

**COURT No.1**  
**ARMED FORCES TRIBUNAL**  
**PRINCIPAL BENCH: NEW DELHI**

**OA 2565/2021**

**Surg Cmde Sanjeev Tandon** ..... **Applicant**

**Versus**

**Union of India and Ors.** ..... **Respondents**

**For Applicant** : Mr. Ankur Chhibber, Advocate

**For Respondents** : Mr. Anil Gautam, Advocate

**CORAM**

**HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON**  
**HON'BLE LT GEN P.M. HARIZ, MEMBER (A)**

**ORDER**

This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007, by a serving Surg Cmde of the Indian Navy who is aggrieved on being held ineligible for consideration for promotion to the rank of Surg R Adm being in a non-promotable medical category. He has made the following prayers:

- (a) Call for records based on which the respondents most discriminately held that the applicant is ineligible for the rank of Surg R Adm by PB (AFMS) No.1: AMC for the vacancies of 2022

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*P*

vide their impugned orders dated 29.09.2021 and 30.09.2021 and thereafter quash them;

(b) Direct the respondents to consider the applicant for PB-1 for Surg R Adm/equivalent giving him the benefit of one time exemption in terms of the policy dated 20.08.1976 as well as the regulations enshrined in SRO-234 dated 25.06.1976 applicable to Indian Navy without coercing him with any restriction/rendering of any certificate;

(c) Pass any other order/orders as deemed appropriate by this Tribunal in the facts and circumstances of the case.

(d) In the interim:

(i) The respondents not to give effect to the PB (AFMS)

No.1: AMC for the vacancies of 2022 till the final disposal of the OA.

### **Brief Facts of the Case**

2. The applicant was commissioned in Army Medical Corps (AMC) on 24.12.1988 and was thereafter concurrently seconded to the Indian Navy in the rank of Surg Sub Lt in the year 2010 after being empanelled in PB (AFMS) No.3: AMC, he was promoted to the rank of Surg Capt (equivalent of Col). Subsequently in 2016, he was considered

for PB (AFMS) No.2: AMC for the rank of Surg Cmde (equivalent of Brig) and promoted the next rank on 01.01.2018.

3. The applicant was diagnosed with Diabetes Mellitus in 2011 and Non-Arteritic Anterior Ischaemic Optic Neuropathy R5 Eye in 2015 and consequently was downgraded to S2A2(P) PMT for Type-II DM and S2A2(E) PMT for Non-Arteritic Ischaemic Optic Neuropathy R5 Eye. Despite him being in a low medical category, the applicant was considered for promotion to the rank of Surg Cmde in the Promotion Board held in November 2016 and was promoted to the rank of Surg Cmde on 01.01.2018. The applicant was in LMC S2A2 (E+P) PMT when he assumed the rank of Surg Cmde. Thereafter, the applicant was in the tentative zone of consideration for the PB (AFMS) No.1: AMC scheduled for the vacancies of 2022. Vide letter dated 29.09.2021 the office of DG AFMS intimated the office of DGMS (Navy) that during perusal of various inputs of officers scheduled to be considered by PB (AFMS) No.1 it was noticed that the applicant was in a non-promotable medical category and that he was therefore not eligible for consideration for promotion to the rank of Surg R Adm. The DGAFMS also observed that the applicant had been promoted to the rank of Surg Cmde while being in a non-promotable medical category, and queried whether necessary sanction of DGAFMS had been obtained for

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waiver of promoting the applicant to the rank of Surg Cmde. Since he was in a non promotable medical category, the office of DGAFMS also directed DGMS (Navy) that in case sanction had not been obtained, necessary ex post facto sanction be obtained now to regularize the earlier promotion. Accordingly, the DGMS (Navy) vide its letter dated 30.09.2021 intimated DG Indian Coast Guard, under whom the applicant was then posted, regarding the issue raised by the DGAFMS. The office of DGMS (Navy) also stated that on perusal of the case in this office, it was established that no sanction had been obtained when the applicant was promoted to the rank of Surg Cmde, even though he was in a non-promotable category. Accordingly, the DG ICG office was intimated to inform the applicant to submit certain documents.

