

RESERVED**A.F.R**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
COURT No - 2**

**Original Application No. 88 of 2013
Thursday, this the 10th of July, 2014**

**Hon'ble Mr. Justice Virendra Kumar Dixit, Judicial Member
Hon'ble Lt. Gen Gyan Prakash, Administrative Member**

MR-05488L Colonel U.K.Sharma S/O Shri Bhawani Dass
Aged about 56 years, Senior Registrar, Military Hospital, Jabalpur

.....Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, Government of India, New Delhi.
2. Chief of the Army Staff, Integrated Headquarters of the Ministry of Defence, (Army), DHQ Post Office, New Delhi.
3. The Director General, Armed Forces Medical Services, Directorate General of Armed Forces Medical Services, Army Headquarters, DHQ PO New Delhi
4. The Director General Medical Services (Army), Directorate General of Medical Services, Army Headquarters, DHQ PO New Delhi.

....Respondents

Ld. Counsel appeared for the applicant - Shri K. C. Ghildiyal,
Advocate

Ld. Counsel appeared for the respondents - Shri Mukund Tewari,
Advocate, Senior Standing
Counsel

ORDER

“Per Justice Virendra Kumar Dixit, Judicial Member”

1. This Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has sought following reliefs:-

“(a) The Hon’ble Tribunal may be pleased to struck down paragraph 11,12 and 13 of policy letter dated 10(1)/2004/D (medi) dated 14 January, 2004 (Annexure A/1) amended vide letter No. 10(1)/2004/D(Med) dated 17 May, 2066 (Annexure A/2) issued by respondent No 1.

(b) The Hon’ble Tribunal may be pleased to direct the respondents to reconsider the case of the applicant for promotion to the rank of Brigadier as a fresh case without taking into consideration Para 11,12 and 13 of the Policy letter dated 10(1)/2004/D (Med) dated 17 May, 2006. He may be promoted to the rank of Brigadier w.e.f. the date when his juniors were promoted with all consequential benefits such as arrears of salary, seniority and further promotions.

(c) Any other appropriate order or direction which this Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case including cost of the litigation.

2. In brief, the facts of the case are that the applicant MR-05488L Colonel U K Sharma was considered for promotion to the rank of Brigadier in Promotion Board (Medical) No. 2 held on 15.11.2011 but was not empanelled. Aggrieved by non empanelment for promotion, the applicant submitted a Statutory Complaint dated 07.01.2012 which was examined by appropriate competent authority and partial redress was granted to him, wherein the entire assessment of Senior Technical Officer

(STO) in Annual Confidential Report (ACR) for the year 2006 was expunged on grounds of inconsistency. With changed profile, he was considered again by Promotion Board (Medical) No. 2 on 29.10.2012 but was again not empanelled. He was considered Second time again for promotion to the rank of Brigadier by Promotion Board (Medical) No. 2 held on 26.11.2012 but was again not empanelled. He was considered by the Promotion Board (Med) No 2 on 20.11.2013 but again he was not empanelled. Aggrieved by non empanelment for promotion to the rank of Brigadier, the applicant has filed this Original Application.

3. Heard Shri K.C.Ghildiyal, Learned Counsel for the applicant and Shri Mukund Tewari, Ld. Sr. Standing Counsel and perused the impugned orders including other relevant documents.

4. Learned Counsel for the applicant has submitted that the applicant was commissioned in Army Medical Corps on 12.11.1982 as Captain. He was promoted to the rank of Major and Lieutenant Colonel in due course of time and subsequently as Colonel in March 2008. The applicant was considered for promotion to the rank of Brigadier on four occasions i.e, 15.11.2011, 29.10.2012, 26.11.2012 and 20.11.2013 but was not found fit for promotion to the rank of Brigadier. The obvious reason for non empanelment for the applicant is that he does not possess any of the academic qualifications mentioned in paragraph 11 and 12 of letter No 10(1)/2004/D (Med) dated 14.01.2004 issued by the Government of India, Ministry of Defence, New Delhi. Ld. Counsel for the applicant argued that paragraphs 11,12 and 13 of the policy letter are wholly illegal and do not provide for any justification for award of weightage. Surprisingly, by an amendment, it has been incorporated in the policy letter that the benefit of

academic qualifications will be available in each consideration for promotion. Such a provision is contrary to the settled principles for service jurisprudence and public policy.

