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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.4659/2013

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Date of decision: 26th July, 2013

HARIPAL SINGH

..... Petitioner

Through: Mr. N.L.Bareja, Advocate

versus

THE CHIEF OF THE ARMY STAFF & ORS.

..... Respondents

Through: Mr.Anil Gautam, Advocate

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J (Oral)

1. By the instant writ petition, the petitioner has challenged the order dated 1st May, 2013 passed by the Armed Forces Tribunal in O.A.No.429/2012 rejecting the petitioner's challenge to the order dated 18th July, 2012 whereby the case of the petitioner for promotion from the post of Havildar to Naib Subedar from the date when Hav.K.N.Pandey being junior to the petitioner was promoted, has been rejected. The petitioner has also prayed for setting aside the assessment endorsed by the Reviewing Officer on the petitioner's ACRs for the year 2004 and 2005.

2. The petitioner was enrolled as Driver (MT) on 2nd October, 1982 and was thereafter promoted to the rank of Naik on 1st December, 1997 and thereafter on 1st

April, 2003 to the post of Havildar. It is the admitted position that the petitioner qualified the mandatory promotion cadre on 27th May, 2005 and claims that he became eligible to the rank of Naib Subedar in terms of policy decision dated 10th October, 1997 of the respondents. It is also an admitted position that so far as the criterion for promotion to the rank Naib Subedar is concerned, as per the policy decision dated 10th October, 1997, the last five ACRs of the personnel are required to be considered.

3. It is undisputed that out of these five ACRs at least three have to be in the rank of Havildar and in case of shortfall, the rest may be in the rank of Naik. The respondents have also specified that in three ACRs out of five reports which have to be considered, the personnel under consideration should have been assessed “at least above average” with a minimum of two such reports in the rank of Havildar. This, of course, is in addition to the individual having passed the promotion cadre course. As noted above, the petitioner was promoted to the rank of Havildar on 1st April, 2003 and earned the three requisite mandatory minimum ACRs only in the year 2005. In the above circumstances, the petitioner became eligible for consideration for promotion to the post of Naib Subedar only after having passed the mandatory promotion cadre course on 27th May, 2005.

4. It appears that in the ACR for the period 2004-2005, the Initiating Officer had graded the petitioner as “above average”. However, on the review by the

reviewing authority, the same was graded down to “high average” by the Reviewing Officer Col.Surender Sharma. The record placed before us by the petitioner shows that further in the year 2004 as well, the petitioner was graded “high average”. However, his reports from the year 2001 to 2003 in the rank of Lance Havildar were “above average”.

5. The petitioner was aggrieved by the review of his ACR by the Reviewing Officer for the year 2004-2005. He consequently filed a non statutory complaint dated 7th September, 2006 which was rejected by an order dated 26th June, 2008. This was assailed by the petitioner by way of a Writ Petition (Civil) no.8004/2008 before this court and was disposed of by this court vide an order dated 16th December, 2008 quashing the decision dated 26th June, 2008 with directions for re-examination of the matter by a different officer within a maximum period of three months from the date of the order.

6. After a detailed reconsideration, the petitioner’s non-statutory complaint was rejected by the respondents by an order dated 16th February, 2007 which was challenged by way of a statutory petition dated 20th June, 2009 addressed to the Chief of Army Staff which was returned by the respondents by an order dated 3rd September, 2009.

7. The petitioner challenged the order of 3rd September, 2009 before the Armed Forces Tribunal in O.A.No.345/2010. This challenge was rejected by an order

passed on 6th September, 2011. The operative part of the order, inasmuch as it has material bearing on the challenge in the present writ petition, deserves to be set out in extenso and reads as follows:

“Now coming to the question with regard to the ACR for the period 2004-05 is concerned, we have seen the ACRs of the petitioner prior to 2004-05 and we find that the incumbent used to get above average prior to 2004-05. He has been down graded from Above Average to High Average by the RO. We cannot go into the allegations as the RO who has reviewed his ACR during that period is not a party before us. However learned counsel for the petitioner modulated his arguments that his case has been considered for the vacancy of the period from December, 2005 to November, 2006. Therefore, his ACR must have been taken into consideration for the period upto 2004 only and not of 2005. If his ACR for the year 2005 is not taken into consideration perhaps he could have made it. He has also submitted that he made a statutory complaint also which was not considered by the respondents on the ground that meanwhile the petitioner has retired. Be that as it may, it is a fact that the petitioner was senior to K.N.Pandey and if the vacancy was of 2005 and the ACR upto 2004 was to be considered then the ACR for the year 2005 was not to be considered. We are not informed that what was the provision of relevant time for writing ACR and ACR of upto which period should be considered. Therefore, we direct that let the case of the petitioner be re-considered for the post of Naib Subedar on the basis of the ACRs especially with reference to the period 2005 but that depends upon the norms of the ACRs obtained at the relevant point of time. The petition is allowed in part and we direct the respondents to consider the petitioner as per the rules or orders bearing on the subject for the post of Naib Subedar as far as possible within a period of three months. No order as to costs.”

