

Court No. 1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 219 of 2016

Tuesday, this the 21st day of December, 2021

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Group Captain Ajay Gaur, No. 2110-N
S/o Sri Surendra Pal Sharma
Presently on the posted strength of Air Force Station, Sarsawa,
District - Saharanpur-247332 (UP)

..... Applicant

Ld. Counsel for the Applicant: **Shri A.K. Singh**, Advocate

Versus

1. Secretary, GOI, Ministry of Defence, Integrated HQs (Air Force), New Delhi.
2. Chief of Air Staff, Air Hqs. (Vayu Bhawan) Rafi Marg, New Delhi.
3. AOP, Air HQs (VB), Rafi Marg, New Delhi.
4. AOC, A.F. Station, Sarsawa, District – Saharanpur.

..... Respondents

Ld. Counsel for the Respondents : **Shri Yogesh Kesarwani**,
Central Govt Counsel.

ORDER (Oral)

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- “(a) Issue/pass an order to quash/set-aside para 4(b)(i) of new Human Resource Policy issued by Air HQs (respondent No. 3) vide letter No. HQs/98824/1/PO-5 dated 28 Aug 13 in relation to minimum performance assessment criteria for grant of substantive promotion from the rank of Wg. Cdr to Gp. Capt (TS) (Annexure A-1).

- (b) Issue/pass an order to quash/set aside Air HQs letter No. AHQ/C 22029/2/7/TS/PO-3(D) dated 11 July 16, the contents of which were communicated vide 30 Wing, AF letter No. 30W/202/1/P2 dated 28 July 2016 (Annexure A-2).
- (c) Issue/pass an order or direction to the respondents to grant the applicant promotion to the rank of Gp. Capt. (TS) w.e.f. 09 March 2016, the date on which the officers of batch of 39 AE Course were promoted to Gp. Capt. (TS) with all consequential benefits.
- (d) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.
- (e) Allow the application with cost."

2. Brief facts of the case are that applicant was commissioned in Indian Air Force on 04.03.1991 and granted Short Service Commission and was granted Permanent Commission (On probation) on 09.03.1992. The applicant was granted ante date seniority for the purpose of pay, promotion and seniority w.e.f. 09.03.1990. The performance of the applicant was not up to the mark in comparison to his batch-mates, therefore, he was promoted to Gp Capt (TS) w.e.f. 01.07.2016 once his two Appraisal reports with grading more than 7 were received. HRP 01/2009 has the minimum performance criteria as '6' in the last three ARs and an aggregate of 18, which was superseded by HRP 03/2013 by which minimum performance criteria was amended to '6.5' in each year's AR with minimum '7' in at least two ARs aggregating a minimum of 33. Being aggrieved with applicability of HRP 03/2013, the applicant has filed the present

Original Application for grant of promotion of Group Captain (TS) w.e.f. 09.03.2016 instead of 01.07.2016.

3. Learned counsel for the applicant submitted that applicant was considered for promotion to the rank of Group Captain thrice but could not be promoted. The applicant on completion of 26 years of service was for the first time considered for promotion to the rank of Group Captain alongwith his batch-mates (39 AEC) in March, 2016 but was not granted promotion vide Air Headquarters order dated 08.03.2016. The applicant made a representation dated 29.03.2016 which was replied by Air Headquarters intimating that applicant was not granted promotion w.e.f.09.03.2016 due to not meeting Minimum Performance Criteria (MPC) in accordance with HRP 03/2013 on the subject. However, the applicant has since been promoted to the rank of Gp. Capt. w.e.f. 01.07.2016 vide Air Headquarters order dated 26.07.2016.

4. Learned counsel for the applicant further submitted that as per HRP dated 12.01.2009, the MPC required for promotion was grading of '6' in last 3 Appraisal Report's (in short AR). On 28.08.2013, HRP was revised to 5 years ARs, with minimum of 6.5 in each year's report and minimum of 7 in two ARs with total 33. The promotion according to new policy was to be made from 01.06.2015. By June, 2013, 3 ARs of the applicant for the period from 01.07.2010 to 30.06.2011, from 01.07.2011 to 30.06.2012 and from 01.07.2012 to 30.06.2013 were already raised as per HRP 2009. The new policy was made applicable to the applicant retrospectively from year 2010. It meant that the applicant had to get a grading of more than 7 (above

average) in the remaining two years i.e. 2013-2014, 2014-2015 ARs to meet the minimum AR criteria for promotion, presuming that applicant met the minimum criteria of 6 in the last 3 years ARs according to HRP 2009. During the last 5 years the applicant has never been informed any time that he has been assessed less than the cut off AR grading required for promotion. As per para 21 of AFO 06/2012, Initiating Officer (IO) is required to inform the Appraisee in writing of the particular aspects of the failing.