4. It is the applicant's case that the Respondents having failed to obtain the requisite sanction at the time of promoting the applicant as Surg Cmde, were now trying to regularize the lapse by obtaining an ex post facto sanction, which was arbitrary, illegal, discriminatory and contrary to fundamentals of service jurisprudence. Being aggrieved, the applicant filed a statutory complaint dated 07.10.2021, wherein he had stated that since the promotion to Surg Cmde was unconditional, he may be considered by PB-1 for Surg R Adm/equivalent without any restriction/rendering of any certificate and to remove all restricting

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provisions of medical category except for being in S1A1/S2A2 for promotion boards. The said statutory complaint is stated to have been pending without any adjudication of the same. Since the PB was due and the statutory complaint had not been disposed of, the applicant filed the OA.

**Arguments by the Counsel for the Applicant**

5. The counsel reiterated the service profile of the applicant and his achievements. He then stated that the applicant was considered for promotion to the rank of Surg Cmde by the PB held in Nov 2016, was empanelled and promoted as Surg Cmde on 01.01.2018 and assumed the appointment of Consultant (Surg & Urology) at Base Hospital, Delhi Cantt. The counsel further emphasized that the establishment was well aware of his medical category since his Annual Medical Examination held in May 2017 indicated his Cat as S2A2 (E+P) since 14.06.2016 and that the applicant had accordingly signed his assumption certificate which also indicated his medical category. The counsel further stated that it was thus the responsibility of the Establishment to obtain the requisite waiver. The fact that the promotion was promulgated vide DGAMS Officer letter dated 09.02.2017 and the applicant was appointed as Consultant (Surgery & Urology) Base Hospital vide Navy

HQ letter dated 06.12.2017 implied that the requisite waiver to promote the officer had indeed been obtained and the applicant had no reason to review his promotion.

6. The counsel explained that having been promoted Surg Cmde despite being in medical category S2A2 (E+P) permanent, it was the legitimate expectation of the applicant that he would be considered for promotion to the rank of Surg R Adm in his own turn. Thus the intimation that he was ineligible for consideration because of his medical status came as a rude shock.

7. The counsel then drew our attention to MoD letter dated 20.08.1976 and elaborated on this policy letter regarding acceptable medical standard for promotion to substantive rank of Col and above in AMC/AD Corps/MNS. The counsel then drew our attention to Section 4 of Gazette SRO 234 (Med Std) dated 25.06.1976 and emphatically stated that under these provisions, the applicant was eligible for consideration for promotion to the rank of Surg R Adm.

#### **Arguments by the Counsel for the Respondents**

8. The Counsel briefly explained the major issue of the case and elaborated that the applicant was promoted to the rank of Surg Capt on 01.07.2010, and that the applicant was in medical category S1A1 then.

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He was placed in low medical category first for DM Type II in April 2011 and subsequently in July 2015 for Non-Arteritic Anterior Ischemic Optic Neuropathy (RT) Eye and since 13.06.2016 the applicant has been in permanent low medical cat S2A2 (E+P) for the above mentioned disabilities.

9. The counsel further added that in 2016, the applicant was empanelled and promoted to the rank of Surg Cmde even though he was in permanent low med cat S2A2 (E+P). The counsel then drew our attention to the MoD letter dated 20.08.1976 and corrigendum dated 25.11.1978 'Substantive Promotion –Low Medical Category Officers' and elaborated that for substantive promotion in the rank of Col and above in AMC/ADC being in medical category S2A2 (E+P), he was not in a promotable medical category and that if such an officer was promoted based on the condition mentioned, the officer was to be wasted out in the rank to which he is promoted. He further added that such promotions of low medical category officers being exception to the policy, required the sanction of the DGAFMS.

10. The counsel then drew our attention to DFAFMS Promotion Policy dated 05.02.2016 and in particular to Para 5(c)(iv) which lays down that officers in low medical category who are to be wasted in the rank

under the provisions of MoD letter dated 20.08.1976, as amended, will not be included in the zone for promotion boards for the next higher rank. The counsel further added that in the light of this policy, when the office of DGAFMS was examining the records of those due for consideration by PB (AFMS) No.1 for promotion to Maj Gen equivalent, noted that the applicant who was in the tentative list for consideration had a non-promotable medical category.

