

Reserved

Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 248 of 2011

Tuesday, the 03rd day of April, 2018

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

Mohammad Arif (736957-F Ex Sgt), House No. 538K/442-I,
Tulsipuram, Triveni Nagar First, Lucknow-226020 (UP)

..... Applicant

Ld Counsel for the Applicant: **Shri Shailendra Kumar Singh,**
Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. The Chief of the Air Staff, Air HQ (VB), New Delhi-11
3. Air Officer Commanding, Air Force Record Office, Subroto Park, New Delhi-10
4. 738958B Sunil Nair, through AOC, AFRO, Subroto Park, New Delhi-10

..... Respondents

Shri Amit Jaiswal and **Ms Amrita Chakraborty**, learned counsel for the respondents, assisted by **Wg Cdr Sardul Singh**, OIC Legal Cell

ORDER

1. The instant OA was heard by a co-ordinate Bench of this Tribunal, consisting of Hon'ble Mr Justice D.P.Singh, Member (J) and Hon'ble Air Marshal BBP Sinha, Member (A). The OA was allowed by Hon'ble Member (J) vide order dated 08.01.2018 while it was

dismissed by Hon'ble Member (A) vide order dated 18.01.2018. Since there was difference of opinion between the two Hon'ble Members over the conclusion drawn, the case was referred to Hon'ble the Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi under the provisions of Section 28 of the Armed Forces Tribunal Act, 2007 for hearing on the points referred or the questions framed. Under the orders of Hon'ble the Chairperson dated 20.02.2018, this matter has been entrusted to me for adjudication and recording my findings as third Judge over the questions/points framed.

2. Before proceeding further, I would like to quote Section 28 of the Armed Forces Tribunal Act, 2007, which reads as under:

“28. Decision to be by majority. —If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ and make a reference to the Chairperson who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Tribunal who have heard the case, including those who first heard it.”

3. The questions/points referred to me for hearing and recording my findings thereon are as under:

- (I) Whether the Policy framed by the Government of India in the form of Air Force Instruction has got statutory force and is mandatory?

- (II) Whether Army Head Quarters or Chief of the Air Staff has been conferred power to frame policies affecting the service conditions of the Air Force personnel in contravention of Policy framed by the Government of India?
- (III) Whether while framing the Policy dealing with the service conditions, Chief of the Air Staff or Air Head Quarters may travel beyond the four corners of Policy framed by the Government of India, Ministry of Defence?

4. Indisputably, the facts of the present case are that the applicant was enrolled in Indian Air Force as Airman on 23.07.1990. He was promoted to the substantive rank of Corporal (Cpl) on 30.07.1995 in pursuance of the provisions contained in Air Force Instruction (AFI) 12/S/48 issued by the Government of India, Ministry of Defence. He completed 08 years of service on 22.07.1998 in the rank of Cpl, which is a condition precedent to be considered for promotion to the rank of Sgt as per AFI mentioned above. Thereafter the applicant passed Sergeant (Sgt) promotion examination. The case of the applicant is that in pursuance of AFI 12/S/48, he was entitled to be considered for promotion to substantive rank of Sgt after completion of 04 years or even 08 years of service. However, he was appointed to the rank of Acting Sgt on 01.02.2004. The claim of the applicant is that the respondents ought to have promoted him substantively to the rank of Sgt instead of promoting him as Acting Sgt in pursuance of AFI 12/S/48 in the first half of 2006. Further, on 01.02.2008 the applicant had completed more than 16 years of service out of which, 04 years' service was in the rank of Sgt and accordingly, he had become eligible for promotion to the substantive rank of Junior

Warrant Officer (JWO) in terms of AFI 12/S/48. From 2008 to 2011, though juniors to the applicant including respondent No. 4 Sunil Nair were promoted to the rank of JWO in terms of Air Force Promotion Policy, but the applicant was ignored. The applicant was granted promotion to the substantive rank of Sgt after completion of 18 years and 11 months of service. It has been argued that AFI 12/S/48 was modified/amended by issuing fresh policy by the Air Force authorities.

5. The main submission of learned counsel for the applicant is that the aforementioned AFI 12/S/48 could not have been modified/supplemented or changed by issuing fresh Policy by Chief of Air Staff or any other Air Force Authority. According to him, the same could have been done only by the Government of India, Ministry of Defence and not otherwise. On the strength of this submission, the claim of the applicant is that the consideration of his promotion to the higher rank in view of the amended Policies issued from time to time was not in accordance with law and the applicant ought to have been promoted strictly adhering to the provisions of AFI 12/S/48.

