

RESERVED
Court No.1
(Sl. No.25)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 433 of 2019 alongwith M.A. No. 770 of 2019

Wednesday, this the 05th day of July, 2023

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

Group Captain BKE Jacob, Personal No. 21917-H, EDN Son of Shri KC Easo, previously on posted strength of Headquarters Central Air Command, Air Force Station, Bamrauli, Prayagraj-211012, Uttar Pradesh and presently posted at Ground crew, Examining Board, 3 Base Repair Depot, Air Force Station, Chandigarh, Chandigarh-160003.

.....Applicant

Ld. Counsel for the : **Col AK Srivastava (Retd)**, Advocate
Applicant

Versus

1. The Union of India, through the Secretary, GOI, Ministry of Defence, Air Headquarters, Vayu Bhawan, New Delhi-110011.
2. The Chief of the Air Staff, Air HQ Vayu Bhawan, New Delhi-110011.
3. AOP, Air HQ, Vayu Bhawan, New Delhi-110011.
4. AOC-in-C, HQ CAC, IAF, Bamrauli, Prayagraj-211012.
5. Group Captain S Jacob (21901) Edn Principal, Sainik School Tilaiya, Tilaiya Dam PO, Koderma District Jharkhand, Pin-825413.
6. Gp Capt HS Sidana, VSM (21908) Edn Principal, Sainik School Amaravathinagar, Amaravathinagar, Coimbatore Tamil Nadu, Pin-641041.
7. Air Comde BS Hora (2136) Edn Air Comde Edn, Air HQ West Block-6, RK Puram, New Delhi-110066.

...Respondents

Ld. Counsel for the : **Shri Amit Jaiswal**, Advocate
Respondents Central Govt Counsel, assisted by Shri Debashish Roy, Deputy Director, DPO-2, AOP Branch, Air Headquarters, New Delhi.

ORDER

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

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

(a) Issue/pass an order to quash/set aside the order of the promotion Board 1/2019 for promotion from Gp Capt to Air Commodore (EDN) and result thereof i.e. the select list published vide Air HQ signal No. Air HQ Signal No.2019/AIR HQ (VB)/PO/265 dated 03 April 2019 except Gp Capt BS Hora (21366) Edn, who is already promoted to the rank of Air Commodore. (Annexure A-1)

(b) Issue/pass an order to set aside the orders of Chief of the Air Staff rejecting the Statutory complaint of the applicant which was conveyed to the applicant vide HQ Central Air Command, Indian Air Force, Bamrauli, Prayagraj letter No CAC/C 2804/5/P2 dated 23 July 2019. (Annexure A-2)

(c) Issue/pass an order to call for the Records of Promotion Board 1/2019 (Gp Capt to Air Cmde) for Education Branch including the noting on file forwarded to the MoD.

(d) Issue/pass an order to call for records of AR of all officers empanelled in promotion Board 1/2019 (Education Branch)

(e) Issue/pass a order to promote the applicant to the rank of Air Commodore with all consequential benefits.

(f) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(g) Allow the application with cost.

2. Brief facts of the case are that the applicant was commissioned in the Indian Air Force (IAF) on 13.05.1992. During the course of his service he was promoted to the rank of Group Captain in PB-2/2013. While posted as C Edn O at HQ CAC applicant was sure that he was likely to be promoted to the rank of Air Cmde in PB-1/2019 for Edn Branch, but he was not promoted to the said post. Against his non empanelment to the rank of Air Cmde, he preferred statutory complaint dated 16.04.2019

which being rejected vide order dated 01.07.2019 and communicated to the applicant on 23.07.2019, this O.A. has been filed.

3. Learned counsel for the applicant submitted that the applicant was commissioned into Education Branch of IAF on 13.06.1992. He further submitted that during the course of his service he was promoted to the rank of Gp Capt on 28.10.2013 (PB-2/2013). His further submission is that despite being a deserving candidate for grant of higher promotion to the rank of Air Cmde, he was denied the same arbitrarily and his statutory complaint was also rejected in a most brazen manner with malafide intention by Chief of the Air Staff on 01.07.2019 usurping the power of Central Govt.

4. Learned counsel for the applicant further submitted that despite the applicant being very high in the appraisal report (AR), which constitutes 95% of the total marks, he was not promoted to the rank of Air Cmde which is not in consonance with the extant promotion policy. It was further submitted that there will not be any promotion board for next five years for Education Branch for promotion from Gp Capt to Air Cmde rank as no retirement is expected in normal course up to the year 2024 and no additional vacancies are likely to come up. It was submitted that the promotion board has brought down the applicant by not awarding discretionary board marks judiciously and objectively which resulted the applicant being placed at fourth position despite having highest AR marks and thus, his rightful and well deserved promotion was denied.

