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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.1250/2013 & CM No.2369/2013**

Date of decision : 26th November, 2013

AMARDEEP DABAS Petitioner

Through Mr.S.S. Pandey, Adv. with petitioner
in person.

versus

UNION OF INDIA AND ORS Respondents

Through Mr.Pavan Narang, Adv. with
Mr.Anish Dhingra, Adv. &
Ms.Vasundhara Chauhan, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case has assailed the judgment dated 4th February, 2013 passed in OA No.4 of 2013 Cpl. Amardeep Dabas Vs. Union of India & Ors. by the Armed Forces Tribunal. A challenge was laid before the Tribunal to an order dated 3rd December, 2012 communicated to the petitioner under cover of a letter dated 11th December, 2012 cancelling his candidature for commissioning as a flying officer in the Indian Air Force.

2. To the extent necessary, the facts giving rise to the instant petition

are briefly noted hereafter.

3. The petitioner was enrolled in the Indian Air Force on 22nd June, 2000 in the post of Airman. In June, 2001, he was appointed as Leading Aircraftman and in July, 2005, was promoted to the post of Corporal. Between 2001 to 2005, the petitioner was employed on security duties at a forward Air Base i.e. 11th Wing Air Force Station, located in Tezpur, Assam.

4. On 9th August, 2005, a court of inquiry was ordered by the respondents against the petitioner based on a complaint made by a civilian on the following grounds:-

“(a) Entering house of Shri Pinku Chetry, resident of Goraimari, in his absence, and forcing his wife to hand over a civil driving license belonging to Shri Sarkar.

(b) Committing forgery by submitting fake address certificates and other documents bearing signatures and stamps of different units/sections of 11 Wing, to District Transport Officer, Tezpur, for procuring driving licences for civilians.

(c) Committing forgery by making a fake Service Driving Licence, for the purpose of obtaining a Heavy Motor Vehicle (HMV) civil driving licence for Shri Pinku Chetry.

(d) Involvement in making Civil Driving Licenses for Civilians from DTO, Tezpur, on commission basis ranging from Rs.1000/- to Rs.2500/-.”

5. The court of inquiry was ordered to inquire into the involvement of the petitioner. It is undisputed that in this court of inquiry, on the 4th June, 2007, the Air-Officer-Commanding-in-Chief in Headquarters, Eastern Area Command (EAC), after considering the material against the

petitioner, awarded severe displeasure for 18 months. In addition, the petitioner's case was processed for change of trade on disciplinary grounds. His trade was changed from the Indian Air Force Police to Environment Support Service Assistant (ESSA). It is undisputed before us that the petitioner submitted his willingness to the change of trade as well. It appears that with effect from 1st July, 2009, the petitioner was promoted to the rank of Corporal as well.

6. In respect of these allegations, a show cause notice dated 16th January, 2007 was issued to the petitioner to show cause as to why he should not be removed from service under Section 20(3) of the Air Force Act, 1950 read in conjunction with Rule 18 of the Air Force Rules, 1969, on account of blameworthiness for the above allegations. The petitioner submitted a preliminary as well as a detailed reply to the notice. After considering the entire facts and circumstances of the case and the replies submitted by the petitioner, he was still found blameworthy by the AOC-in-C, EAC for the following lapses:-

- “(a) Entering house of a civilian i.e. Shri Pinku Chetry in his absence, and pressuring his wife to hand over a Civil Driving License belonging to Shri Sarkar, and
- (b) Involvement in making Civil Driving License for Civilians from DTO, Tezpur, on commission basis ranging from Rs.1000/- to Rs.2500/-.”

The AOC-in-C EAC, has therefore, awarded to the petitioner his

`severe displeasure' for 18 months on 4th June, 2007.

7. We may note that censure awarded to the petitioner as well as the change of trade from the Indian Air Force Police to ESSA, has not been challenged by the petitioner by way of any statutory appeal or by way of the present writ petition.

8. Apart from this censure, in respect of the loss of luggage by the petitioner, he was awarded a red ink entry on the 14th of October, 2008 and a black ink entry on the 28th May, 2009.

9. It appears that the respondents invited applications from eligible and desirous Airman to apply for the Ground Duty Officers Course (hereinafter referred to as 'GDOC'). The petitioner claims to have applied for 131, 132 & 133 Ground Duty Officers Courses. The petitioner could not clear the selection process for the 131 & 132 GDOC.

10. The instant case relates to the petitioner's application for the 133 GDOC and confines its challenge to the same. Applications for this course were invited vide a communication dated 8th December, 2011. The petitioner has claimed that he satisfied all eligibility requirements and had submitted application in compliance of the laid down procedure prescribed in the advertisement. It is also urged that as per the applicable procedure, the application was processed by the Board of officers and his case was recommended to the Command Headquarter for inclusion in the written examination. The petitioner submits that he not only qualified the

written examination but also the interview which was held by the Air Force Selection Board and he was included in the list of successful candidates. In the medical test conducted on 7th July, 2010, he was found medically fit. Despite the above, the petitioner's name did not feature in the list of successful candidates published on the website on 20th December, 2012. The petitioner was informed on 24th December, 2012 by his Commanding Officer that his name was not included in the list of successful candidates for such commissioning and that his candidature has been cancelled because of the afore-noticed censure awarded to him in the year 2007. The petitioner has also submitted that he learnt that the respondents had proceeded with the cancellation of his candidature based on para 38(f) of AFO 3/2008.