11. The counsel further elaborated that it was as a result of this scrutiny that the office of DGAFMS vide their letter dated 29.09.2021 sought clarification from DGMS (Navy) where in it had queried if necessary sanction of the DGAFMS had been obtained, when in the first instance the applicant had been promoted as Surg Cmde whilst being in a non-promotable medical category of S2A2 (E+P) Permanent. The office of DGAFMS had also stated that in case such sanction had not been obtained necessary ex post facto sanction be obtained now.

12. The counsel further emphasized that irrespective of the fact whether sanction for the earlier promotion to the rank of Surg Cmde had been obtained or not, since the applicant had already been promoted whilst being in a non-promotable medical category, as per the existing policy, he was to be wasted out in the rank to which he

was promoted; in this case the applicant's present rank of Surg Cmde. Thus it did not give any right to the applicant to now claim a right for consideration for promotion to the rank of Maj Gen equivalent, which is in grave contravention of existing policy. The applicant cannot claim negative equality, in that merely because he was promoted Surg Cmde, whilst being in a non promotable category, he must be now considered eligible for promotion again.

13. The counsel then elaborated on the applicant's statutory complaint dated 07.10.2021 wherein he had prayed that since his promotion to Surg Cmde was unconditional, he should be considered for PB-1 for the rank of Maj Gen equivalent without any restriction. The counsel then stated that without waiting for the disposal of the statutory complaint, the applicant had filed the OA in Nov 2021, merely a month after he filed the complaint. The counsel added that the complaint had since been rejected vide order dated 21.02.2022. The counsel then relied on the following judgments:

(i) **Union of India and another** Vs. **Kartick Chandra Mondal and another** (2010) 2 SCC 422;

(ii) **State of Odisha and another** Vs. **Anup Kumar Senapati and another** (2019) 19 SCC 626;

(iii) **Hav (OFC) RWMWI Borgoyary and others Vs. Union of India and others** (2019 SCC Online SC 1564); and

(iv) **Maj Gen Basvaraj G Gilanchi Vs. Union of India** (OA No. 1256/2018) dated 13.12.2018.

14. The counsel concluded that though the Department had erred in not obtaining requisite sanction to promote him to Surg Cmde whilst being in a non-promotable medical category, as per the provisions, only one such promotion was permissible and the officer is to be wasted out in the rank to which promoted. Thus he cannot claim negative equality. The counsel prayed that the OA be dismissed.

#### **Consideration of the Case**

15. Having heard both parties, the only issue for consideration is whether the applicant is entitled for consideration by PB (AFMS) No.1 for promotion to the rank of R Adm, whilst being in a non-promotable medical category, even though the applicant had been earlier promoted to his present rank of Surg Cmde when he was already in a non-promotable category.

16. It is not in dispute that the applicant has been in low medical category S2A2 (E+P) since 13.06.2016 for the disability DM Type II and Non-Arteritic Anterior Ischemic Optic Neuropathy (RT) Eye. It is

also not in dispute that the applicant was considered by PB (AFMS) No.2 in 2016, empanelled for promotion to the rank of Surg Cmde and was finally promoted Surg Cmde on 01.01.2018, even whilst being in low medical category S2A2 (E+P) Permanent.

17. The policy on substantive promotion of medical officers in low medical category is given in MoD letter dated 20.08.1976 as amended by Corrigendum dated 25.11.1978. Both these are extracted below:

**Letter dated 20.08.1976:**

*ANNEXURE TO GOVT. OF INDIA, MINISTRY OF DEFENCE LETTER  
NO.10(1)/2004/D(MED) DATED 14<sup>th</sup> JANUARY 2004.*

*No.29303/DGAFMS/DG1X/10800-S/D(Med).*

*GOVERNMENT OF INDIA*

*MINISTRY OF DEFENCE*

*NEW DELHI, the 20<sup>TH</sup> AUGUST 1976*

*THE DG AFMS,*

*NEW DELHI (50 copies)*

*Subject: SUBSTANTIVE PROMOTIONS; LOW CATEGORY MEDICAL OFFICERS*

*Sir,*

*I am directed to say that the President is pleased to decide that the medical standards acceptable for promotion to the substantive rank of Colonel and above in respect of AMC/AD corps/MNS officers will be as shown in Appendix 'A' to this letter.*