5. Learned counsel for the applicant further submitted that the applicant has a strong belief that close proximity of present Chief of the Air

Staff with Gp Capt HS Sidana worked in his favour. Chief of the Air Staff wanted Gp Capt HS Sidana who was at No. 4 position in AR Marks to be cleared for promotion and insisted on giving very high discretionary board marks, whereas the applicant was given low discretionary board marks to bring the applicant down from No. 1 position to No. 4 position. In support of his contention, learned counsel for the applicant has relied upon order dated 08.11.2004 passed by the Hon'ble Delhi High Court in WP (C) Appeal No. 1035 of 2004, ***AVM Harish Masand vs Union of India & Ors*** and order dated 18.05.2015 passed by AFT (PB), New Delhi in M.A. No 569/2015, ***AVM Sanjay Sharma vs Union of India & Ors***.

6. On the other hand, learned counsel for the respondents submitted that the applicant was commissioned in the IAF on 13.05.1992. It was further submitted that the applicant, against his non selection to the rank of Air Cmde in PB-1/2019 for Edn Branch, had preferred a statutory complaint dated 16.04.2019. In his application, he had stated that he had been adversely affected by the promotion board, despite being very high in the AR merit and his award of VSM/CAS commendation. He had apprehension that his name had been overlooked for promotion to favour other candidates in PB-1/2019 despite his higher AR marks vis-a-vis those who were earlier considered alongwith him in PB-2/2013. It was further submitted that the said statutory complaint was rejected keeping in view of Section 27 of the AF Act, 1950 and Para 622 (j) of Regulations for the Air Force and communicated to applicant vide letter dated 23.07.2019.

7. Learned counsel for the respondents further submitted that PB-2/2013 (Wg Cdr to Gp Capt) was held as per HRP 03/2008 whereas PB-

1/2019 (Gp Capt to Air Cmde) was held as per the promotion policy-Air Ranks dated 30.12.2015 and different set of ARs have been considered by the respective promotion boards. As both the promotion boards were guided by separate promotion policies, merit in a previous promotion board cannot be claimed as a matter of right for promotion in the subsequent promotion boards.

8. Learned counsel for the respondents further submitted that the promotion board for education branch has assessed and found that applicant did not perform as per the desired standard in the core area in comparison to other officers who have been empanelled by the board. It was further submitted that there was a marked dip in his performance when he was posted as Principal, Sainik School Rewari (core area) and he could not sustain himself in that environment which necessitated for professional acumen in educational branch. It was submitted that in the board proceedings for the year 2019 the board noted that in the last reckonable 10 years (from 2009 to 2018), the applicant spent approximately 05 years as Mess Secretary, Akash Mess from July 2009 to May 2015 in a non-core functional area. Accordingly, the promotion board assessed him in totality, with all the details of administrative/vigilance reports, medical reports, discipline/intelligence inputs and any other factors not known to the IO/RO/SRO.

9. Further submission of learned counsel for the respondents is that applicant was considered in the promotion board for the year 2019 and board members allotted the marks commensurate with his past profile and selection was made on comparative merit. It was further submitted that

there has been no discrimination with the applicant and no service wrong has been committed against him. In support of his contention learned counsel for the respondents has relied upon order dated 10.12.2018 passed by AFT (PB), New Delhi in O.A. No 1394 of 2018, ***Air Cmde SP Singh vs Union of India & Ors***, order dated 23.04.2019 passed by AFT (PB), New Delhi in O.A. No. 1265 of 2018, ***Gp Capt Sanjay Seth vs Union of India & Ors*** and order dated 03.10.2019 passed by the Hon'ble Supreme Court in Writ Petition No 3019 of 2017, ***Air Cmde Naveen Jain vs Union of India & Ors***. He pleaded for dismissal of O.A. stating that no injustice has been done to the applicant.

10. Heard Col AK Srivastava (Retd), learned counsel for the applicant and Shri Amit Jaiswal, learned counsel for the respondent No 1 to 4 assisted by Shri Debashish Roy, Deputy Director, DPO-2, AOP Branch, Air Headquarters, New Delhi and perused the record.