6. During the course of arguments, learned counsel for the applicant has drawn the attention of the Tribunal towards Paras 1 to 6 of Promotion Policy dated 23.09.2002, which are reproduced as under:

“1. Presently promotions for Personnel Below Officer Rank in the IAF are based on specific minimum length of service, seniority, minimum performance criteria, medical fitness and passing of relevant promotion exam. The aim of this policy is to bring about a competitive/ healthy work culture, in which hard work and merit with due weightage to seniority would be the criteria for promotions to a higher rank. Since this New Policy is merit based, all airmen, must endeavour to fulfil the required conditions and pre- requisites of eligibility for promotion to the next rank.

“ Eligibility Criteria for Promotion.

2. All airmen who have completed the minimum length of service as mentioned below for promotion to next higher rank (except to the rank of Sgt) as on 30 Jun of the year, preceding the promotion panel year would be considered for promotion (e.g. 30 Jun 03 for promotion year 2003 - 04): -

<u>Rank</u>	<u>Min length of service</u>
(a) Sgt to JWO	17 Yrs
(b) JWO to WO	23 Yrs
(c) WO to MWO	28 Yrs

3. Promotions in the following trades will be governed by AFIs as indicated against each. However, other eligibility conditions such as merit, distribution of vacancies, promotion examinations, medical fitness etc would be governed by this policy :-

- (a) Flt Eng : AFI 19/62 (Amended vide Corr 3/95)
- (b) Flt Gun : AFI 2/ 98
- (c) Flt Sig : AFI 9/56 (Amended vide Corr 4/95)
- (d) P J I : AFI 147/50
- (e) Edn Inst : AFI 19/69
- (f) GTI (S) : Relevant Policy Letter.

Minimum Service in Present Rank

4. Minimum service in present rank would be governed as per AFI 12/S/48. The minimum service of one year in present rank is required to be completed as on 30 Jun of the year preceding the promotion panel for the next promotion. For example, an airman who gets promoted to the rank of JWO on 01 Aug 02 and is meeting the criteria for promotion to WO rank, would not be considered for promotion in the promotion year 01 Jul 03 since the subject JWO would not have held the present rank of JWO for complete one year, as on 30 Jun 03.

Time-Frames for Promotion

5. Time-frames for promotion for the purpose of redistribution of vacancies would be under the following categories, rank wise: -

Grade III	Grade II	Grade I
(a) Sgt to JWO 17-19th Yr	20th-23rd Yr	Above 23 Yr
(b) JWO to WO 23-25 th Yr	26 th -29 th Yr	Above 29 Yr
(c) WO to MWO 28-30 th Yr	31 st -34 th Yr	Above 34 Yr

Notes: 17-19th Yr implies 17 yrs of service to less than or equal to 19 yrs of service. 20th -23rd yr implies 19 yrs one day of service to less than or equal to 23 yrs of service.

Eg. If DOE is 01 Jul 84

Length of service as on 30 Jun 2003 is 18 yrs 11 months 29 days, therefore, airman will be eligible for promotion from Sgt to JWO in Grade III.

Distribution of Vacancies

6. The vacancies would be allotted in the proportion of 1:3:6 for Grade 3: Grade 2: Grade 1: respectively. Thus, 60% of the vacancies would be for the senior most groups, 30% for the middle level and 10% for the relatively junior level. A similar method would be employed for promotion to WO and MWO ranks. If the total vacancies are less than 10 in a year, the distribution of vacancies for a particular rank and trade between Grade III, Grade II and Grade I categories would be in the ratio of 0:1:2. However, if the total trade-wise/rank wise vacancies for a year are equal to or more than 10, then the ratio would be 1:3:6. For any trade and rank, if the number of eligible airmen are less than the number of available vacancies, then the excess vacancies would be distributed as under:-

(a) If Grade I vacancies are in excess, redistribution between Grade III: Grade II would be 1:3.

eg. Trade =AF Fit :	Rank = Sgt
No. of Grade I eligible airmen	= 6
No. of Grade I vacancies	= 85
Excess vacancies (85-6)	= 79

Redistribution of excess vacancies Grade II and Grade III would be as follows:-

Grade III: Grade II (at 1:3)	= 20:59
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(b) If Grade II vacancies are in excess, distribution between Grade III: Grade I would be 1:6.

