

RESERVED

Form No. 4
{See rule 11(1)}
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

O.A. No. 365 of 2022

Naik (GD/TA) Narayan Datt Punetha
By Legal Practitioner for the Applicant

Applicant

Versus

Union of India & Ors
By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>12.12.2022</u> <u>Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)</u> <u>Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)</u></p> <p>Judgment pronounced.</p> <p>O. A. No. 365 of 2022 is allowed.</p> <p>For orders, see our judgment and order passed on separate sheets.</p> <p style="text-align: center;">(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava) Member (A) Member (J)</p> <p>rathore</p>

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**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

ORIGINAL APPLICATION No. 365 of 2022

Monday, this the 12th day of December, 2022

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

Ex Ser No 12898401-N Naik (GD/TA) Narayan Datt Punetha, S/o Shri Ganesh Datt Punetha, Resident of Vill-Furti, P.O.-Lohaghat, Distt-Champawat, Uttarakhand-262524.

..... Applicant

Learned counsel for the: **Wg Cdr SN Dwivedi** (Retd), Advocate
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi.
2. Addl Dte Gen Territorial Army, General Staff Branch, IHQ of MoD (Army), 'L' Block, Church Road, New Delhi-110001.
3. Officer-in-Charge Records, The Kumaon Regiment, Ranikhet, PIN-900473, C/o 56 APO.
4. Pay Accounts Office (ORs), Kumaon Regimental Centre, Ranikhet, PIN-900473, C/o 56 APO.

..... Respondents

Learned counsel for the: **Shri Ashish Kumar Singh**, Advocate
Respondents. Central Govt. Counsel

ORDER**“Per Justice Umesh Chandra Srivastava, Member (J)”**

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

- (a) *To issue/pass any order or direction to the respondents to grant second service pension and gratuity to the applicant from the next day of his discharge, i.e. 01.07.2021, from 130 Infantry Battalion (Territorial Army) Ecological Kumaon and pay the accrued arrears.*
- (b) *To issue/pass any order or direction to quash or set aside the impugned order of Pay Accounts Office (ORs), Kumaon Regimental Centre, Ranikhet vide their letter No LG/II/130TA/ SER.PEN/ 12898401N Dated 11.03.2022 (Impugned order Annexure A-1) arbitrarily and unjustly denying the applicant his entitled second service pension for his services rendered with 130 Infantry Battalion (Territorial Army) Ecological Kumaon as a soldier from 01.11.2005 to 30.06.2021 (total embodiment service 15 years, three months and six days) before his final discharge from service.*
- (b) *To issue/pass any order or direction to quash or set aside the Addl Dte Gen Territorial Army, IHQ of MoD (Army) letter No 38974/GS/TA-3 dated 13.07.2005 and Govt of India, Ministry of Defence, South block, New Delhi letter dated 30.10.2018 which has been made basis for denial of second service pension to the applicant in so far as the same is issued in contravention to the Regns. Mp 182-186 of the Pension Regulations for the Army, Part-I, 2008 (Regn No 292 of 1961 edition).*

(d) To issue/pass any other order or direction that this Hon'ble Tribunal may deem fit, just and proper under the circumstances of the case.

2. Brief facts of the case are that the applicant was enrolled in the Kumaon Regiment of the Indian Army on 19.07.1985 and he was discharged from service in the rank of Naik w.e.f. 30.06.2003. Accordingly, he was granted service pension w.e.f. 01.07.2003 vide PPO No. S/047329/2003 (Army) dated 23.07.2003. He was re-enrolled in 130 Infantry Battalion (Territorial Army) Ecological Kumaon on 01.11.2005 in the rank of Sep and during the course of his service he was promoted to the rank of Naik on 01.12.2017. He was discharged from service w.e.f. 30.06.2021 in the rank of Naik after completion of terms of engagement, however, he was not granted service pension for the services rendered in 130 Infantry Battalion (Territorial Army) Ecological Kumaon for the reason that service pension in Ecological units is not permissible. Applicant preferred representation dated 09.02.2022 but it was turned down vide letter dated 11.03.2022 stating that under the provisions of ADG (TA)

letter dated 13.07.2005 and Government of India MoD (Army) letter dated 30.10.2018, applicant is not entitled to second service pension. It is in this perspective that this O.A. has been filed.

3. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 19.07.1985 and after discharge from service he was granted service pension vide PPO dated 23.07.2003. He further submitted that the applicant joined 130 Infantry Battalion (Territorial Army) Ecological Kumaon on 01.11.2005 as a soldier in the rank of Sepoy and during the course of his service he was promoted to the rank of Naik. He retired as Naik on 30.06.2021 (AN) on completion of terms of engagement after having rendered total embodied service of 15 years, 03 months and 06 days and thus, he is entitled to receive second service pension.

4. Learned counsel for the applicant further submitted that neither applicant was granted his entitled second service pension w.e.f. 01.07.2021 nor was he provided his

due service gratuity even after rendering more than 15 years service in the Territorial Army Ecological Kumaon. He further submitted that applicant's representation dated 09.02.2022 preferred for grant of second service pension was wrongly rejected vide letter dated 11.03.2022 citing reference of policy letter dated 13.07.2005 and 30.10.2018. It was further submitted that non grant of second service pension to the applicant contravenes the provisions stipulated in Regulations 182 to 186 of the Pension Regulations for the Army-2008 (Part-I) (Regulation 292 of 1961 Edition of Pension Regulations).

5. Learned counsel for the applicant further submitted that Para 1 and 2 of policy letter dated 11.06.1985 of the MoD (Army) provides grant of service pension to Territorial Army personnel. He further submitted that grant of service pension to Territorial Army personnel has also been clarified vide policy letter dated 30.10.1987. It was further submitted that Para 5 (2) of the Govt of India, MoD

(Pay/services) letter dated 03.02.1998 also provides for grant of service pension to the Territorial Army personnel.

6. Advancing his arguments, learned counsel for the applicant further submitted that Para 9 of the Territorial Army Act, 1948 specifically provides that Territorial Army personnel should be treated as Regular Army personnel. It was further submitted that Regulations 182 and 184 of Pension Regulations for the Army-2008 (Part-I) provide that an Army personnel should have 15 years embodied/qualifying service for grant of service pension and accordingly, the applicant having more than 15 years embodied service, is very much entitled to grant of service pension. It was further submitted that Para 292 of Pension Regulations for the Army-1961 (Part-I Chapter V) provides that the grant of pensionary awards to members of the Territorial Army shall be governed by the same general regulations as are applicable to the corresponding personnel of the Army except where they are inconsistent with the provisions of regulations in this chapter.

7. In support of his contention, learned counsel for the applicant has placed reliance on the Hon'ble Supreme Court judgment in the case of **Santosh Devi vs Union of India & Ors**, AIR 2016 SC 2213, Hon'ble Apex Court order dated 17.12.2021 passed in Civil Appeal No. 2275 of 2019, **Pani Ram vs Union of India & Ors**, Hon'ble Delhi High Court order dated 22.08.2012 passed in Writ Petition No 9088/2011, **Ausua Roy vs Union of India & Ors**, Hon'ble Principal Bench, New Delhi order dated 19.02.2010 passed in T.A. No 46/2010, **Maj SD Singh vs Union of India & Ors**, this Tribunal order dated 06.04.2021 passed in O.A. No. 562 of 2020, **Nk Daya Kishan vs Union of India & Ors** and this Tribunal order dated 25.05.2016 passed in T.A. No. 41 of 2011, **Col VK Bajpai vs Union of India & Ors**. He pleaded for grant of second service pension to the applicant keeping in view of aforesaid pronouncements.