5. Ld. Counsel for the applicant has further submitted that as per policy dated 14.01.2004, officers in possession of academic qualifications, are awarded marks in the Promotion Board like, Doctor of Medicine (MD)/Master of Surgery(MS)/Masters in Hospital Administration (MHA) recognized by Medical Council of India/Diplomat National Board (DNB) – 2 marks, Master of Dental Sciences (MDS) (for AD Corps) recognized by Dental Council of India – 2 marks, Master of Science (M Sc) (Nursing) (for MNS) recognized by Nursing Council of India-2 marks, Two year full time training program during study leave in India/Abroad in a medical field from an institution/university recognized by a statutory body – 2 marks, Post Graduate degree in a subject related to medical field from an institute/university recognized by a statutory body – 2 marks, All Diploma courses recognized by Medical Council of India – 1 mark, Defence Services Staff College Course at Wellington – 1 mark, National Defence College Course at New Delhi – 1 mark, Long Defence Management course from College of Defence Management Secunderabad – 1 mark, LLB – 1 mark and MBA – 1 mark. It was further provided that in case an officer is having more than one of the above qualification, marks not exceeding two will be credited. In paragraph 12 of the letter it has been provided that three marks will be awarded for the academic achievements namely Master of Chirugury (M Ch) or Doctorate in Medicine (DM) or Docotr of Philosophy (Ph D) or Diploma of National Board (DNB) (Super specialty subject) or two years training during study leave in a specialized field of medical sciences/Certificate of Training

from an Institute/University recognized by a statutory body. It was further provided that an officer is having more than one of the above mentioned qualifications, marks for only one qualification will be credited. The policy letter dated 14.01.2004 also provided that credit marks for academic qualifications will be awarded only in the first promotion board an officer is exposed to, after acquiring the same.

6. Ld. Counsel for the applicant also submitted that policy letter dated 14.01.2004 has been amended vide policy letter dated 17.05.2006 in which two marks to be awarded for qualification mentioned in para 11 have been reduced to one mark and one mark has been reduced to 0.5 mark. Similarly in para 3, marks for academic achievements have been reduced to one mark. It has however been introduced by way of amendment letter dated 17.05.2006 that the marks under paragraph 11 and 12 will be awarded in each Promotion Board an officer is exposed to. It is also submitted that provision regarding grant of additional mark on the basis of the academic qualification while considering the cases for promotion is absolutely illegal, arbitrary and discriminatory. An individual who enters into the service with the Basic Minimum Qualification may or may not get the chance to enhance his academic qualifications due to the service condition he is posted in. There exists a provision in service on the basis of which the officers having additional academic qualifications are paid special allowances like, Consultant/Professor/Advisor - Rs 2400/- per month, Classified Specialist – Rs 2000/- per month, Graded Specialist – Rs 1600/- per month, Post Graduate Degree holder – Rs 1000/- per month and Post Graduate Diploma holder – Rs 600/- per month. He submitted that after having been given the financial benefit for the academic qualifications, the

officers should not be given wightage of academic qualifications in promotion as it gives them dual benefit. As per amended policy the benefit of academic qualification is granted not only once but on each occasion whenever the officer is considered for promotion. The list of the qualification is not exhaustive; however, an officer having a higher academic qualification but not enlisted in paragraph 11 and 12 is not given any added advantage. Some of the qualifications such as LLB and MBA has got no professional connection with the medical services yet the same have been included in paragraph 11 for award of additional marks.

7. Ld. Counsel for the applicant further submitted that in no other branch of the Army while considering the cases for promotion, the officers are granted marks on the basis of the academic qualifications. Framing such policy only for the medical services is highly discriminatory and it does not stand scrutiny of Law in view of the Constitutional Mandate as contained in Article 14 and 16 of the Constitution of India.

8. Ld. Counsel for the applicant has argued that policy letter dated 04.01.2004 and 17.05.2006 are liable to be struck down as the same have not been issued by a Competent Authority. Both policy letters have been issued on behalf of the Central Government but, none of them has been executed in the name of President of India in accordance with Article 77 of the Constitution and the same have not been authenticated in that manner. The promotion policy letter in question cannot be said to be the policy of the Government of India and no promotion board can be held on the basis of this policy. This illegal and arbitrary policy has created a separate class within a homogenous class of officers of medical services and it provides a discriminatory and arbitrary treatment to the officers. Ld