(c) If Grade III vacancies are in excess, distribution between Grade II: Grade I would be 1:2. ”

Thus, the sum and substance of the submissions made by learned counsel for the applicant is that AFI 12/S/48 could not have been amended by issuing Policies from time to time.

7. On the contrary, it has been argued on behalf of respondents that the respondent No. 4 Sunil Nair was higher in merit than the

applicant and, therefore, he was preferred for grant of promotion to higher rank. It has also been argued that Air Force Instructions are no doubt the Instructions issued by the Government of India, Ministry of Defence, but the same can be modified or amended by issuing Policies from time to time keeping in view the changes required to be made in service conditions and promotions of Armed Forces personnel in the changed circumstances. It has also been argued that the Policy of 2015, part of which has been quashed by Hon'ble Member (J), was nowhere in dispute. In the present case, the applicant was discharged from service after initial term of his engagement and at that time the said Policy was not in existence; therefore, the Hon'ble Member (J) has travelled beyond its jurisdiction in commenting upon the said policy and quashing some part of it.

8. In the aforementioned factual background, I proceed to consider the questions/points referred to me for adjudication and findings. Since all the aforementioned three questions/points are interwoven, they are being discussed and dealt with conjointly, and their conclusions/answers shall be given separately.

9. I have gone through the opinions expressed by the two Members in the matter. Hon'ble Member (J) has held that the aforesaid AFI was statutory in nature and could not have been amended by issuing fresh Policies thereby changing the service conditions/conditions of promotion of Air Force personnel and hence quashed the portion of the Policy issued in 2015. On the other hand, Hon'ble Member (A) has held that the Courts should refrain from interfering in Policy making decisions of the Air Force Authorities as it

is not open for the Courts to further examine its validity. According to his opinion, the Policies have to be changed keeping in view the changes required from time to time.

10. On the point whether the Policy framed by the Government of India in the form of AFI has got statutory force and cannot be changed by administrative orders of Air Force authorities, Hon'ble Member (J) has referred to the pronouncements of Hon'ble Apex Court in the cases of **Capt Virendra Kumar vs Union of India** (AIR 1981 SC 947), **Capt Rachpal Singh vs Union of India** (AIR 1987 SC 212) and **Lt Gen RK Anand vs Union of India and another** (AIR 1992 SC 763).

11. In the case of **Capt Rachpal Singh vs. Union of India** decided on 04.12.1986, reported in AIR 1987 SC 212, which has been relied upon by the applicant, the Hon'ble Supreme Court placing reliance on the earlier case of **Capt Virendra Kumar vs. Union of India** (supra), reiterated in it that the Air Force Instruction has got statutory force. For convenience Para-8 of the judgment is reproduced as under :-

“ 8. The Army Act, the Rules & Regulations and Instructions thereunder govern the service conditions of the commissioned officers including those on Emergency Commission, like the appellant before us. Termination of Emergency Commission is provided in Rule 15 of the Army Instruction. A contention was raised in Virendra Kumar's case that the Army Instruction did not have any statutory status and could not therefore bind the service conditions of the Emergency Commissioned Officer. This contention was repelled by this Court. We respectfully agree.” (Underlined by me.)

On the strength of this case law, learned counsel for the applicant has also submitted that in view of the aforementioned view of the Hon'ble Apex Court, the AFIs have got statutory force.

12. On the contrary, learned counsel for the respondents has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **Union of India vs Mahesh Kumar Nag and others**, (2001) 3 SCC and also on the decision of Delhi High Court dated 02.06.2008 in the case of **JWO A.K.Singh and others vs Union of India and others** in *Writ Petition (C) No. 6943 of 2003*, whereby bunch of cases were disposed of. In that case, the issue involved was exactly the same as is involved in the instant case. The SLPs preferred against the said judgment have been dismissed by the Hon'ble Apex Court; therefore, the said judgment has attained finality. In the said judgment, it has been held that the AFIs have no statutory force. It has been argued on behalf of the respondents that after issuing the aforesaid AFI, the Air Force Act was amended in the year 1950 which replaced the Air Force Act, 1932. It has also been argued that thereafter in the year 2001, vide letter No. 10(8)/2001-D (Air-III) dated 14.08.2001, the Government of India, Ministry of Defence had delegated its administrative powers to Air Headquarters on the subjects which were mentioned in the list annexed with the letter. At serial No. 6 of the annexed list, the promotion of officers upto the rank of Colonel and equivalent is mentioned. Thus, by way of this letter, the Union of India has delegated its powers to the Chief of Air Staff to make rules and policies relating to promotion etc and in exercise of this power, the competent Air force authority has amended the Policies from time to time in view of the requirements.