8. Per contra, learned counsel for the respondents submitted that the applicant after discharge from Kumaon Regiment was re-enrolled into 130 Infantry Battalion

(Territorial Army) Ecological Task Force of Kumaon on 01.11.2005 as an ex-serviceman in the rank of Sepoy and during the course of his service he was promoted to the rank of Naik and was discharged from service on 30.06.2021 after completion of 15 years embodied service. He further submitted that 130 Infantry Battalion (Territorial Army) Ecological Task Force was established as a rehabilitation measure for the ex-servicemen (ESM) with the conditions that they would not be treated at par with a regular soldier in the Indian Army. It was further submitted that since as per Para 1 (d) (v) of Govt of India, MoD letter dated 31.03.2008 personnel enrolled in Territorial Army (Ecological Task Force) are not entitled to any pensionary benefits, therefore the applicant after discharge from Ecological Task Force was not granted service pension as claimed.

9. Learned counsel for the respondents further submitted that at the time of enrolment, the applicant was explained about his terms of engagement as applicable to a person

enrolled in Ecological Battalion in TA Enrolment Form and it was accepted by the applicant who also signed the certificate on 02.12.2005. It was further submitted that vide ADG (TA) Directorate policy letter dated 13.07.2005 it has been clarified vide Para 5 that service in Ecological Units of TA is to provide extra income to ex-servicemen after their retirement from regular service and no pension is applicable to personnel of Ecological Units for the service rendered in the unit.

10. Further submission of learned counsel for the respondents is that in view of policy letter dated 31.03.2008, since personnel of Ecological Units are not entitled to service pension, hence his request for grant of service pension was rightly denied vide letter dated 08.03.2022. He pleaded for dismissal of O.A.

11. Heard Wg Cdr SN Dwivedi (Retd), learned counsel for the applicant and Shri Ashish Kumar Singh, learned counsel for the respondents and perused the record.

12. The distinctive features of Territorial Army and Regular Army are significant in the present case. As per Army Order 77/1984, the Territorial Army is a part of the regular Indian Army. The role of Territorial Army is to relieve the regular Army from static duties, assist civil administration in dealing with natural calamities and maintenance of essential services in situations where life of the communities is affected or the security of the country is threatened, and to provide assistance to the regular Army as and when required.

13. Applicant being an ex-serviceman was re-enrolled in 130 Infantry Battalion (TA) Ecological Kumaon on 01.11.2005 and he was discharged from service on 30.06.2018 after embodied service of 15 years, 03 months and 03 days. After discharge from service, he submitted a representation dated 09.02.2022 for grant of his entitled second service pension but it was denied vide letter dated 11.03.2022 stating therein that he is not entitled to service

pension under the provisions of ADG (TA) letter dated 13.07.2005 and Govt of India MoD letter dated 31.03.2008.

14. Para 9 of Territorial Army Act, 1948, specifies that Territorial Army Personnel are subject to Army Act, 1950. For convenience sake, the aforesaid Para is reproduced as under:-

"9. Every officer, when doing duty as such officer, and every enrolled person when called out or embodied or attached to the Regular Army, shall, subject to such adaptations and modifications as may be made therein by the Central Government by notification in the Official Gazette, be subject to the provisions of the Army Act, 1950, and the rules or regulations made thereunder in the same manner and to the same extent as if such officer or enrolled person held the same rank in the Regular Army as he holds for the time being in the Territorial Army."

15. We further notice that Territorial Army personnel are liable to perform military duty when called for in terms of Para 7 of Territorial Army Act, 1948. For convenience sake, the aforesaid Para is reproduced as under:-

"7. Every officer or enrolled person shall be liable to perform military service:-

(a) When called out in the prescribed manner to act in support of the civil power or to provide essential guards;

(b) When embodied in the prescribed manner for training or for supporting or supplementing the regular forces; and

(c) When attached to any regular forces either at his own request or under the prescribed conditions."

