

COURT NO. 2**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****T. A. No 792 of 2010****Friday, this the 12th day of August, 2016****“Hon’ble Mr. Justice D.P.Singh, Judicial Member
Hon’ble Air Marshal Anil Chopra, Administrative Member”**

Naib Subedar Clerk (Store) Bachan Singh, J.C.-209000-L, 40 Company ASC
(Supply) Type’ É’, Meerut Cantt.

..... Petitioner

Versus

1. Union of India, through Ministry of Defence, New Delhi.
2. Record Officer for OIC, Records, Sena Seva Corps Abhilekh (Purti), ASC Records (sup), Bangalore-560007.
3. Commandant, 40 Company Sena Seva Corps (Purti), 40 Company ASC (Supply) Type-E, Meerut Cantt.

....Respondents

**Ld. Counsel appeared
for the Petitioner**

-Shri V.P. Pandey, Advocate.

**Ld. Counsel appeared
for the Respondent**

**-Shri D.K. Pandey, Advocate
Ld. Standing Counsel assisted
by Col Kamal Singh, OIC Legal Cell.**

ORDER

1. Being aggrieved with the order of discharge dated 23.08.1993 on account of medical category P2 (permanent) (Obesity) and on account of denial of sheltered appointment the petitioner preferred writ petition No 42667 of 1993 in the Allahabad High Court. The petitioner has been transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007.
2. We have heard Ld. Counsel for the parties and perused the records.
3. The factual matrix on record shows that the petitioner joined the Indian Army in 1976. Thereafter he was promoted to the rank of Hav/Clk (store) in 1985 and thereafter to the rank of Naib Subedar in the year 1991. According to Ld. Counsel for the petitioner, the petitioner throughout his career was a devoted soldier and performed his duties entirely to the satisfaction of his superiors. It is also stated that the petitioner was graded as outstanding or High Average NCO/JCO in his annual confidential reports from 1984 to 1993. However, during course of engagement the petitioner has served at different units and places as is revealed from para 4 of the petition, which has not been disputed by the respondents. It is submitted that the petitioner was placed in category P2 (permanent) on account of obesity (being overweight by 25 kg) and thereafter he was discharged from service by the impugned order dated 23.08.1993
4. Grievance of the petitioner is that at the time of discharge the petitioner was entitled for sheltered appointment which was not provided to him inspite of the fact that he was eligible for purpose.

On the other hand Ld. Counsel for the respondents submitted that the petitioner was not medically fit as he was overweight by 25 kg and according the medical report the petitioner was restricted lifting heavy weight, carrying out sudden and severe exertion and was found unfit for high altitude/hilly terrain. However, Ld. Counsel for the petitioner emphasized that three persons viz. Subedar (Clerk) Om Prakash, Hav (Clerk) NK Nair and Nk (Cik) Prem Prakash were given sheltered appointment in public interest while denying the same to the petitioner, which fact has not been disputed by Ld. Counsel for the respondents, however with the rider that all the persons were attributed to military service on account of being posted in high altitude area and sheltered appointments were given to them. It has further been submitted by Ld. Counsel for the respondents that aforesaid persons were not suffering from obesity like the petitioner.

5. The question involved in the present case is whether the petitioner has been discriminated in the matter of grant of sheltered appointment by the respondents. The petitioner's counsel has not invited attention to any material on record that all the aforesaid persons were suffering from obesity like the petitioner. The concept of parity flowing from Article 14 of the Constitution is a positive circumstance and applied only to equally situated persons. It is well settled proposition of law that unequals cannot be treated equally and likewise equals cannot be treated unequally. In the present case since all the aforesaid persons who were given sheltered appointments did not fall within the medical category of the petitioner, no right cannot be claimed by the petitioner on the basis of parity with

regard to sheltered appointment. However the fact remains that since the petitioner was not physically fit and was unable to discharge duties and carry heavy weight in accordance with medical advise we do not feel that the respondents have not committed any illegality by not providing sheltered appointment to the petitioner. The duties being discharged by Army personnel who have been provided sheltered appointment are hectic duties and a person with regard to whom the doctors had opined that he shall not be able to discharge strenuous duties or carry heavy weights and shall not be able to work in high altitudes has rightly been denied sheltered appointment and the action of the respondents to this affect does not suffer from any illegality or impropriety.

6. The Army Order 46 of 1980 and 146 of 1977 apply only to those Army personnel who have been discharged from service but simultaneously they are medically fit to be granted sheltered appointment.

7. It is further well settled proposition of law that power of the Tribunal is to look into the decision making process and not the decision itself. Once the medical board advised against the petitioner, which has not been disputed by the Ld. Counsel for the petitioner rather has been admitted that the petitioner was suffering from obesity, there is no reason to take a different view as to what has been given by the medical authorities of the Army. So far as following procedure is concerned, the petitioner's case was considered by the respondents and decision was taken after issuing show cause notice and considering the petitioner's reply thereto.

8. Ld. Counsel for the petitioner submitted that the petitioner is entitled to disability pension. However in the present case disability pension has not been claimed. It would be open to the petitioner to approach appropriate forum for disability pension.

9. No other ground has been argued by Ld. Counsel for the petitioner.

10. The petition lacks merit; hence **dismissed** with liberty to the petitioner to approach the appropriate forum claiming disability pension.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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(Justice D.P. Singh)
Member (J)