According to the respondents, therefore, the submission made on behalf of the applicant that the AFI issued in 1948 could have been amended only by an AFI issued by the Government of India and not by issuing any promotion Policy by the Air Force authorities, is meaningless.

13. I have given my anxious consideration over the matter. The Hon'ble Apex Court in the case of **Capt Virendra Kumar** (supra) relied upon by learned counsel for the applicant has also held that AFIs are statutory in nature. It has further observed that the said Instructions can be supplemented by issuing policy letters. At this stage, I would like to quote para 8 of the judgment of **Mahesh Kumar Nag** (supra), which reads as under:

“8. In the High Court of Rajasthan, the question of the applicability of circular dated 16-11-1989 was also considered. It was held that Air Force Instruction 19/62 was statutory in nature. It was held that additional conditions which have the effect of amending AFI 19/62 could not be imposed by way of a circular. On this reasoning the appellants were directed to promote the respondent as conditions in clause (14) were fulfilled. This view also is not sustainable. Undoubtedly Air Force Instruction 19/62 is statutory in nature. Under clause (12) it is provided that Airmen must be considered suitable”. In what manner they are to be considered suitable is left open. Thus the criteria for suitability can be imposed by the Chief of Air Staff or under his authority by way of a circular. Such circulars, laying down criteria for suitability, do not lay down additional conditions or vary or amend Air Force Instruction 19/62.” (Emphasis supplied.)

14. Though the similar point was involved in the case of **JWO A.K.Singh and others** (supra) decided by Hon'ble Delhi High Court, but Hon'ble Member (J) while recording his opinion has not placed reliance on this judgment because, according to him, the order passed by the Hon'ble Apex Court in SLPs preferred against the aforesaid judgment was not a speaking order and on this basis, he was of the view that the view expressed by Hon'ble Delhi High Court cannot be said to be the view expressed by the Hon'ble Apex Court.

15. On behalf of the respondents, it has also been argued that in view of the changed circumstances, change in the service conditions of Air Force personnel was also required; therefore, as per existing requirement fresh policies were issued by the Air Force authorities under the powers delegated to them by the Union of India, hence it cannot be said that the said policies issued by the Air Force authorities have no statutory force and they cannot change the conditions of AFI 12/S/48.

16. At this stage, I would like to quote the first paragraph of the Introduction of Air Force Act, 1950 which reads as under:

“Before India attained independence the defence forces were being governed by three Acts, namely, the Indian Army Act, 1911, the Indian Navy Discipline Act, 1934 and the Indian Air Force Act, 1932. The need for general revision of these acts was being felt as some of the provisions of these Acts were already becoming out of date and insufficient for modern requirements. After India became independent, the need for revision became imperative due to constitutional changes. It was, therefore, decided to revise all the three Acts with a view

to making themselves sufficient and complete codes in themselves. The object was to make them as closely similar in form and arrangement of matter as the special requirements of each service might demand.”

17. The Air Force Act, 1932 itself was replaced by Air Force Act, 1950 keeping in view the changed circumstances. Therefore, the submission of learned counsel for the respondents has substance that in view of the changed circumstances and requirement of service, the promotion policies were reviewed from time to time and fresh policies were issued which were made indiscriminately applicable to all personnel governed by the Air Force Act. After 2001, the power to deal with all the matters relating to promotion and other listed administrative matters was delegated to the Air Force authorities and under such delegated powers, the Air Force authorities have issued the Policy in question. At this stage, it would be relevant to quote para 31 of the judgment given by Hon’ble Delhi High Court in **JWO A.K.Singh’s** case (supra) which reads as under. It is being referred only to bring some facts on record.

“31. Before we part with, we would like to put on record that the respondents have mentioned that under the new Policy, following number of airmen have been considered and promoted:-

*(a) **For Promotion to the Rank of Junior Warrant Officer**- 98409 airmen (including successive occasions) have been considered, out of which 8718 were promoted to the rank of Junior Warrant Officer.*

*(b) **For Promotion to the Rank of Warrant Officer**- 34184 airmen (including successive occasions) have been considered, out of which 5135 were promoted to the rank of Warrant Officer.*

(c) **For Promotion to the Rank of Master Warrant Officer-** 15379 airmen (including successive occasions) have been considered, out of which 3441 were promoted to the rank of Master Warrant Officer.”