Counsel further submitted that the policy so framed is arbitrary, illegal, unreasonable and unconstitutional, the same is liable to be quashed and the case of the applicant is full of merits and it deserves to be allowed with cost. In support of his contention, learned counsel for the applicant has relied upon the following judgements of the Hon'ble Apex Court :-

- (a) **Jaipur Development Authority vs. Vijay Kumar Data and another**, reported in (2011) 12 SCC 94.
- (b) **Central Inland Water Transport Corporation Limited** reported in AIR 1986 SCC 1571.
- (c) **Kailash Chand Sharma Vs State of Rajasthan and Ors** reported in (2002) 6 SCC 562.
- (d) **State of Orissa and another Vs Mamata Mohantriy** reported in (2011) 3 SCC 436.
- (e) **A.L. Kalra vs Project and Equipment Corporation of India Limited** reported in (1984) 3 SCC 316.
- (f) **Brij Mohan Lal vs. UOI** reported in (2012) 6 SCC (502).
- (g) **Centre for Public Interest Litigation vs. UOI and others** reported in (2012) 3 SCC.
- (h) **Sanchit Bansal & another vs. Joint Admission Board and others** reported in (2012) 1 SCC 157.
- (j) **Delhi Union of Journalist Co-operative House Building Society Limited vs. Union of India and others** reported in (2013) AIR SCW 6036.

9. On the other hand Ld. Counsel for the respondents has submitted that the applicant was considered for promotion to the rank of Colonel by Promotion Board (Medical) No. 3 Administrative Cadre held on 23 Dec 2005 under promotion policy letter dated 14.01.2004 but was not selected for promotion. He was again considered for promotion to the rank of Colonel by Promotion Board (Medical) No. 3 held on 28.12.2006 but again was not selected. Aggrieved by the same, he submitted a Non Statutory Complaint dated 10.03.2006 which was considered and rejected by the Chief of the Army Staff. The applicant further preferred a

Statutory Complaint dated 21.12.2006 which was considered and partial redress was given to him wherein the numerical assessment of STO in ACR 1995, SRO and STO in ACR 1997-98 and HTO in ICR 2000 were expunged. It was also directed that the officer be reconsidered by an appropriate promotion board in accordance with the existing policy. Accordingly, the applicant was considered by the Review Medical Board (Medical) No. 3 held on 06.11.2007 with amended profile against the parameters of the Promotion Board (Medical) No. 3 held on 23.11.2005, however, he was not selected. The applicant was graded 'B' (fit for promotion in his own turn) against the parameters of the Promotion Board (Medical) No. 3 held on 28.12. 2006 and was accordingly promoted to the rank of Colonel on 07.03.2008 with reckonable seniority of 28.12.2006.

10. The applicant was considered for promotion to the rank of Brigadier in his First Chance in Promotion Board (Medical) No 2 held on 15.11.2011 but was graded 'Not Selected'. The applicant submitted a Statutory Complaint dated 07.01.2012 which was examined and partial redress was granted to him wherein the entire assessment of Senior Technical Officer in Annual Confidential Report of 2006 was expunged on grounds of inconsistency. With changed profile he was considered by Promotion Board (Medical) No. 2 held on 29.10.2012 against the parameters of Promotion Board (Medical) No. 2 held on 15.11.2011 but his grading remained 'Not Selected'. He was considered in his Second Chance for promotion to the rank of Brigadier by Promotion Board (Medical) No.2 held on 26.11.2012 and was again graded 'Not Selected'. He was again considered in his Third Chance for promotion to the rank of Brigadier by Promotion Board (Medical) No.2 held on 20.11.2013 and was graded 'Not Selected'.

11. Ld Counsel for the respondents further submitted that promotions in the Armed Forces Medical Services are vacancy based and the selection is based on comparative merit. Officers placed higher in merit are selected for empanelment for promotion. Promotions in Armed Forces Medical Services (AFMS) to the select ranks of Colonel, Brigadier, Major General and Lieutenant General (and equivalent) serving in the Army, Navy and Air Force are held under a common Promotion Board as per Promotion Policy issued by the Government of India, Ministry of Defence vide their letter dated 14.01.2004 (**Annexure A to O.A.**), further amended vide Government of India, Ministry of Defence letter dated 17.05.2006 (**Annexure A-12 to O.A.**). The Director General Armed Forces Medical Services (DAFMS) is the convening authority for all the Promotion Boards and these are convened and held as per the laid down procedure for the vacancies for a calendar year. The existing promotion policy has been prepared after due deliberation on file and application of mind by different authorities involved in the chain of execution of such important policy letters which relates to career advancement and selection of the best in the next higher ranks within the cadre. The policy had concurrence of Medical Services Advisory Committee, the Apex Advisory Body to the Ministry of Defence and finally by the Central Government. There does not appear to be any ground to challenge the existing policy which has withstood all Promotion Boards since 2004.