*This issues with the concurrence of the Ministry of Finance (Defence) vide their uo No.630-3/PA of 1976.*

*Yours faithfully*

*Sd/-*

*O.A No. 2565/2021  
Surg Cmde Sanjeev Tandon*

*Pa*



(M VIRJEE)

UNDER SECRETARY TO THE GOVERNMENT OF INDIA

Copy to: xxxxx

Appendix 'A' to Government letter No.29303  
/DGAfMS/DG-1(X/1000-S/D(Med), 20 Aug 76

MEDICAL STANDARDS IN SHAPE FACTORS FOR PROMOTION TO THE  
SUBSTANTIVE RANK OF COL AND ABOVE IN THE AMC/AD CORPS/MNS

(a) Shape-1

(b) Grade 2 under anyone of the factors, H, A, P and E

(c) Grade 2 under both factors H and E

(d) Grade 2: under both the factors H and P as well as both factors P and E provided that the grade 2 under P is for an eye or ear disease, which is also responsible for defective acuity of the organ.

(e) Grade 2 under both the factors H and A as well as both factors A and E provided that the following conditions are fulfilled:

(i) Such promotions are in public interest and will be certified by the DGAfMS.

(ii) Medical Board certifies that the officer can perform the normal active service duties of the rank of which he is being promoted and that any defect/disability is not likely to be aggravated by the service conditions.

(f) Grade 2 under factor 'P' due to constitutional, metabolic or other disease process when associated with Grade 2 in the factor 'A' or 'H' or 'E' from the same cause, each case will be considered on merits. (For example, hearing defect in association with diabetes (P2E2), or gout with arthritis (P2A2).

(g) Notwithstanding the above recommendations, in exceptional cases an officer in medical classification other than those mentioned above, may be considered for promotion provided that:

(i) He is in S1

- (ii) Conditions under (e)(i) & (ii) are satisfied and  
(iii) He is considered specially suitable and efficient.  
(h) When promoted vide paras (e) to (g) above, the officer will be wasted out in the rank to which he is promoted.

**Corrigendum dated 25.11.1978**

No.29303/DGAFMC/DG 1(X)/1370 S/D(Med)

GOVERNMENT OF INDIA

MINISTRY OF DEFENCE

NEW DELHI, the 25<sup>th</sup> November, 1978

**MEMORANDUM**

This Ministry letter No.29303/DGAFMS/DG 1(X)/1000-S/D dated the 20<sup>th</sup> August, 1976, relating to the substantive promotion of officers in Low Medical Category is amended as under:

In Appendix 'A' – delete para e (ii) and substitute as follows:

"(ii) Medical Board certifies that:-

- (a) The officer can perform the normal active service duties of the rank to which he is being promoted in his present medical category ;and  
(b) Any defect/disability/ disease from which the officer is suffering is not likely to be aggravated by service conditions, provided he is employed on duties compatible with his medical category and within the restrictions placed by the Board."

This issues with the concurrence of Ministry of Finance (Defence) vide their u.o. o.843-S/PA and 487J-Folls of 1978.

(H.I. Ahuja)

Under Secretary to the Government of India

Copy of the above forwarded to: xxxxxx

18. The applicant is in medical category S2A2 (E+P) Permanent for (i) Type II DM and (ii) Non-Arteritic Anterior Ischemic Optic Neuropathy (RT) Eye. Clearly, as per the policy on the subject, the applicant is in a non promotable category. Thus as per the Para (h) in Appendix A to letter dated 20.08.1976, where such an officer is promoted under the provisions of Para (e) to (g) of the Appendix A, the officer is to be wasted out in the rank to which he is promoted. Considering the applicant's disabilities and his medical category, his case is clearly governed by Para (g) of the Appendix and thus is required to be wasted out in the rank to which promoted. Thus we find much force in the arguments of the respondents that irrespective of the fact whether sanction of the DGAFMS was obtained to promote the applicant to the rank of Surg Cmde or not, the applicant as per policy is to be wasted out in the rank of Surg Cmde. Moreover, the medical category of the applicant and its status is not in dispute here.