8. It appears that the respondents have thereafter considered the matter afresh and have passed the Speaking Order dated 18th July, 2012 which has been assailed by way of the present writ petition.

9. We find that the Tribunal's order dated 6th September, 2011 was accepted by both parties. The respondents revisited the entire matter again and have thereafter

passed a detailed order dated 18th July, 2012. This order was again challenged by the petitioner by a second petition before the Armed Forces Tribunal which came to be registered as O.A.No.429/2012 and rejected vide a judgment dated 1st May, 2013. Aggrieved thereby the petitioner has challenged the same before this court by way of the present petition.

10. Both parties rely on the various orders which have been passed by this court and the Armed Forces Tribunal. We have heard learned counsel for the parties. The primary challenge in the present writ petition is with regard to his grading in the ACR for the years 2004-2005. So far as the ACR for the year 2004 whereby the petitioner was graded as “High Average” is concerned, we are informed that the petitioner had challenge the same before the Armed Forces Tribunal by way of O.A.No.345/2010.

11. We have noted the above directions of the Armed Forces Tribunal. A reading of the order dated 6th September, 2011 passed by the Tribunal would show that no challenge was pressed with regard to the ACR for the year 2004 inasmuch as there is no mention of the same either in the contentions of either side or in the adjudication. It is also found that the petitioner has accepted the outcome by the judgment dated 6th September, 2011 of the Armed Forces Tribunal and did not assail it on any ground. In this background, the petitioner has lost the right to challenge the ACR of the year 2004. So far as the ACR of the year 2005 is

concerned, the petitioner has been challenged, as noticed above, his grading as “above average” by the Initiating Officer. However, he was reviewed by the Group Commander/CO Col.Surender Sharma and his grading was downgraded to “high average”. This is in consonance with the grading which was recorded in the year 2004. Be that as it may, the petitioner has alleged that his junior Havildar K.N.Pandey was directly working under the Reviewing Officer as a Driver and as such the Reviewing Officer was biased against the petitioner and was in his favour. The petitioner appears to have stated before the Tribunal that he has also been censured by the said Col.Surender Singh.

12. We have set out in extenso the findings of the Tribunal on this challenge. The Tribunal has noted that the allegations of malafide and bias against the Reviewing Officer could not be entertained or adjudicated for the reason that the petitioner had failed to make him party respondent.

The petitioner accepted the outcome of his challenge and has not assailed the final order dated 6th September, 2011.

13. Mr.Bareja, learned counsel for the petitioner submits that he has impleaded Col.Surender Sharma as party respondent in O.A.No.429/2012. In our view, the same is inconsequential, inasmuch as, the petitioner having challenged the grading awarded to him by the said officer in the year 2005 in his first application being O.A.No.345/2010, adjudication wherein had attained finality, could not have

legally raised/challenged the same by way of a second petition before the tribunal. Before us the petitioner has challenged his promotion on the exact ground which was raised before the Armed Forces Tribunal in the first application being O.A.No.345/2010. The findings therein have attained finality.

14. The respondents have considered matter in the light of directions made in the order dated 6th September, 2011 and had recorded a detailed speaking order dated 18th July, 2012. The material facts, which we have noted are set out in the order. The order notes that the petitioner passed the mandatory promotion cadre course only on 27th May, 2005 vide order dated 22nd June, 2005 and became eligible for the promotion of Naib Subedar only thereafter.

15. In these circumstances, the petitioner was considered by the Regimental Unit Promotion Board for the year 2005-2006 for promotion to the rank Naib Subedar but could not be selected by the Promotion Board since “he was lacking in the mandatory criteria of having a minimum of two ‘above average’ assessment in the rank of Hav. as assessment in two out of three available reports in the rank of Hav. were ‘high average’ ”.

16. This finding in the speaking order dated 18th July, 2012 is in consonance with the consideration which the respondents are required to undertake in terms of the policy decision dated 10th October, 1997 which we have noted above and which is undisputed.

17. We have also noted above the ACR grading of the petitioner for five ACRs before his consideration by the Board for the year 2005-2006. The petitioner's challenge to the above came to be rejected by the order dated 1st May, 2013 which is impugned before us. We find that the Tribunal has agreed with the reasoning recorded in the order dated 18th July, 2012. The findings of the Tribunal are in terms of the policy of the respondents. The respondents could not have ignored the petitioner's ACR for year 2004-2005 while considering the petitioner for promotion to the post of Naib Subedar for the year 2005-2006.

18. The impugned order and the action of the respondent cannot be faulted on any legally tenable grounds and the challenge thereto is misconceived.

This writ petition is, therefore, dismissed.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

JULY 26, 2013

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