12. As per promotion policy, the selection criteria are based on four parameters i.e. Average marks of ACR extrapolated out of 90 - 90 marks, Total marks for PG Qualifications - 01 marks, Total Marks for Academic Achievements – 01 marks Military Awards and decorations – 01 mark and Marks awarded by the members of the Board based on overall profile,

exceptional achievements – 02 marks. Total 95 marks. The final merit is drawn based on the sum total of these four parameters. The first three parameters are based on records and the last parameter is for the members of the Board to decide. Hence, it is not just the Confidential Reports average which decides the promotion prospects but factors like qualification's marks, military awards, and marks by the board member also have a crucial role in deciding the promotional prospects of the candidates.

13. Ld. Counsel also submitted that marks for qualifications are basically on the principle of recognition for excellence in a technical corps like Army Medical Corps. Every candidate is commissioned in AMC based on his/her basic qualification of MBBS. Subsequent opportunities for higher qualifications made available uniformly to all the officers at each and every stage of his/her career, in no way leads to any discrimination among the batch mates if one candidate qualifies and the other does not due to competitive examinations/screening by duly constituted professionals in the respective fields of medical specialization. The contention of the Ld counsel for the applicant is that any officer not having higher academic qualifications is out of reckoning even before the applicant is considered for promotion is wrong and denied and the same is borne out by the records wherein numerous officers are there who have made it to the rank of Brigadier without possessing the higher academic qualifications.

14. Ld Counsel for the respondents argued that policy letters dated 14.01.2004 and 17.05.2006 have been issued strictly in accordance with the provisions of Article 77 of the Constitution of India. It is also

confirmed that approval of the then Defence Minister was taken and the letters communicating the decisions were signed by the then Under Secretaries in terms of the provisions of the Authentication (Orders and other Instruments) Rules, 2002.

15. Ld. Counsel for the respondents reiterated that no officer has any fundamental right to promotion, but has only the right to be considered for promotion, when it arises, in accordance with the relevant rules. The structure of the Armed Forces is pyramidal and the number of vacancies after the rank of Colonel are a few and limited. Hence, it is natural that only a select few would be able to make it to the next rank, although the comparative difference in the merits of the last in the list of those empanelled and those not empanelled may be very nominal.

16. The extant policy on promotion to the select ranks for the officers of Armed Forces Medical Services has been uniformly applied to the applicant alongwith the similarly placed officers without any bias. He submitted that the operative promotion policy for the Promotion Board by which the officer regained post seniority of the Promotion Board (Medical) No. 3 held on 28 Dec 2006 was entirely as per the parameters of the same policy being presently impugned by him. Hence, when the applicant was beneficiary of the present dispensation in 2008 when he was promoted to the rank of Colonel, he chose not to agitate the provisions as contained in the *ibid* policy whereas when he failed to qualify for promotion to the rank of Brigadier he is now agitating and impugning the said Promotion Policy. That the Original Application is without merit and liable to be dismissed. In support of his arguments, Learned counsel for

the respondents has relied upon the judgements of Hon'ble The Apex Court in the cases of :-

- (a) **Virendra Kumar Verma vs. UPPSC** reported in 2011(1) SCC 150.
- (b) **Hardev Singh vs. Union of India and others** reported in (2011) 10 SCC 121.
- (c) **Sanchit Bansal vs. Joint Admission Board** reported in (2012) 1 SCC 157.
- (d) **Brij Mohan Lal vs. Union of India and others** reported in (2012) 6 SCC 502.
- (e) **State of Bihar vs. Sunny Prakash** reported in (2013) 3 SCC 559.
- (f) **State of Orissa and another vs Mamata Mohanty** reported in (2011) 3 SCC.
- (g) **Centre for Public Interest Litigation vs U.O.I & Ors** reported in (2012) 3 SCC.

17. We have bestowed our best of the consideration on rival submissions made by both sides and perused all relevant documents available on record.

