

RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No 144 of 2016

Friday, this the 10th day of August, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)

Hon'ble Air Marshal BBP Sinha, Member (A)

709099 Sgt Rajendra Prasad Pal Elect Fit (Retd), son of Shri Krishna Prasad Pal, House No. 16G/11A, New Market Bamraulli (SHIWALA) Post Bamraulli, Allahabad (UP) - 211012

...Applicant

Counsel for the applicant: **Shri Shailendra Kumar Singh**, Advocate.

Versus

1. Union of India through Secretary, Ministry of Defence (Army), South Block, New Delhi
2. Chief of Air Staff, Air Headquarters, Vayu Bhawan, New Delhi – 110011
3. Dte of Edn. Air Headquarters, West Block – VI, R.K. Puram, New Delhi – 110066
4. Air Officer Commanding, Air Force Records Office, Subroto Park, New Delhi - 110010
5. Commanding Officer, Groundcrew Examining Board (GEB), Air Force Station Chandigarh - 160003

.... Respondents

Counsel for the Respondents : **Dr. Shailendra Sharma Atal**,
Central Government Counsel.

ORDER

“Per Hon’ble Air Marshal BBP Sinha, Member (A)”

1. By means of the present O.A., the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 praying for the following reliefs:

- (A) *To partially quash and set aside the order dated 23 Dec 2015 (Annexure No. A-1 of Original Application) passed by Respondents*
- (B) *To quash and set aside the order of discharge dated 04 Aug 2008 (to the extent applicable to the applicant) and to issue order or direction to the Respondents for re-instatement of applicant into service wef 01 Jul 2009 protecting his previous service from 29 Jun 1989 to 30 Jun 2009 for all the service purpose.*
- (C) *To issue order or direction to the Respondents for grant of extension of service to the applicant with effect from 29 Jun 2009 and to pay the salary and other admissible allowances, for the period from 01 Jul 2009 till the date of re-instatement along with suitable rate of interest as deemed fit by this Hon’ble Tribunal under the circumstances.*
- (D) *Any other relief as deemed just and proper by this Hon’ble Tribunal may be granted to the applicant in the nature and circumstances of the instant case in the interest of justice.*
- (E) *Cost of application be granted in favour of the applicant as he was forced for litigation for no fault of his conduct.*

2. Briefly stated, the facts of the case are that the applicant was enrolled in the Indian Air Force as an Airman in the Trade of Elect Fit. The applicant was reclassified as Leading Aircraft Man (LAC) and in due course of time he was promoted to the substantive rank of Corporal and Sergeant. The Airman however could not clear JWO promotion examination in time and was discharged from Indian Air force.

3. The learned counsel for the applicant submitted that the airman has been unfairly failed in the said promotion examination because on 15.05.2004 the applicant appeared and passed Junior Warrant Officer (JWO) Examination Part I Education Test. In July-December cycle and thereafter in October 2004-March 2005 cycle he appeared for the JWO

Promotion Examination Part-II Trade Test but was declared unsuccessful in both the attempts. Both the examinations were conducted by Groundcrew Examination Board (GEB). At the relevant time i.e. till July 2005, as per the promotion policy (AFO 53/1982) in vogue, there was no restriction in number of attempts to be availed by an Airman for passing JWO promotion examination. However, the 2005 AFO 21/2001 on Airmen promotion examination was modified on 22 July 2005 and was made applicable w.e.f. 01 August 2005. According to this AFO the maximum number of chances to pass Promotion Examination was restricted to 03 chances w.e.f. 01 August 2005. However, as per para 3 of Appendix 'B' to Air HQ/19509/ED/CTS&T) dated 28 November 2005 all those airmen who availed one chance of GEB and two chances of TEB or vice versa and not cleared will have two chances to clear APE under new pattern. Thus the applicant was having two further chances to pass his REB examination (JWO Promotion Examination part II).