11. The challenge by the petitioner rests primarily on the ground that the petitioner's application and candidature was required to be processed in terms of AFO 39 dated 3rd November, 2006 wherein procedure for commissioning has been prescribed. It is urged that once the petitioner's candidature was cleared by the Board as well as Headquarters and that he had successfully undertaken not only the written examination but the interview as well as medical examination, no discretion was available to any other person to reject the petitioner's candidature on merit.

12. So far as the AFO 3 dated 18th January, 2008 is concerned, it is urged by Mr.S.S. Pandey, learned counsel for the petitioner that in terms

of Clause 38(a), the award of censure can be considered only once by the authority or the Board of Officers before whom the Airman's case came comes up for consideration after award of the censure. The submission is that the petitioner having crossed the stage of first consideration by the authority and his candidature having been approved by the Board of Officers, for this reason as well, no discretion lay with any authority for rejecting the petitioner's merit and that the petitioner was entitled to commissioning with the Indian Air Force in terms of the laid down procedure.

13. The issue which has been considered by the Armed Forces Tribunal and has been pressed before us, is as to the manner in which the respondents would be required to consider the candidature for Airman for commissioning in the Indian Air Force.

14. Given the limited issue which has been pressed before us, we may usefully advert to the prescription contained in Air Force Order 3 of 2008; which standardises aspects with regard to processing, conduct and conclusion of disciplinary and administrative action in respect of the Air Force personnel. As per the introduction to the Air Force Order 3 of 2008, it provides guidelines on important issues directly or indirectly relating to disciplinary/administrative actions which were not specifically laid down in any other Air Force publication. We may usefully advert to the paragraph 38 of the Air Force Order 3 of 2008 which is captioned

“Effect of Censure”, the relevant portion whereof reads thus:-

“Effect of Censure

38. (a) The award of Censure will be considered only once by the authority or Board of Officers before which the airman’s case first comes up for consideration after the award of Censure. The award shall be considered irrespective of the currency of the Censure.

(b) Censure awarded to an airman will be considered while deciding his suitability or otherwise for his promotion to the next higher rank only e.g. if an airman incurs Censure in the rank of JWO. Such award shall be considered for grant of acting rank of WO only. To determine suitability of the airman for promotion, the gravity of misconduct, the authority which censured the airman and the period for which the Censure was awarded would be taken into account.

(c) The award of Severe Displeasure and ‘Displeasure’ shall carry negative marks while considering an airman for promotion to the acting rank of JWO, WO and MWO. If such award of Censure has not been considered on on any earlier occasion. The basis for awarding negative marks shall depend upon the status of the authority that censured the airman and in case of Severe Displeasure, besides the authority, the period for which the Severe Displeasure was awarded will also be taken into consideration. If after taking into account the negative marks for the award of Censure, the airman is cleared for promotion, then, the currency of ‘Severe Displeasure’ will not be the ground to deter his promotion.

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(f) **The Censure shall also be taken into consideration by the competent authority for**

considering suitability of airmen for commissioning important assignments and courses postings abroad extension of service etc.”

(Emphasis supplied)

15. While the petitioner has placed reliance on para 38(a), the respondents have relied on para 38(f) afore-noticed both before the Armed Forces Tribunal as well as in the present proceedings. It is noteworthy that sub para (a) only states that censure will be considered only once. The instant case is concerned with accelerated commissioning into the officer rank of the Air Force, pursuant to a competitive examination and an interview which is prescribed. The issue, therefore, does not relate merely to eligibility of the person participating in the examination and the selection process but also, after his meeting the eligibility criterion and his successfully undertaking the written examination and interview, the suitability of such candidate for the appointment. It has thus been left open to the competent authority to consider suitability of the candidates to such commissioning as well. The scheme of para 38 shows that in sub para (f) it mandatorily provides that a censure given to a candidate, shall also be taken into consideration by the competent authority for considering suitability of the Airman for commissioning into the Air Force. The use of the expression ‘also’ clearly shows that the power under Section (f) is additional to the power

conferred on the authority in paras (a) to (e). Sub para (f) is strictly related to 'commissioning' with which we are concerned in the present case.

16. We may note that Air Force Order 3 of 2008 was issued w.e.f. 18th January, 2008 and was applicable to the Selection Process conducted by the respondents. This fact is undisputed. Therefore, the rigors of para 38(f) of Air Force Order 3 of 2008 had to be applied by the respondents.

17. In view thereof, the vehement submission of learned counsel for the petitioner that the censure could have been considered only by the authority who first considers the petitioner's application and recommends the same or the Board of Officers before whom Airman comes up after award of censure, is without any merit and has been rightly rejected by the Armed Forces Tribunal.