18. The policy regarding procedure for selection of Armed Forces Medical Services Officers viz, Army Medical Corps (AMC), Army Dental Corps (AD Corps), Army Medical Corps (Non Technical) and Military Nursing Service (MNS) is contained in the policy letter No 10(1)/2004/D (Med) dated 14.01.2004 amended vide letter No 10(1)/2004/D (Med) dated 17.05.2006, both issued by Government of India, Ministry of Defence, New Delhi. For ready reference the same are reproduced as under :-

Government of India, Ministry of Defence, New Delhi
letter No 10(1)/2004/D (Med) dated 14.01.2004

PROCEDURE FOR SELECTION AND PROMOTION OF ARMED FORCES
 MEDICAL SERVICES (AFMS) OFFICERS VIZ ARMY MEDICAL CORPS (AMC),
 ARMY DENTAL CORPS (AD CORPS), ARMY MEDICAL CORPS (NON-TECH) AND
 MILITARY NURSING SERVICE (MNS)

“Paras 1 to 10. x x x x x x x x x x x x

Para 11. **PG. Qualifications** Officers in possession of the following academic achievements will be awarded marks, as mentioned against each :-

Ser No	Qualification	Marks
(a)	Doctor of Medicine (MD)/Master of Surgery (MS)/Master in Hospital Administration (MHA) recognized by Medical Council of India/Diplomate National Board (DNB)	2
(b)	Master of Dental Sciences (MDS) (For AD Corps) recognized by Dental Council of India	2
(c)	Master of Science (MSc (Nursing) (for MNS) recognized by Nursing Council of India	2
(d)	Two year full time training program during study leave in India/Abroad in a medical field from an institution/university recognized by a statutory body	2
(e)	Post graduate degree in a subject related to medical field from an institute/university recognized by a statutory body	2
(f)	All Diploma Courses recognized by Medical Council of India	1
(g)	Defence Services Staff College Course at Wellington	1
(h)	National Defence College Course at New Delhi	1
(i)	Long Defence Management Course from College of Defence Management, Secunderabad	1
(j)	LLB	1
(k)	MBA	1

Note : If an officer is having more than one of the above mentioned qualifications, marks not exceeding two (02) will be credited.

12. Marks will be awarded for possessing any one of the academic achievements as given below :-

- | | | | |
|-----|--|---|---|
| (a) | Master of Chirugury (M Ch | - | 3 |
| (b) | Doctorate of Medicine (DM) | - | 3 |
| (c) | Doctor of Philosophy | - | 3 |
| (d) | Diplomate of National Board (DNB) -
(Super specially subject) | - | 3 |
| (e) | Two years training during
Study leave in a specialized
field of medical sciences/Certificate
of Training from an institute/university
recognized by a statutory body | - | 3 |

Note : If an officer is having more than one of the above mentioned qualifications, marks for only one qualification will be credited.

13. Basic Parameters for grant of weightage are as follows :-

- (a) Credit marks for academic achievements will be awarded only in the first Promotion Board an officer is exposed to after acquiring the same.
- (b) Those who are already having the above academic achievements, when exposed to the first promotion board will be entitled to the weightage.

14. to 24. x x x x xx x x x x x x

x

Sd/-

RC Raturi

Under Secretary to the Government of India

Amendment issued by Government of India Ministry of Defence vide their letter No 10(1)/2004/D(Med) dated 17.05.2006 in above Promotion policy No 10(1)/2004/D (Med) dated 14.01.2004.

PROCEDURE FOR SELECTION AND PROMOTION OF ARMED FORCES MEDICAL SERVICES (AFMS) OFFICERS VIZ ARMY MEDICAL CORPS (AMC), ARMY DENTAL CORPS (AD CORPS), ARMY MEDICAL CORPS (NON-TECH) AND MILITARY NURSING SERVICE (MNS)

Para 11. PG Qualifications. Officers in possession of the following academic achievements will be awarded marks, as mentioned against each :-

Ser No	Qualification	Marks
(a)	Doctor of Medicine (MD)/Master of Surgery (MS)/Master in Hospital Administration (MHA) recognized by Medical Council of India/Diplomate National Board (DNB)	1
(b)	Master of Dental Sciences (MDS) (For AD Corps) recognized by Dental Council of India	1
(c)	Master of Science (MSc (Nursing) (for MNS) recognized by Nursing Council of India	1
(d)	Two year full time training program during study leave in India/Abroad in a medical field from an institution/university recognized by a statutory body	12
(e)	Post graduate degree in a subject related to medical field from an institute/university recognized by a statutory body	1
(f)	All Diploma Courses recognized by Medical Council of India	0.5
(g)	Defence Services Staff College Course at Wellington	0.5
(h)	National Defence College Course at New Delhi	0.5
(i)	Long Defence Management Course from College of Defence Management, Secunderabad	0.5
(j)	LLB	0.5
(k)	MBA	0.5

Note : If an officer is having more than one of the above mentioned qualifications, marks not exceeding one (01) will be credited.