19. The procedure for selection and promotion of Armed Forces Medical Services officers is governed by MoD letter dated 05.02.2016. As per the provisions of Para 5 (c)(iv), officers in low medical category who are to be wasted out in the rank under the provisions of MoD

letter dated 20.08.1976 as amended will not be included in the zone for PB for the next higher rank. Para 5 is extracted below:

5. Zone of Consideration. The zone of consideration for all the Promotion Boards (AFMS) will be worked out as under:-

(a) xxxxxxxxxx

(b) xxxxxxxxxx

(c) The following will be observed while finalizing the zone of consideration:-

(i) xxxxxxxxxx

(ii) xxxxxxxxxx

(iii) xxxxxxxxxx

(iv) Officers in low medical category who are to be wasted out in the rank under the provisions of MoD letter No. 29303/DGAFMS/DG-1 (X)/**10800**-S/D (Med) dt. 20 Aug 76 as amended will not be included in the zone for Promotion Board for next higher rank.

20. Thus vide DGAFMS letter dated 01.07.2021, the likely zone of consideration for PB (AFMS) No 1 & 2: AMC for vacancies of 2022 was issued. As indicated by the details there in, it is the tentative zone of consideration. This list along with relevant data of officers in the likely zone of consideration is promulgated to facilitate verification and validation prior to finalization of the final zone of consideration. As part of the validation various documents were called for including the details of the present medical category and disability if any [along with a copy of the latest approved Medical Board Proceedings (AFMSF-

15) for officers in low medical classification. The details pertaining to the applicant reflected at Ser 43 of Appendix A to this letter is as under:

**Table of Applicant:**

**Appx 'A' to DGAFMS Note No 35890/DGAFMS/DG-1(X)/Comp Cell dt 01 Jul 2021**

**TENTATIVE ZONE OF CONSIDERATION FOR PROMOTION BOAR  
(AFMS) NO1 : AMC FOR THE VACANCIES OF 2022**

<b>SNO</b>		43
<b>PERSNO</b>		MR-05933Y
<b>RANK</b>		Surg Cmde
<b>NAME</b>		SANJEEV TANDON
<b>A/S</b>		5
<b>CH</b>		1
<b>DATES OF</b>	<b>BIRTH</b>	16-03-66
	<b>COMMISSION</b>	24-12-88
	<b>SENIORITY</b>	01-12-89
	<b>RANK</b>	01-01-18
	<b>RETIREMENT</b>	31-03-25
<b>PROFQUAL</b>		MBBS. MS(SURG), MCh (Uro)-AIIMS
<b>DÉCOR</b>		FoC-IN-C(WNC)(2010) COMMENDATION
<b>MOJC</b>		C
<b>MOBC</b>		B
<b>MEDCAT</b>		S2A2 (E+P) PMT WEF 13 Jun 2016

21. Thus it was during the preparation of documents for the PB that the office of DGAFMS vide its letter dated 07.09.2021 observed the issue regarding the medical category of the applicant, questioned

whether sanction had been obtained when he was promoted as Surg Cmde, advised DGMS (Navy) to obtain ex post facto sanction and intimating that the applicant will not be eligible for consideration for promotion by PB (AFMS) No.1: AMC for promotion to the rank of Rear Adm. And subsequently the office of DGMS (Navy) vide their letter sought clarification from the present organization to which the applicant was posted. Both the letters are reproduced below:

**DGAFMS letter dated 07.09.2021**

Tele : 23092715

35890/DGAFMS/DG-1(X)/CC

7 Sep 2021

**MINISTRY OF DEFENCE**

**O/O DGAFMS/DG-1(XI))**

**OBSN ON LMC: MR-05933Y SURG CMDE SANJEEV TANDON**

1. MR-05933Y Surg Cmde Sanjeev Tandon was empanelled for the rank of Surg Cmde by Promotion Board (AFMS) No 2: AMC held on 02 Nov 2016 for the vacancies of 2017. He had assumed his rank of Surg Cmde on 01 Jun 2018.
2. During perusal of his inputs for consideration of Promotion Board (AFMS) No 1: AMC to be held shortly for the vacancies of 2022, it has been noticed that the officer is in LMC is as under:-