11. Having carefully considered the rival contentions of both the parties, the primary issue before us is, whether the applicant was unfairly and illegally denied promotion by the respondents by taking action in a manner that was in contravention to existing policies on the conduct of promotion boards and approval of results by the approving authority?

12. The promotion boards are conducted in accordance with 'Promotion Policy-All ranks' issued vide letter dated 30.12.2015. The merit list is prepared on the basis of AR marks and board marks with a weightage of 95:05. For promotion to the rank of Air Cmde, the average of numerical grading of available ARs during the last 10 years is taken into consideration. Board marks is the sum total of marks given by each

member present in the board meeting on a scale of 05 and is based on the factors of employability, leadership, personality and potential to hold the responsibility of the next higher rank as discerned from the reports raised on the officer in various fields and staff appointments held by him.

13. We have perused the board proceeding records on file pertaining to PB-1/2019 submitted in Court. Applicant was commissioned in the IAF on 13.05.1992 and during the service he was promoted to the rank of Gp Capt. While posted as C Edn O at HQ CAC, his promotion board was conducted for promotion to the rank of Air Cmde in PB-1/2019 but he was not empanelled only because board members downgraded applicant in awarding marks, though it is clear at the face of record that he was placed at number 1 in the ARs. Against his non empanelment to the rank of Air Cmde he preferred statutory complaint dated 16.04.2019. In the said statutory complaint the applicant has stated that he has been adversely affected by the Promotion Board (PB-1/2019), despite being very high (No. 1) in the merit and award of VSM and Chief of Air Staff Commendation Card, however, his statutory complaint was rejected vide order dated 23.07.2019 in a cavalier manner.

14. Promotion board No. 1/2019 was convened on 05th and 06th February, 2019 to select a panel of Gp Capts of Edn Branch to fill the forecast vacancies during the promotion year 2019-2020 in the rank of Air Cmde in the Edn Branch. The officers were considered by the board in accordance with Para 11 of the 'Promotion Policy-Air Ranks' dated 30.12.2015.

15. After having gone through the original record, we find that in the year 2019 there were (03) three vacancies for the post of Air Cmde (01xchain vacancy and 02x retirement vacancies). Against these three vacancies, six officers were considered for promotion from Gp Capt to Air Cmde. Merit list was prepared and based on marks obtained in AR plus promotion board, three candidates were selected from the list in order of merit. For convenience sake, extract of list in descending order of AR marks is reproduced as under:-

<u>Rk & Name</u>	<u>95% AR Weightage</u>	<u>ARxnumber of bd members</u>	<u>Bd Members Marks</u>	<u>G. Total</u>
Gp Capt BKE Jacob	83.88	1174.32	45.00	1219.32
Gp Capt BS Hora	83.76	1172.64	55.75	1228.39 ^{*(1)}
Gp Capt S Jacob	83.72	1172.08	54.00	1226.08 ^{*(2)}
Gp Capt HS Sidana	83.55	1169.70	55.25	1224.95 ^{*(3)}
Gp Capt PJ Mathew	80.80	1131.20	41.00	1172.20
Gp Capt RR Lall	80.09	1121.26	40.00	1161.26

*selected candidates.

16. From the aforesaid it appears that though the applicant was at number one in AR which holds 95% weightage, yet he was downgraded by board members just to benefit other candidates by awarding higher marks. Therefore, contention of the applicant that he was awarded less marks by the board members seems to be justified.

17. Respondents' contention is that in the last 10 reckonable years he was posted as Mess Secretary, Akash Mess (412 AF Stn, New Delhi from July 2009 to May, 2015) for approximately 05 years therefore, board members have downgraded him being in a non-core functional area. This

plea of the respondents is not sustainable as the applicant had never asked to be posted as Mess Secretary, Akash Mess.

18. We also find that Gp Capt HS Sidana was at 4th position as per AR merit but he has been moved to 3rd position by awarding him high disproportionate discretionary board marks so as to clear him for promotion against one of the three vacancies available, whereas applicant despite being at 1st position in AR was downgraded by board members to place him at 4th position. Respondents have alleged that there was dip in AR earned by the applicant being posted as Principal Sainik School, Rewari for the period from 28.10.2013 to 30.09.2014. In regard to this it may be submitted that if there was at all a dip in the said AR, it amounts to inconsistent and adverse AR and it was incumbent upon the concerned IO/RO/SRO to have apprised applicant but no such action has been taken by the respondents which indicates that the alleged dip was not a matter of setback to determine the entire record of the applicant with one stroke.