16. In terms of Section 182 of Territorial Army Act, 1948, Territorial Army personnel are governed by the same general regulations as applicable to the regular Army. For convenience sake, the aforesaid Section is reproduced as under:-

"182. The Grant of pensionary awards to the service personnel shall be governed by the same general regulations as are applicable to the corresponding personnel of the Army except where they are inconsistent with the provisions of regulations in this chapter. These regulations shall not apply to those who are:-

(i) Civil Government servants holding permanent appointments.

(ii) Retired Civil Government servants."

17. Further, Para 186 of Territorial Army Act, 1948 provides that Territorial Army personnel below officer rank are eligible for grant of service pension after completion of

15 years embodied service. For convenience sake, the aforesaid Para is reproduced as under:-

"186. All Territorial Army personnel (other than civil government servants and civil pensioners), who have a minimum qualifying aggregate embodied service of 20 years in the case of officer and 15 years in the case of personnel below officer rank, shall be eligible for service pension"

18. We have also perused Regulation 292 of Pension Regulations for the Army, 1961 (Part-I) (Chapter V-Territorial Army Section I-General), as per which Territorial Army personnel are governed by the same general regulations as are applicable to the corresponding personnel of regular Army. For convenience sake, the aforesaid Regulation is reproduced as under:-

"292. The grant of pensionary awards to member of the Territorial Army shall be governed by the same general regulations as are applicable to the corresponding personnel of the Army except where they are inconsistent with the provisions of regulations in this chapter."

19. From the aforesaid it is clear that rules made for regular Army personnel are applicable to Territorial Army personnel also as they are subject to Army Act, 1950. Para

186 of aforesaid Regulations clearly lays down that Territorial Army personnel are eligible for grant of service pension after completion of 15 years service.

20. Pension Regulations for Army-2008 (Part-I) is Statutory Rule and Army HQ letter dated 13.07.2005 and Govt of India letter dated 31.03.2008 cannot supersede and shall not have retrospective application over it. Accordingly, the executive letter/instructions cannot supersede Para 186 of Pension Regulations for the Army as the Regulations have force of law. A question cropped up whether a rule made under Article 309 of the Constitution of India can be set at naught by an executive fiat. In regard to this we observe that it is settled law that executive fiat cannot override the statutory provisions as held by the Hon'ble High Court of Allahabad in Special Appeal No 1143 of 2001 decided on 28.07.2004, **Vijay Singh and Others vs State of UP and Others** in which it was held that-

"It is settled legal proposition that executive instructions cannot override the statutory provisions. Executive instructions cannot amend or supersede the statutory Rules or add something therein, nor the orders

*be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law, while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. In **Union of India vs Sri Somasundaram Vishwanath**, the Hon'ble Apex Court observed that if there is a conflict between the executive instruction and the rules framed under the proviso to Article 309 of the Constitution, the rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and law, the law will prevail. Statutory rules create enforceable rights which cannot be taken away by issuing executive instruction."*

21. In **Sukhdev Singh Vs Bhagatram Sardar Singh Raghuwanshi**, (1975) 1 SCC 421, the Hon'ble Apex Court has observed as under:-

"30. In this view a Regulation is not an agreement or contract but a law binding the corporation, its officers, servants and the members of the public who come within the sphere of its operations. The doctrine of ultra vires as applied to statutes, rules and orders should equally apply to the Regulations and any other subordinate legislation. The Regulations made under power conferred by the statute are subordinate legislation and have the force and effect, if validly made, as the Act passed by the competent legislature.

33. There is no substantial difference between a rule and a Regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A Regulation framed under a statute applies uniform treatment to everyone or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame Regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These Regulations impose obligation on the statutory authorities. The statutory authorities cannot

deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and Regulations. The existence of rules and Regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory Regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and the employee with no option to vary the conditions. An ordinary individual in the case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and Regulations."