18. The aforementioned figures were of 2001 and since thereafter, much water has flown; so the figures as given in the aforesaid judgment must have multiplied several times. The applicant was discharged in the year 2010 and the Policy in question is still in vogue. All the Air Force personnel/officers were promoted in accordance with the said Policy. I also find substance in the submission of learned counsel for the respondents that so far as the Policy of 2015 is concerned, there was absolutely no occasion for this Court to interfere because the same has absolutely no role to play in the matter of promotion of the applicant. The applicant cannot in any manner be said to be adversely affected by the said policy. There cannot be any promotion policy which satisfies each and every person concerned.

19. Before parting with the judgment, I would like to quote the letter dated 14.08.2001 whereby power to deal with the matters of promotion and other matters has been delegated to the Air Force authorities as under :-

*“No. 16(8)/2001-D(Air-III)
Government of India
Ministry of Defence*

New Delhi, the 14th August, 2001

To,

The Chief of Air Staff

Subject: Delegation of Administrative powers to Air Headquarters

Sir,

I am directed to say that Raksha Mantri has approved delegation of administrative powers of the Ministry of Defence in respect of subjects listed in the Annexure, in so far they were being dealt with in Air Wing of the Ministry.

2. Based on the delegation of power as above, Air HQrs/AOP's and AOA's Branches may amend their existing channel of submission and level of final disposal in respect of the subject pertaining to them after following the required procedure. SOI's may be formulated, wherever necessary, to implement these powers and a copy of each of such SOI's may be forwarded to this Ministry.

3. This issues with the concurrence of Ministry of Defence (Fin/AF) vide their U.O. No. 1230A/Dir/Fin/Org dated 14 August, 2001.

*Sd.- Illegible
(A.P.Pandit)*

Deputy Secretary to the Government of India."

20. The Hon'ble Member (J) in his opinion has not considered the impact of aforesaid Policy letter. In para 23 of his opinion, the Hon'ble Member (J) has referred to a decision of Hon'ble the Apex Court in the case of **P.U. Joshi vs. Accountant General**, reported in (2003) 2 SCC 632 and has observed that no power can be claimed by the Chiefs of any Armed Forces, unless they are delegated under the statute by the competent authority to do so. It is the basic concept of law that there should be a source of law under which it has been made, vide *AIR 1972 1302 Raj Narain vs. Smt. Indira Nehru Gandhi* (Para 34A). But in the instant case, admittedly the Government of India, Ministry of Defence has issued AFI of 1948 and the authority to issue such Instructions is not in question. The

authority, which issued the said Instruction, subsequently delegated the power to Chief of the Air Staff; therefore, the subsequent promotion policy issued by the Chief of Air Staff has legal sanction behind it.

21. The Hon'ble Member (J) has quoted some part of the judgment of Gauhati High Court in the case of Parath Singh Gour SMO No. S9/2 vs. Union of India & others, which was dismissed vide judgment dated 13,03,2008. I would like to quote para 10 of the said judgment, as hereinbelow, which also throw light on the issue involved in the instant case.

“10. Regardless of what has been held above, there is no denial to the fact that the Regulations and the Air Force Instructions lay down norms including norms for promotion which must be adhered to by the respondent while performing their duties and exercising their powers. Departures from the existing norms, though permissible, will have to be judged on the touchstone of the proximity or relevance of such departures to the needs of the institution as well as to the needs of reasonableness, fairness, and rationality.” (Emphasis added).

It also shows that deviation from initial AFI was held to be permissible.

22. In view of the discussion made above, the points/questions referred to are answered as under:

- (I) The Air Force Instruction has got statutory force, but the promotion Policy can be issued by the Air Force authorities to explain the terms of Air Force Instruction.

- (II) Since the Government of India has delegated its power to Chief of Air Staff to frame policies affecting the service conditions of the Air Force personnel as per requirements of service, the Air Force authorities are well within their jurisdiction to frame such Policies under such delegated powers. Hence this point is answered in affirmative.
- (III) The Air Force Instructions can be supplemented subsequently by issuing policies explaining the terms of AFI. However, in exercise of powers delegated by the Government of India to the Chief of Air Staff, the conditions relating to promotion and service conditions of Air Force personnel can be amended keeping in view the need to make changes therein in the changed circumstances.

Let this opinion of the Tribunal be placed before the appropriate Bench for deciding the case in view of the majority opinion.

(Justice SVS Rathore)
Member (J)

April 03, 2018
LN/-