19. Reliance has been placed by learned counsel for the applicant in the case of ***AVM Harish Masand*** (supra). We have gone through the judgment passed by the Hon'ble Delhi High Court and we find that board marks were assailed in that case and the Hon'ble High Court in Para 19 has held as under:-

“.....but if Board Marks were used as device to upset the level age of combined effect of ARs and were either too low or too high so as to nullify the aggregate weightage of AR marks, judicial review of consideration which were into the process of awarding such marks must stand the test of scrutiny on rationality, reasonableness and doctrine of fair play.”

20. In the instant case applicant being at number 1 position in AR was placed at 4th position by awarding low marks by the board members which in our view is against the doctrine of fair play.

21. Setting aside the order dated 13.01.2016 passed in O.A. No. 64 of 2015 by the AFT (RB), Mumbai the Hon'ble Supreme Court in **Brig Nalin Kumar Bhatia vs UOI & Ors**, Civil Appeal No. 5751 of 2017 decided on 11.02.2020 has held as under:-

“18. The earlier policy followed for promotion to higher ranks in the Army from 1987 was revised in the year 2008 to introduce a quantification system to be followed by the Selection Boards. The policy governing promotions to higher ranks in the Army was issued on 04.01.2011 in supersession of the earlier policy of the quantification system. Primacy is given to the CRs as is clearly mentioned in the policy. There is nothing mentioned in the policy that an officer can be ignored for empanelment only on the basis of the value judgment in spite of his securing high marks on the basis of the other criteria. We are unable to agree with Mr. R. Balasubramanian that the Selection Board can recommend non- empanelment of an officer on the basis of their value judgment without reference to the other marks that are allotted to him. If the submission of Mr. Balasubramanian is accepted, the reason for the change in the method of evaluation of officers by the Selection Board to a quantification model would be meaningless. In the instant case, the Appellant was the only eligible Brigadier of his batch for empanelment to the rank of Major General with a meritorious record of service. He could not have been deprived of his empanelment only on the basis of value judgment of the Selection Board.

19. Another submission of Mr. Balasubramanian is that the Selection Board consists of senior officers of the Army and deference has to be shown to the discretion exercised by them in the matter of promotion. We disagree. Lord Acton said: - “I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases.

20. There is no presumption that a decision taken by persons occupying high posts is valid. All power vested in the authorities has to be discharged in accordance with the principles laid down by the Constitution and the other Statutes or Rules/Regulations governing the field. The judicial scrutiny

of a decision does not depend on the rank or position held by the decision maker. The Court is concerned with the legality and validity of the decision and the rank of the decision maker does not make any difference.”

22. It is further noticed that despite of all the alleged setbacks i.e. ‘dip’ in applicant’s performance at Sainik School, Rewari, the applicant maintained his number 1 position in AR status among the six officers in the zone of consideration by PB-1/2019 for a period of 10 years.

23. Additionally, the AFT (PB), New Delhi in **AVM Sanjay Sharma vs UOI & Ors** while deciding O.A. No. 363 of 2014 on 18.05.2015 has quoted the judgment of the Hon’ble Apex Court delivered in the case of **Dev Dutt vs UOI & Ors**, AIR 2008 SCC as under:-

“10 (h).....A discretionary power conferred on an administrative authority must be exercised by that authority reasonably. If the power is exercised unreasonably then there is an abuse of power and the action of the authority will be ultra vires.”

24. In view of the above, we are of the considered opinion that action of the respondents in awarding low points by board members is not justified keeping in view that applicant was maintaining his number 1 position in his AR for the last 10 years despite being posted to the appointment of a non-core functional area (Sainik School, Rewari) in which it is stated that there was dip in his performance. Scrutiny of the original records reveals that though there was slight dip in his performance while serving as Principal, Sainik School, Rewari, yet he maintained his position at No. 1 in the ACR profile.

25. Apropos above order dated 23.07.2019 rejecting statutory complaint of the applicant is set aside with directions to the respondents to award

board members marks to the applicant judiciously keeping in view the observations made in body of the aforesaid judgment and consider his promotion to the post of Air Cmde on the basis of his seniority. Since Gp Capt BS Hora has already been promoted to the rank of Air Cmde, applicant on being considered/promoted to the rank of Air Cmde be granted seniority w.e.f. retrospective date with all consequential benefits.

26. The aforesaid exercise shall be completed within a period of three months on receipt of a certified copy of this order.

27. No order as to costs.

28. Miscellaneous application(s), pending if any, stand disposed off.

(Vice Admiral Atul Kumar Jain) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 05.07.2023

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