5. Learned counsel for the applicant further submitted that on acceptance of AVSC recommendations, GOI, MOD issued a letter dated 12.03.2005 for re-structuring of the officer cadre of Air Force. On issue of letter dated 12.03.2005, Air Headquarters issued HRP 01/2009 dated 13.01.2009 for grant of substantive promotion upto the rank of Wg Cdr and Gp Capt (TS) clarifying criteria for promotion to the rank of Gp Capt. On 27.06.2012, Chief of Air Staff issued Air Force Order (AFO), 06/2012 which deals with Appraisal Reports of IAF officers. Air HQ issued another HRP dated 28.08.2013, superseding HRP dated 12.01.2009 on the subject of substantive promotion to the rank of Wg Cdr and Gp Capt (TS). The rejection of promotion of the applicant to the rank of Gp Capt w.e.f. 09.03.2016 is assailed on the grounds of (i) HRP dated 28.08.2013 is repugnant to MOD letter dated 12.03.2015, (ii) HRP dated 28.08.2013 revising upwards the minimum assessment criteria is repugnant to AFO 06/2012 which relates to minimum assessment criteria and fails on the ground of being "*per in curium*", (iii) The genesis of superseding the earlier HRP dated 12.01.2009 by new HRP dated 28.08.2013 is

untenable and unjust, (iv) Shifting of goal post midway and denying level playing field, (v) AR below cut off for promotion not communicated and (vi) HRP dated 28.08.2013 violates Article 14 of Constitution of India. He also said that genesis of superseding the earlier HRP dated 12.01.2009 by HRP dated 28.08.2013 is unreasonable, untenable and unjust.

6. Learned counsel for the applicant placed reliance on the judgment of the Hon'ble Apex Court in ***Union of India & Ors vs. Lt. Gen. Rajendra Singh Kadyan & Anr***, decided on 28.07.2000 and ***B.V. Sivaiah and Ors vs. K. Addanki Babu and Ors***, (Civil Appeal No. 3809-3810 of 1996), decided on 17.07.1998 and pleaded that applicant be granted promotion to the rank of Gp Capt w.e.f. 09.03.2016, the date on which his batch-mates officers were promoted to Gp Capt (TS) with all consequential benefits.

7. Learned counsel for the respondents submitted that performance of the applicant was not up to the mark in comparison to his batch-mates, therefore, he was promoted to Gp Capt (TS) w.e.f. 01.07.2016 once his two Appraisal Reports with grading more than 7 were received. Air Force order (AFO) 06/2012 issued on 27.06.2012 with 'Appraisal reports of IAF officers', broadly lays down the procedure for rendering and submission of Appraisal Reports (ARs) of IAF officers. Annexure 6 of AFO 06/2012 states that "Reporting Officers in the appraisal channel are to inform the appraisee in writing if assessing 1 or 2 in any of the Professional and/or Behavioural traits in form P-57A (AR form of Group Captain Time Scale and below) or wherever awarding a grading of 5 or less in any of the mandatory

qualities in the AR or any unqualified remark/comment which conveys a definite and clear negative trait in pen picture of IO/RO/SRO". In the ARs from 2011 to 2015, considered for Group Captain (Time Scale) rank, the applicant has been assessed and reviewed by different Initiating Officer (IO)/Reviewing Officer (RO)/Senior Reviewing Officer (SRO) in the reporting channel and there was no adverse grading/remarks, hence, there being no provision to inform the applicant as per AFO 06/2012, applicant was not communicated for gradings being more than 5.0. Human Resource Policy (HRP) 01/2009 dated 12.01.2009 was superseded by HRP 03/2013 dated 28.08.2013 and therefore, HRP 01/2009 became null and void. HRP 01/2009 has the minimum performance criteria as '6' in the last three ARs and an aggregate of 18, which was amended to minimum of '6.5' in each year's AR with minimum '7' in at least two ARs aggregating a minimum of 33. Gp Capt (TS) is a senior rank granted after a long period of service (26 years) with certain attendant rights and privileges, which requires a minimum level of performance. The service reserves the right to alter the QRs for promotion as per operational imperatives and existing environmental factors and in accordance with service interests. The amendment was prospective, with two years lead time which provided adequate notice to all officers. AFO 06/2012 deals with 'Appraisal report of IAF officers' and HRP 03/2013 deals with 'Grant of substantive promotion up to the rank of Wg Cdr and Gp Capt (TS)'.