22. Para 14 of this order clearly specifies that every officer or enrolled person in Territorial Army when holds the rank, shall be subject to the provisions of Army Act, 1950 and the Rules and Regulations made thereunder, equivalent to the same rank in the regular Army.

23. In ***Pani Ram vs Union of India & Ors***, Civil Appeal No 2275 of 2019 decided on 17.12.2021 the Hon'ble Apex Court has held that Territorial Army Personnel shall be governed by the same Pension Regulations as applicable to

regular Army personnel. Operative part of the aforesaid order is reproduced as under:-

"16. It could thus be seen that the grant of pensionary award to the members of the Territorial Army shall be governed by the same rules and regulations as are applicable to the corresponding persons of the Army except where they are inconsistent with the provisions of Regulations in the said chapter.

19. The communication of the Union of India dated 31st March 2008, vide which the President of India has granted sanction, itself reveals that the sanction is for raising two additional companies for 130 Infantry Battalion (Territorial Army) Ecological.

20. It is thus clear that the ETC is established as an additional company for 130 Infantry Battalion of Territorial Army. It is not in dispute that the other officers or enrolled persons working in the Territorial Army are entitled to disability pension under Regulation No 173 read with Regulation No 292 of Pension Regulations for the Army, 1961. When the appellant is enrolled as a member of ETC which is a company for 130 Infantry Battalion (Territorial Army), we see no reason as to why the appellant was denied the disability pension. x x x.

21. In case of conflict between what is stated in internal communication between the two organs of the State and the Statutory Rules and Regulations, it is needless to state that the Statutory Rules and Regulations would prevail. In that view of the matter, we find that AFT was not justified in rejecting the claim of the appellant."

24. With regard to signing of certificate by the employee to forgo pensionary benefits in Ecological Task Force, the Hon'ble Apex Court relying upon **Central Inland Water Transport Corporation Limited and Another vs Brojo**

Nath Ganguly and Anr has held in Para 23 of **Pani Ram case** (supra) as under:-

"23. As held by this Court, a Right to Equality guaranteed under Article 14 of the Constitution of India would also apply to a man who has no choice or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair, reasonable and unconscionable a clause in that contract or form or rules may be. We find that the said observations rightly apply to the facts of the present case. Can it be said that the mighty Union of India and an ordinary soldier, who having fought for the country and retired from Regular Army, seeking re-employment in the Territorial Army, have an equal bargaining power. We are, therefore of the considered view that the reliance placed on the said document would also be of no assistance to the case of the respondents."

25. Thus, It is evident that executive instructions cannot be issued in contravention to the rules framed under the proviso to Article 309 of the Constitution and statutory rules cannot be set at naught by the executive fiat. It is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is one. Thus, in the result it is clear that policy letters may be supplement to the

Rules/Regulations but these cannot supplant the Rules/Regulations having force of law as held by the Hon'ble Supreme Court in the case of ***Union of India vs Ashok Kumar Aggarwal***, AIR 9 (2013) 16 SCC 147. The operative portion of the aforesaid judgment is as under:-

"It is settled law that in the event of an inconsistency or conflict between a statutory provision and an executive instruction, the former must be given effect. Memorandums or executive instructions issued by the govt can be used only to supplement the statutory rules but not to supplant them."

26. Apropos above, we are of the view that the applicant is eligible for grant of service pension and gratuity for the services rendered by him in Territorial Army (Ecological Task Force).

27. In view of the above, the O.A. deserves to be allowed, hence **allowed**. The impugned orders passed by the respondents rejecting the claim of the applicant for grant of service pension are set aside. The applicant is entitled for grant of second service pension and gratuity for his services rendered in the Territorial Army as per Pension Regulations. Respondents are directed to give effect to this order within

four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% p.a.

28. No order as to costs.

29. Miscellaneous application(s), pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

Dated: 12.12.2022

rathore

(Justice Umesh Chandra Srivastava)
Member (J)