4. The learned counsel for the applicant further submitted that the applicant made his third attempt under the new policy in July-Dec 2005 Cycle. He opted to appear in this examination for ST-68 Radar System for which he was trained and performing duties at that time. However, the examination body, i.e. REB (C), on their own, changed his opted subject of examination from 'ST-68 Radar' to 'Wing Electrical System' and informed this change to him six days before the examination. The surprised applicant requested for permission to appear in his originally opted subject for examination, i.e. 'ST-68 Radar' vide his application dated 0809.2005. He was, however, informed by REB (C) that his allocated subject 'Wing Electrical System' cannot be changed and he does

not have the option to skip his examination because his third attempt will be counted if he decided to absent himself from the examination due to change of subject. Thus, the applicant was left with no option but to appear in the examination. He thereafter appeared and failed in the examination.

5. Thereafter, the applicant, as per his learned counsel, again appeared for his fourth attempt during Jan-Jun 2006 Cycle. This time he got his subject of 'ST-68 Radar' and passed the examination (Part-II) vide RED(C)/J/3/2006 dated 04.07.2006.

6. Thereafter, the applicant applied for extension of service on 18 July 2007 for a period of 3 years w.e.f. 29 June 2009 which was denied to him by AFRO vide their Signal No RO/RDD/180 dated 31 July 2008 on the grounds of not passing the requisite JWO examination in three attempts in terms of the policy in vogue. The passing of Promotional Examination in fourth attempt was declared invalid and cancelled on the ground of 'maximum permissible three attempt' as per policy on the subject. Thereafter, the AFRO issued discharge order dated 04 August 2008 so as to discharge the applicant from service w.e.f. 30 June 2009.

7. Continuing his arguments, learned counsel for the applicant informed that under these circumstances the applicant filed Writ Petition No. 22448 of 2007 before Hon'ble High Court of Judicature at Allahabad. In addition, the applicant also applied for waiver of third attempt in November 2008 on official channels. In response to his application, the Air Headquarter issued direction for his interview with the CO of the Examining Body, i.e. GEB on 18.11.2008. C.O., GEB Gp Captain Saigel interviewed the applicant and recommended to Principal Director

Education, Air Headquarter that waiver of third attempt should be granted to applicant vide letter No. GEB/3404/2/RO dated 10.12.2008. In Writ Petition No. 22448 of 2007, vide order dated 07.05.2009, Hon'ble High Court issued direction that if the petitioner (applicant) has been declared passed in the last qualifying examination, due weightage may be given to his success and marks obtained in the last examination and he shall be not be denied promotion only on the ground that he has exhausted all the chances. This order clearly indicates that the Hon'ble High Court intended the applicant to be declared passed and the natural course would have been that once he was declared passed, he should have continued to be in service and the discharge order based on 'not passing promotion examination' should have been cancelled. It appears that since the order passed by the Hon'ble High Court was not implemented in its letter & spirit, the applicant filed Contempt Petition No 2353 of 2009. Thereafter the Civil Misc Writ Petition (supra) was transferred to this Tribunal and based on orders of this Tribunal dated 24.09.2015, the respondents have issued a speaking order dated 23.12.2015 in which they have conceded waiver of third attempt. However, the respondents are silent on denial of extension of service which was primarily based on the failure of the applicant to pass promotion examination. Hence, the present O.A. by the applicant.

8. The Ld. Counsel for the respondents informed the background of the case in terms of Civil Misc Writ Petition No 22448/2007 (supra) and Hon'ble High Court order dated 07.05.2009, the contempt petition filed by the applicant vide Contempt Petition No 2353 of 2009 and the transfer of the Writ Petition to this Tribunal which has been re-numbered as T.A.

No. 1128 of 2010 and the order dated 24.09.2015 passed by this Tribunal. Thereafter he fairly conceded in line with speaking order of Air Headquarter that the third attempt of the applicant has been waived off and he has been considered as passed JWO Promotion Examination as per his fourth attempt. He also highlighted the denial of promotion to the applicant to JWO rank in line with the speaking order on the ground that in the years the past for which the applicant's case has been considered for promotion i.e. 2006-07, 2007-08 and 2008-09, the applicant's ACR profile is well below the cut of marks. However, he did not amplify anything on the issue that not passing of JWO Promotion Examination was the sole reason for refusing three years' extension to the applicant and his discharge from service. Hence, though the respondents are conceding that the applicant passed the JWO examination, they are silent on the denial of extension of service for three years which was specifically denied to the applicant on the ground of not passing the Promotion Examination.