<b>S.No.</b>	<b>Disability</b>	<b>LMC</b>	<b>Onset</b>
(a)	Non Arteritic Anterior Ischemic Optic Neuropathy Rt Eye	S2A2(E) PMT	Jul 2015
(b)	Type II DM	S2A2 (P) PMT	Apr 2011

3. It is evident that the officer was in LMC S2A2 (E+P) PMT when he assumed the rank of Surg Cmde. Since the officer was apparently in a Non Promotable Low Medical Category as per Appx A to Govt letter No 29303/DGAFMS/DG-1(X)/1000-S/D(Med) dt 20 Aug 1976, you are requested to confirm the following:-

a. The actual Med Category of the officer when he was promoted to the rank of Surg Cmde.

b. Was the sanction of DGAFMS accorded for waiver of Non Promotable Category to allow the officer to assume his higher rank.

4. In the event of non availability of the waiver of the DGAFMS in terms of Govt letter maintained above, you are directed to imdtly process the case for obtaining ex-post facto sanction of the DGAFMS for waiver of officers Non Promotable Medical Category at time of his promotion to the rank of Surg Cmde.

5. It is confirmed that the officer will not be eligible for consideration for the rank of Surg R Adm by Promotion Board (AFMS) No 1 : AMC for the vacancies of 2022. Once the waiver of DGAFMS has been accorded.

(Kavit Sahai)

Maj Gen

Addl DGAFMS (HR)

**DGMS (Navy) letter dated 30.09.2021:**

Tele 21411/19

Integrated Headquarters of

Ministry of Defence (Navy)

New Delhi-110001

MD/75451B/OPF

30 Sep 21

The Director General Indian Coast Guard

Coast Guard Headquarters



**OBSERVATION ON LMC**

**SURG CMDE SANJEEV TANDON (75451B) (MR-05933Y)**

1. Refer to O/o DGAFMS Note 35890/DGAFMS/DG-1(X)/CC dated 29 Sep 21(not addressed to all).
2. Surg Cmde Sanjeev Tandon (75451B) (MR-05933Y) was empanelled to the rank of Surg Cmde by Promotion Board (AFMS) No.2 AMC held on 02 Nov 2016 for the vacancies of 2017. He had assumed his rank of Surg Cmde on 01 Jan 2018.
3. The officer is now in the tentative Zone of Consideration for the Promotion Board (AFMS) No. 1 AMC to be conducted by the O/o DGAFMS for the vacancies of 2022, for promotion from the rank of Surg Cmde to Surg R Adm (& equivalent).
4. This Dte gen has been intimated by the O/o DGAFMS that during perusal of the personal details/inputs of the officer for the forthcoming Promotion Board it has been noticed that the officer is in permanent LMC, S2A2 (E+P) PMT and as per the extant regulations on the subject, promulgated vide Appx A to Govt letter No 29303/DGAFMS/DG-1(X)/1000-S/D (Med) dated 20 Aug 1976 (copy enclosed) the officer is in Non-Promotable Low Medical Category. The details of the officer's LMC is as under:

<b>S.No.</b>	<b>Disability</b>	<b>LMC</b>	<b>Onset</b>
(a)	Non Arteritic Anterior Ischemic Optic Neuropathy Rt Eye	S2A2(E) PMT	Jul 2015
(b)	Type II DM	S2A2 (P) PMT	Apr 2011

5. Further, it is evident from the above timelines that the officer was in LMC S2A2 (E+P) PMT when he assumed the rank of Surg Cmde on 01 Jan

2018 and hence, at the time of assuming the rank of Surg Cmde also, the officer was in a **Non-Promotable Low Medical Category**.

6. As per the extant regulations (GoI letter dated 20 Aug 1976), the physical assumption of higher rank post-empanelment in a Non-Promotable Low Medical Category can only be done after obtaining **one-time sanction** from the O/o DGAFMS with the understanding that the officer will not be considered for any further promotions and will be wasted out in the promoted rank only.

