approved the applicant for empanelment, the Respondents can now proceed with further action on issue of any promotion or orders in the matter.

5. MA stands disposed of."

Arguments of the Counsel for the Respondents:

15. The counsel reiterated the details of the case and sequence of events. He emphasised that ACC had not approved the recommendations of the SSB and the applicant had then filed a Writ Petition in the Hon'ble High Court which did not interfere. The counsel then stated that the issue that the applicant had been denied his rights under Article 14 had been extensively argued. In relation to this the counsel emphasised that the fundamental right of the applicant was for a fair consideration which had taken place and that he had no right to claim promotion.

16 The counsel then referred to Regulation 108 of the Regulation for the Army (Revised Edition), 1987, and explained that the recommendations of a Selection Board shall be recommendatory in nature and was not binding until approved by the competent authority who have the inherent powers to modify, review, approve with the variation or repeal the recommendation of the SB. He further added that the promotional avenue had been created in the organisational interest and that there was no statutory or legal or service regulation or legitimate expectation to promotion as a right. He explained that the applicant's legitimate expectation was limited to a fair consideration for promotion and not for promotion.

17 The Counsel further added that there was a difference in referring to the medical category of the applicant, the counsel emphasised that his category was a promotable category as per the policy in vogue and that is why he was considered by the SSB in the first place.

18. Referring to various cases/judgments relied upon by the counsel for the applicant, the counsel drew our attention to the Apex Court's judgment in **Union of India** Vs. **Maj Bahadur Singh** (2006) 1 SSC 368 wherein it was observed that:

"The courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the courts are neither to be read as

Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Consideration of the Case

19. Having heard both parties at length and having examined various documents connected to the case produced by the respondents for examination by the Court, the main issue that is required to be adjudicated is whether ACC, the competent authority here, was justified in not approving the recommendations made by the SSB held on 22.02.2021 which had recommended the applicant to be empanelled for promotion to the rank of Lt Gen.

20. The counsel for the applicant relied on **Suman Gupta and Others** Vs. **J & K and Others**. [(1983) 4 SCC 339], **Kumari Shrilekha Vidyarthi and Others** Vs. **State of U.P. and Others** [(1991) 1 SCC 212] and **Kalabharti Advertising** Vs. **Hemant Vimalnath Narichania and others** [(2010) 9 SCC 437], **State of Orissa and Anr** Vs. **Mamta Mohanty** [(2011) 3 SCC 436], and **A L Kalra** Vs. **Project and Equipment Corporation of India Ltd** [(1984) 3 SCC 316] to the laid

down procedures were not followed and to contend that the action of the respondents by not empanelling the applicant to the post of Lt Gen without giving justified reasons is arbitrary and reflect the that there was malice on the part of the respondents.

21. However, it is not in dispute that the SSB held on 22.02.2021 gave a fair consideration to the applicant for promotion to the rank of Lt Gen. It is also not in dispute that the SSB had made a positive recommendation to empanel the applicant for promotion to the rank of Lt Gen. However, the competent authority returned the proposal without recommendation without ascribing any reason for the same. As per the Transaction of Business Rules, ACC is the competent authority for approving the empanelment of officers to the rank of Lt Gen. Further, as per Regulation 108 of the Regulation for the Army, Revised Edition 1987, the competent authority had inherent powers to modify, review, approve with variation or repeal the recommendations made by the SSB.

22. Moreover, the Hon'ble Supreme Court in the case of **Union of India and Ors.** Vs. **NP Dhamania**, [(1995) Supp (1) SCC 1], examined the issue that whether it was open to the ACC to differ from the recommendation of the Departmental Promotion Committee and if did so, whether it had to assign reasons for differing with the recommendations of the DPC. The Hon'ble Court held that the recommendations of the DPC

were advisory in nature and such recommendations were not binding on the appointing authority and that it was open to differ in public interest.

23. Hon'ble Delhi High Court's in the case of **Shri Bhaskarendu Datta Majumdar** Vs. **Union of India and Anr** [Writ Petition (Civil) 4135 of 2008], held that the recommendations of a Selection Board were not binding on the ACC and that it was open to the ACC to differ from the recommendations of the Selection Board specially where issue of public interest is involved.

24. Further, the judgements relied by the counsel for the applicant on the issue of legitimate expectation are not applicable to the present case. The Supreme Court in the case of **Ram Pravesh Singh and Ors.** Vs. **State of Bihar and Ors.** reported as (2006) 8 SCC 381, observed that there are a few defences to make the plea of legitimate expectation inapplicable. The Court held - "*public interest, policy change, the conduct of the expectant or any other valid or bona-fide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'*".

25. In view of the above consideration, we conclude that the ACC was justified in their action in not having approved the recommendation of the Service HQ & MoD as the approving authority is authorised to accept/ modify/ repeal the recommendation of a Selection Board. And in this case the ACC is not required to provide reasons for their action which has been

taken in public interest. In the case at hand, the applicant, if empanelled, would have been the Head of the Remount & Veterinary Corps. In view of this OA is hereby dismissed.

Pronounced in the open Court on this day of 19 December, 2023.

(RAJENDRA MENON)
CHAIRPERSON

(P M HARIZ)
MEMBER(A)

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