18. It is noteworthy that the original record of the case has been scrutinized by the Armed Forces Tribunal. The same has been produced before us as well. Given the detailed finding returned by the Armed Forces Tribunal with regard to the unsuitability of the petitioner based on his antecedent record, it is not necessary for us to repeat the findings.

19. Learned counsel for the petitioner has submitted that given the dicta of the Supreme Court dated 13th September, 1996 entitled ***Jahar Singh Vs. Union of India & Ors.***, the petitioner's candidature could not have been cancelled by the respondents. In this case, cancellation of

Jahar Singh's candidature for appearance for the PO & RMS Accountant examination was challenged. Jahar Singh had been granted unqualified and unconditional permission to participate in the examination and he had also been informed that he had qualified for the post. The Supreme Court noted that the respondents had been unable to produce any rule or circular which empowered the respondents to cancel his candidature. The Tribunal had set aside the order cancelling the candidature of the petitioner yet had not granted relief. It was in this background that the Supreme Court had accepted the appeal filed by Jahar Singh and had directed the respondents to grant the benefit to him. No principle of law as urged by the petitioner has been laid in this judicial pronouncement. The judgment has been rendered in the facts of the case we have noted heretofore.

20. It is an admitted position before us that the petitioner was awarded a censure. There is a mandate in para 38(f) of AFO 3 of 2008 that the censure awarded to him was mandatorily required to be taken into consideration by the competent authority for considering his suitability for commissioning. The competent authority would be the authority considering the petitioner's candidature for issuance of the offer of appointment. In the instant case, no offer of appointment had been issued to the petitioner.

21. It was at this stage that the respondents arrived at a finding of

unsuitability of the petitioner for commissioning and rejected his candidature. No right, therefore, would flow in favour of the petitioner, merely because the respondents had overlooked para 38(f) while considering his application and permitting him to participate in the examination and interview.

22. Learned counsel for the petitioner has urged that so far as the permanent commissioning of an airman in the Indian Air Force is concerned, the procedure, therefore is prescribed in the AFO 39 of 3rd November, 2006 and reliance has been placed on para 3. Mr.Pandey, learned counsel for the petitioner has urged that in terms thereof the petitioner's case having been recommended by his station-in-commander and the same having been scrutinized by the Board of Officers, no discretion remained with the authorities to cancel his candidature.

23. We may usefully extract the provisions contained in para (e) of sub para 3 of Armed Force Order 39 which reads as follows:-

“(e) Airman who incurred any Red Ink Entry in Sheet Roll, due to lack of integrity, moral turpitude, financial irregularities or such other act of misdemeanour or against whom criminal proceedings or investigation/inquiry of such a nature are pending which in the opinion of Commanding Officer make them unfit for commissioning, shall not be considered for commissioning. Further, airmen who incurred more than one Red Ink Entry for any type of offence in the preceding five years will not be considered for commissioning. Commanding Officers of such applicants will ensure that their applications are not forwarded.”

24. The stipulation in para (e) is clear and unequivocal. It renders Airmen who have incurred more than one red ink entry for any type of offence in the preceding five years, not eligible for consideration for commissioning. A mandate is given to the commanding officer to ensure that such applications of such applicants are not forwarded. Para (e) also stipulates that Airmen who have incurred any red ink entry in the sheet roll due to lack of integrity, moral turpitude, financial irregularities or such other act of misdemeanour which in the opinion of commanding officer make them unfit for commissioning, shall not be considered for commissioning.

25. It is trite that merely because a person has been brought on the merit list, does not give a person right for appointment. The appointing authority is within its right to examine the suitability of the person concerned for his appointment. The authority may be required to record reasons for effecting appointment of a person who is on the merit list.

26. The Tribunal has noted that the original file placed before it showed the reasons recorded for not appointing the petitioner. The Tribunal has noted that the record showed that the subordinate officer had erred in making the recommendations of the cases petitioner. The respondents have stated that the petitioner was permitted to apply for the written as well as the Air Force Selection Board interview due to

oversight of understanding of AFO 3 of 2008 by the Board of Officers completed at the station level. This was pointed out by the Directorate of Intelligence and remedial measures were taken resulting in cancellation of the petitioner's candidature. The record of the respondents includes the inputs received from the Directorate of Intelligence which are also against the selection of the petitioner.

27. The record of the respondents shows that an inquiry was conducted with regard to the recommendations of the petitioner's candidature by the Station Commanding Officer as well as the Board of Officers and the possibility of misinterpretation of the applicable Air Force orders which may have resulted in the recommendation of the petitioner's candidature.

28. The petitioner has placed before us the directions made by the respondents in the communication dated 13th December, 2012 reiterating the position that the procedure for commissioning of Airman as laid down in Air Force Order 39 of 2006 has to be read in conjunction with para 38(f) of Air Force Order 3 of 2008.

29. In view of the above, the challenge laid down by the petitioner is hopelessly misconceived and is hereby rejected.

The writ petition is dismissed.

CM No.2369/2013

30. In view of the writ petition having been dismissed, this application

does not survive for adjudication and is dismissed.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

NOVEMBER 26, 2013

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