7. On further scrutiny of documents, it has come to light that the above mentioned one time exemption has not been obtained prior assuming the rank Surg Cmde on 01 Jan 2010. There is a requirement to regularize this administrative lapse by obtaining an ex-post facto sanction of the DGAFMS. It is therefore requested that the officer be directed to submit the following:

a. A '**Personal Undertaking Certificate**' duly countersigned by the IO Higher administrative authority (sample copy enclosed)

b. A '**Medical Certificate**' (sample copy enclosed) signed by a duly constituted Medical Board and countersigned by the approving authority certifying the following:

(i) As per the given employability restrictions the officer can perform the normal active service duties of the rank to which he is being promoted in the present LMC.

(ii) The disabilities are not likely to be aggravated by the service conditions in the proposed employability.

8. The O/o DGAFMS has further intimated that the officer will not be eligible for consideration for the rank of Surg R Adm by Promotion Board (AFMS) No1. AMC for the vacancies of 2022, once the one time waiver of DGAFMS for physical assumption of the rank of SurgCmde in non-promotable LMC is accorded to the officer.

9. It is requested that the officer be directed to submit all the necessary documents latest by **07 Oct 21**.

(CS Naidu)

Surg R Adm

22. Further, the contention raised by the applicant asserting that, as he was already promoted to the rank of Surg Cmde while being in a non-promotable category without the organization securing the necessary waiver, ex-post facto waiver should not be granted because it was incumbent upon the establishment to obtain the requisite waiver, and the petitioner should not bear the consequences thereof, is untenable. This is because if a promotion was made irregularly or illegally, the same cannot be the basis of further promotion. Moreover, the Hon'ble Supreme Court in the case of **Union of India and another** Vs. **Kartick Chandra Mondal and another** (2010) 2 SCC 422 had held:

*" 25. Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section...xxx"*

23. Further, on the concept of negative equality the Hon'ble Supreme Court in the case of **State of Bihar** Vs. **Upendra Narayan Singh** (2009) 5 SCC 65 held that:

*" 67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or*

*court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order...."*

24. The Hon'ble Supreme Court in **Basawaraj S/O Kashappa Vs The Special Land Acquisition Officer** (2013) 14 SCC 81 held:

*"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide Chandigarh Admn. v. Jagjit Singh, (1995) 1 SCC 745, Anand Buttons Ltd. v. State of Haryana, (2005) 9 SCC 164, K.K. Bhalla v. State of M.P, (2006) 3 SCC 581 and Fuljit Kaur v. State of Punjab, (2010) 11 SCC 455)."*

25. Lastly the Hon'ble Supreme Court in **State of Odisha and another** Vs. **Anup Kumar Senapati and another** (2019) 19 SCC 626

had held:

*"39. ....In our opinion, there is no concept of negative equality under Article 14 of the Constitution. In case the person has a right, he has to be treated equally, but where right is not available a person cannot claim rights to be treated equally as the right does not exist, negative equality when the right does not exist, cannot be claimed... xxxx."*

26. Therefore, in view of the policy on substantive promotion of medical officers in low medical category as given in MoD letter dated 20.08.1976 as amended by Corrigendum dated 25.11.1978 and the aforementioned cases, we are of the view that the applicant cannot claim consideration for substantive promotion to the rank of Surg R Adm merely because he had been promoted earlier, whilst in a non promotable medical category without obtaining requisite sanction. Any directions now given for promoting the applicant would not be setting a wrong right but could be perpetuating another wrong. Clearly whether the sanction of DGAFMS was obtained to promote the applicant to the rank of Surg Cmde being in a non promotable medical category or not, the policy is unambiguous in that when such promotions are undertaken the officer will be wasted out in the rank to which he is promoted. Hence, we are of the considered opinion that the applicant

is not entitled to the relief claimed as the policies in vogue on substantive promotion of medical officers in low medical category have to be followed and the same cannot be ignored.

27. The OA is therefore dismissed being bereft of any merit.

28. No order as to costs.

29. Pending miscellaneous application(s), if any, stands closed.

Pronounced in open Court on this <sup>51-</sup> day of April, 2024.



**(JUSTICE RAJENDRA MENON)**  
**CHAIRPERSON**



**(LT GEN P.M. HARIZ)**  
**MEMBER (A)**

/ashok/