9. We have heard the parties and perused the material on record. We have particularly perused the judgment of Hon'ble High Court at Allahabad and the earlier order of this Tribunal. Thus, in light of all these above mentioned aspects and keeping the prayer of the applicant in mind we have come to the following conclusion:-

- (a) Every employee has a right to expect fair play and principles of natural justice from his employer.
- (b) The act of respondents in changing the subjects of a technical examination in the third and final attempt of the applicant just six days before the examination defies logic and rationality.

(c) Thereafter despite written and verbal appeals of the applicant, insistence by the respondents that the applicant must appear in the new subject not opted by him and absence from examination will not help him as third chance will be counted, does not reflect the respondents in a good light.

(d) The fact that the applicant passed in his fourth attempt when he got the subject of his choice confirms that the applicant could have passed in the third attempt also but for the obstinate attitude of the respondents.

(e) Having accepted the application by the applicant plea for considering the waiver of his third attempt in passing the promotion examination and having detailed a Commanding Officer of the Examination Board to interview the applicant; the respondents thereafter failed to respond to the recommendation of the experienced Group Capt, i.e. the Commanding Officer of the Examination Board sent vide his letter dated 10.12.2008 recommending waiver of third chance of the applicant and did not waive off the third chance and contrary to fair play and principles of natural justice, discharged the applicant from service after six months on the perverse logic of not passing his JWO examination. This again shows the respondents in poor light.

(f) The applicant was due for discharge on 30.06.2009. However, despite specific order of Hon'ble High Court dated 07.05.2009 (supra) which stated, "due weightage may be given to his success and marks obtained in last examination and he shall not be denied promotion only on the ground that he has exhausted all

the chances”, the respondents chose to discharge him by not considering him as having passed the promotional examination in a very brazen manner.

(g) Now that under the pressure of Court orders, the respondents have waived off the third attempt of the applicant and declared him having passed his JWO promotion examination by accepting his fourth attempt of examination as third attempt, it automatically establishes his claim to extension of service by three years. However, the respondents are conspicuously silent on this issue.

10. It is also clear that the applicant is well below the cut off marks as explained by the respondents and hence is not eligible for promotion to JWO rank. We agree with the respondents’ view on this issue.

11. Keeping in view the fact that the respondents have dealt with the matter of in a very insensitive manner and the applicant has been forced to litigate since 2007 by knocking the doors of Hon’ble High Court of Judicature at Allahabad by preferring Writ Petition No 22448 of 2007 and thereafter filing Contempt Petition No 2353 of 2009, we are of the opinion that it is a fit case where in view of law settled by Hon’ble Supreme Court in the case of *Salem Advocate Bar Association, Tamil Nadu vs. Union of India AIR 2005 SC 3353*, exemplary costs should be imposed, which we quantify to Rs. 1,00,000/- (Rupees one lac).

12. In view of observations made hereinbefore, the O.A. is **partly allowed**. The discharge order dated 04.08.2008 is quashed. The applicant is to be notionally re-instated in service on the last rank held w.e.f. 01.07.2009 for three years. He shall be granted 75% of his wages during his notional extension of service along with all other consequential

benefits. The exercise shall be completed within four months from the date of receipt of a certified copy of this order failing which the applicant shall be entitled to receive 9% interest per annum from the due date, till date of actual payment.

The cost quantified at Rs 1 Lac shall be deposited by the respondents in this Tribunal within one month from today which shall be paid to the applicant by the Registry through cheque.

Copy of the order be supplied to learned counsel for the parties free of costs within 24 hours.

(Air Marshal BBP Sinha)
Member (A)

Dated : August, 2018
anb

(Justice SVS Rathore)
Member (J)