12. *Officers in possession of any one of the following academic achievements will be awarded one (1) mark :*

- (a) *Master of Chirugury (M Ch*
- (b) *Doctorate of Medicine (DM)*
- (c) *Doctor of Philosophy*
- (d) *Diplomate of National Board (DNB)*
(Super specially subject)

Note : If an officer is having more than one of the above mentioned qualifications, marks for only one qualification will be credited.

IV. For the existing Para 13.

READ

13. *Basic parameters for grant of weightage for qualifications : marks for qualifications under paragraph 11 and 12 will be awarded in each promotion board an officer is exposed to.*

V. For existing para 14.

READ

14A. *Marks for Military Awards and Decorations : Officers in possession of any of the following military awards and decorations will be awarded mark as mentioned against each :*

- | | | |
|---|---|------|
| (a) <i>Param Vir Chakra (PVC)/Mahavir Chakra (MVC)/
Ashok Chakra (AC)/Vir Chakra (VrC)/Kirti Chakra (KC)/
Param Vishisht Seva Medal (PVSM)</i> | - | 1.00 |
| (b) <i>Ati Vishisht Seva Medal (AVSM)/Sena Medal (SM)
(Gallantry & Equic/Shaurya Chakra (SC)/Yudh Seva Medal
(YSM)/Uttam Yudh Seva Medal (UYSM)</i> | - | 0.75 |
| (c) <i>Sena Medal (SM) (Distinguished) & Equivalent/
Vishisht Seva Medal (VSM)</i> | - | 0.50 |
| (d) <i>Mention in dispatches/Chiefs Commendation Card</i> | - | 0.25 |

Note :

1. *If any officer is having more than one of the above mentioned Awards and Decorations, marks not exceeding one (1) will be credited.*
2. *If an officer has earned the same award or decoration more than once or another equivalent award or decoration in the same category, the mark shall not exceed that prescribed for the next category.*

14 (B). to 15. *x x x x x*

x x x x x x

x x x x x

Yours faithfully,

Sd/- x x x

RC Raturi

Under Secretary to the Govt. of India

19. Ld. Counsel for the applicant has argued that the impugned policy letters dated 14.01.2004 and 17.05.2006 are liable to be struck down as the same have not been issued by the competent authority. He has also submitted that bare perusal of the impugned policy letters would reveal that the same have been issued on behalf of the Central Government but none of them have been executed in the name of President of India in accordance with Article 77 of the Constitution of India, and the same has not been authenticated in that manner. In support of his argument Ld. Counsel for the applicant has cited the law laid down by the Hon'ble Apex Court in the case of **Jaipur Development Authority and Others** (Supra) in which it was held that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of Government and also in the case of **Delhi Union of Journalist Co-operative House Building Society Limited Vs. UOI & Ors** (Supra), same view has been taken by Hon'ble The Apex Court.

20. In reply Ld. Counsel for the respondent has contended that the impugned policy letters have been issued strictly in accordance with the provisions of Article 77 of the Constitution of India.

21. Article 77 of the Constitution of India reads as under:-

“77. Conduct of business of the Government of India.

(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or

instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

22. The Respondents had confirmed on affidavit dated 15.05.2014 that the issuance of the impugned policy letters are in accordance with Article 77 of the Constitution of India. Para 5 and 6 of the said affidavit dated 15.05.2014 filed by the respondents are reproduced as under:-

5. *That the office of DGAFMS sought clarification from Ministry of defence regarding that the policy of letters dated 14.01.2004 and 17.05.2006 have been issued in accordance with Article 77 of the Constitution of India.*

6. *That Ministry of defence (D) Medical informed the office of DGAFMS that the policy letters dated 14.01.2004 and 17.05.2006 informed as follows:*

“ Para 70 of the Central Secretariat Manual of office Procedure states that all the orders and other instruments made and executed in the name of the President should be expressed to be made in his name and signed by an officer having regular or ex-officio secretariat status of and above the rank of Under Secretary, or others specifically authorized to authenticate such order under the Authentication (Orders and other Instruments) Rule, 2002. It is confirmed that the decisions contained in the policy letters dated 14.01.2004 and 17.05.2006 were taken with the approval of the then Raksha Mantri and the letters communicating the decisions were signed by the then Under Secretary in terms of the provisions of the Authentication (Orders and other Instruments) Rule, 2002.”