8. Learned counsel for the respondents further submitted that in ***Ganga Ram vs. Union of India*** (AIR SC 2178), the Hon'ble Apex

Court had observed that “*Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The state is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete.*” The QRs/provisions of HRP 03/2013 are uniformly applied to all officers considered for promotion to substantive rank of Flight Lieutenant, Squadron Leader, Wing Commander and Group Captain (TS). Hence, applicant’s contention that QRs of the previous HRP 01/2009 should be applicable to him and not the criteria laid down in HRP 03/2013 is not tenable.

9. Learned counsel for the respondents also submitted that the Minimum Performance Criteria (MPC) for the promotion to the rank of Group Captain (TS) and below has been stipulated in HRP 03/2013. Para 4 of HRP provides MPC for the promotion to all officers upto rank of Group Captain (TS) and according to MPC for grant of substantive promotion to the rank of Group Captain (TS), (i) Last five year’s report must have an aggregate of 33 with a minimum grading of at least 6.5 in each year’s AR and minimum 7 in two of the ARs in the last five years, (ii) The last AR is not an adverse AR and (iii) Requirement of latest AR, if due, is mandatory. There is no violation of Article 14 of the Constitution of India which is defined in AFT (PB), New Delhi judgment in ***Wg Cdr Deepak Dogra vs. Union of India***, decided on 12.05.2016. A Court of Inquiry was held to investigate the circumstances under which one small carton containing 10 rounds of

7.62 mm ammunition was found deficient during range firing practice on 28.01.2013 and Court of Inquiry has held applicant blame worthy and recommended disciplinary action and therefore, applicant was awarded 'Displeasure' by AOC-in-CMC, IAF on 14.07.2014. The applicant has not been denied promotion in the first instance based on the clause of censure, but because he was a chronic underperformer, due to which he did not have two AR grading of 7 and above. The grading of 7 was well below the peer group average for the past 13 years, which indicated that the bar stipulated was a patently achievable datum. This is borne out by the fact all his course-mates picked up the rank of Gp Capt (TS) without any delay. The applicant improved his performance thereafter, and was granted the rank of Gp Capt (TS) once two ARs with a grading of 7 and above were received. He pleaded for dismissal of O.A.

10. Heard learned counsel for the parties and perused the material on record.

11. It is pertinent to mention here that judgments relied up by the applicant in Para 6 above are not relevant in this case being based on different facts and circumstances and therefore, applicant cannot be given the benefit of aforesaid judgments.

12. We have perused the records and analysed the submissions of both the learned counsels and find that in the ARs from 2011 to 2015, considered for Group Captain (Time Scale) rank, the applicant has no adverse grading/remarks, hence, there being no provision to inform the applicant as per AFO 06/2012, applicant was not communicated

for gradings being more than 5.0. Human Resource Policy (HRP) 01/2009 dated 12.01.2009 was superseded by HRP 03/2013 dated 28.08.2013 . HRP 01/2009 has the minimum performance criteria as '6' in the last three ARs and an aggregate of 18, which was amended to minimum of '6.5' in each year's AR with minimum '7' in at least two ARs aggregating a minimum of 33. AFO 06/2012 deals with 'Appraisal report of IAF officers' and HRP 03/2013 deals with 'Grant of substantive promotion up to the rank of Wg Cdr and Gp Capt (TS)'. The applicant was lacking required grading in accordance to MPC for grant of substantive promotion to the rank of Group Captain (TS), i.e. (i) Last five year's report must have an aggregate of 33 with a minimum grading of at least 6.5 in each year's AR and minimum 7 in two of the ARs in the last five years, (ii) The last AR is not an adverse AR and (iii) Requirement of latest AR, if due, is mandatory. Therefore, applicant superseded in promotion and was approved/promoted only on achieving required ARs and on fulfilling the conditions of MPC, hence, there is no violation of Article 14 of the Constitution of India.

13. We also find that HRP 03/2013 was superseded by earlier HRP 01/2009 which laid down revised QRs and guidelines for grant of substantive promotion upto the rank of Wg Cdr and Gp Capt (TS). The provisions of this policy are applicable to all permanent commissioned officers except Medical and Dental Branches. Since the applicant was not meeting criteria as per HRP 03/2013, he was not promoted to the rank of Gp Capt on 09.03.2016 alongwith his batch mates rather he was promoted on 01.07.2016 when he met the required gradings.

14. In view of the above, we do not find any irregularity or illegality in granting promotion to the applicant to the rank of Group Captain (TS) w.e.f. 01.07.2016 on achieving required ARs/MPC. The O.A. deserves to be dismissed. It is accordingly **dismissed**.

15. No order as to costs.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: December, 2021
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