23. In the case of **State of Bihar Vs Sunny Prakash** (supra), Hon'ble the Apex Court has observed that the State being the author of that decision, merely because it is formally not expressed in the name of the Governor in terms of Article 166 of the Constitution, the State itself cannot be allowed to resile or go back on that decision.

24. We have perused the original records regarding the issuance of impugned policy letters. The original record indicates that the original policy letters were issued after being taken the approval of Defence Minister and the letters communicating the decision were signed by the then Under Secretaries Government of India. The Respondents have contended in the aforesaid Affidavit dated 15.05.2014 that Under Secretary, Government of India is authorised to issue impugned policy letters in terms of the provisions of the authentication (orders & other instruments) Rule 2002. In view of the above, **we are of the view that the impugned policy letters were issued by the competent authority in accordance with Article 77 of the Constitution of India.**

25. Ld. Counsel for the applicant has submitted that Para 11, 12 and 13 of the impugned policy letters dated 14.01.2004 and 17.05.2006 are illegal and arbitrary and discriminatory, hence liable to be quashed. He has further submitted that granting weightage on the basis of the prescribed academic qualification is contrary to the principles of service jurisprudence as such evaluation of profile should be done on the basis of equal scale and not arbitrarily. He has also submitted that granting weightage on the basis of qualifications like L.L.B and M.B.A is wholly irrelevant and arbitrary and policy is violative of Article 14 and 16 of the Constitution of India.

26. On the other hand Ld. Counsel for the respondents has submitted that framing of the policy is in the domain of the Central Government. He has also submitted that the policy can be changed and it is always open to the employer to change the policy. He has further submitted that it is well settled legal position that Courts are not concerned with the practicality or wisdom of the policy but only are concerned with illegality. In the instant case, he has argued that since no malice has been alleged in the instant matter, the impugned policy is not interferable.

27. For ready reference, Article 14 and 16 of the Constitution of India are also reproduced as under :-

“14. Equality before Law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

16. Equality of opportunity in matters of public employment.

(1) *There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.*

(3) *Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory) prior to such employment or appointment.*

(4) *Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*

(4A) *Nothing in this article shall prevent the State from making any provision for reservation (in matters of promotion, with consequential seniority, to any class) or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.*

(4B) *Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved*

for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year).

(5) *Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.*

28. In the case of **State of Orissa and another Vs Mamata Mohanty** (supra), Hon'ble The Apex Court in para 37 of the judgment has observed as under:-

*“37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide *Upen Chandra Gogoi v. State of Assam*¹⁶, *Mangal Prasad Tamoli v. Narvadeshwar Mishra and Ritesh Tewari v. State of U.P.*¹⁸).*

29. In the case of **Brij Mohan Lal Vs. UOI** (Supra), Hon'ble the Apex Court in para 96 of the judgement has observed as under :

“96. It is a settled principle of law that matters relating to framing and implementation of policy primarily falls in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing the same. Normally, the courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The courts have repeatedly taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or malafide.”

30. In the case of **Centre for Public Interest Litigation Vs. UOI & others** (Supra), Hon'ble the Apex Court in para 99 of the judgement has observed as under :

“Para 99. The Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. However, when it is clearly demonstrated that the policy framed by State is contrary to the public interest or is violative of the Constitutional Principles it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be acceded beyond the recognized parameters.

31. In the case of **Sanchit Bansal vs. Joint Admission Board** (supra), Hon'ble the Apex Court in para 26 and 28 has observed as under :

26. *This Court has also repeatedly held that the courts are not concerned with the practicality or wisdom of the policies but only illegality. In Directorate of Film Festivals v. Gaurav Jain this Court held : (SCC p746, para 16)*

16.Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review”

28. *An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bonafide manner, by adopting a process which is uniform and non discriminatory, it cannot be described as arbitrary or capricious or mala fide.*

32. In view of the law discussed above it is a settled principal of law that matters relating to framing and implementation of policy primarily falls in the domain of the Government. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any

particular policy as it may deem fit and appropriate and the law gives it liberty and freedom in framing the same. The court cannot substitute its opinion for the one formed by the experts in a particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. It is also a settled legal proposition that the courts are not concerned with the practicality or wisdom of the policies but only illegality. It is always open to an employer to change its policy in relation to giving promotion to the employees. In the case of **Balco Employees Union vs. Union of India reported in (2002) 2 SCC p.333**, Hon'ble The Apex Court has observed that a Court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the Court to weigh the pros and cons of the policy or to test the degree of the beneficial or equitable disposition. In the instant case since no malice has been alleged, hence the policy is not liable to be interfered as observed by Hon'ble The Apex Court in the case of **Brij Mohan Lal vs UOI & Ors (supra)**.

33. In the case of **G. Sarana (Dr) vs. University of Lucknow (1976) S.C.C 585**, Hon'ble The Apex Court has observed that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. In the case of **K.H.Siraj vs. High Court of Kerala reported in (2006) SCC 6, page 395**, Hon'ble The Apex Court has observed that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around

and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppels. In the case of **Union of India vs. V.S. Vinodh Kumar reported in (2007) 8 SCC** page 107, it was observed by Hon'ble The Apex Court that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. The aforesaid view has been taken by Hon'ble The Apex Court in the case of **Veranda Kumar Verma** (supra). It is also to be noted that in the instant case, the impugned promotion policy was in vogue since 2004 amended in 2006. The applicant was beneficiary of the impugned policy letters dated 14.01.2004 and 17.05.2006 in 2008 when he was considered and promoted to the rank of Colonel, he chose not to agitate the provisions contained in the impugned policy letters, whereas when he failed to qualify for promotion to the rank of Brigadier, now he is agitating and impugning the said promotion policy. In view of the law discussed above, the applicant after having participated under the impugned promotion policy and having been declared unsuccessful for promotion to the rank of Brigadier, he cannot take U turn for challenging the said policy.

34. The doctrine of equality before law and equal protection of laws and equality of opportunity in the matter of employment and promotion enshrined in Article 14 and 16 of the Constitution of India which is intended to advance justice by avoiding discrimination is attracted only when equals are treated as unequal or where unequal are treated as equals. In the instant case the impugned policy was applicable to similarly placed persons uniformly without any discrimination on any ground. Ld.

Counsel of the applicant could not establish, how the impugned policy is in violation of Article 14 and Article 16 of the Constitution of India.

35. We have perused the applicant's relevant original documents regarding promotion process and found that in promotion Board (Med) No 2 held on 15.11.2011, Promotion Board (Med) No 2 held on 29.10.2012, Promotion Board (Med) No 2 held on 26.11.2012 and Promotion Board (Med) No 2 held on 20.11.2013, the applicant was considered but in overall performance and comparative merit with his batch-mates, he could not come in merit; hence he was not selected for promotion. From perusal of original record it also transpires that if the award of additional 0.5 marks for LLB/MBA degree was ignored, even then the applicant could not come in merit for empanelment for promotion.

36. System of promotion in Army is pyramidal in nature, i.e. in higher ranks, the number of vacancies decrease. From the broad base of pyramid only those officers whose record of service merits promotion within a particular batch are selected to fill the vacancies available in higher ranks. For selection to select ranks, all the officers of a particular batch are considered together with cut of ACR and inputs on the basis of individual career profile and batch merit and thereafter empanelled or not empanelled for promotion. Seniority in itself is not the only consideration before the Selection Board for empanelment or non empanelment. As per applicable policy an officer is entitled to three considerations for promotion to a select rank. The applicant was considered on each occasion and was not empanelled due to overall performance and comparative merit with his batch-mates.

37. The impugned promotion policy is being uniformly applied to all the similarly placed officers without any bias or discrimination. In view of the facts & circumstances of the case and the case law discussed above, we are of the considered view that the impugned policy letters dated 14.01.2004 and 17.05.2006 are neither unjust, unfair, illegal, arbitrary or discriminatory nor in violation of Article 14 and 16 of the Constitution of India. We are also of the considered view that no injustice has been done with the applicant. The applicant was considered with fresh profile but he was not empanelled for promotion to the rank of Brigadier because of overall performance and comparative merit. The Original Application has no merits and deserves to be dismissed.

38. In the result, the Original Application is dismissed. There shall be however no order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member

(Justice Virendra Kumar DIXIT)
Judicial Member

Dated : July , 2014

dds/-