

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

% **Date of decision: 11th March, 2020**

+ **W.P.(C) 634/2020**

SUBHASH CHAND

..... Petitioner

Through: Mr. Ankur Chhibber & Mr. Nikunj
Arora, Advs.

Versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Gaurav Rohilla, Adv. for R-1 to 3
with Mr. Paul, IAF.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

RAJIV SAHAI ENDLAW, J.

1. The petitioner, serving at the rank of Corporal with the Indian Air Force (IAF), upon being denied discharge from service, vide speaking order dated 26th December, 2019, to join as Assistant Professor (College Cadre) (Mathematics) with Department of Education, State of Haryana, has filed this petition (i) impugning the speaking order dated 26th December, 2019; (ii) impugning as arbitrary and unreasonable, Clause 6 of the Air Force Order (AFO) dated 8th December, 2017 bearing No.33/2017; and, (iii) seeking a writ of mandamus directing the respondents no.1 to 3 to issue discharge from service to the petitioner for joining the post of Assistant Professor (College Cadre) in the subject of Mathematics in Haryana.

2. The petition came up first before this Court on 17th January, 2020, when notice thereof was ordered to be issued. The petitioner, besides impleading the Union of India (UOI), Chief of Air Staff and Air Officer Commanding, had also impleaded Haryana Public Service Commission (HPSC) as respondent no.4 and the Principal Secretary, Department of Higher Education, Haryana as respondent no.5. On 12th February, 2020, the counsel for HPSC stated that HPSC had no role to play vis-à-vis the relief sought by the petitioner and in that view of the matter, HPSC was directed to be deleted from the array of respondents. The petitioner has filed amended memo of parties wherein the Principal Secretary, Department of Higher Education, Haryana continues to be a party, though none appears on its behalf. The respondents no.1 to 3 have filed a counter affidavit and to which a rejoinder has been filed by the petitioner. The counsels have been heard.

3. It is the case of the petitioner, that (i) the petitioner, after completing 10+2 education, applied for the post of Aircraftsman with the IAF and on being successful, was enrolled as Airman on 27th December, 2006; (ii) on 1st August, 2011, the petitioner was promoted to the rank of Corporal; (iii) the respondents encourage career progression for all Airmen and AFO No.14/2008 was introduced, providing for permission to Airmen to apply for civil posts / services under Central / State Government and Public Sector Undertakings in Group 'A' or equivalent posts on completion of seven years of service with the IAF; (iv) thereafter AFO No.4/2012 dated 31st May, 2012 was issued, which laid down the eligibility and procedure with respect to Airmen, for grant of permission to apply for civil posts / services under the Central / State Government / Public Sector Undertaking as well as grant of

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NOC; as per the policy contained therein, any Airman who had completed seven years of regular service, was eligible to apply to any Group 'A' post in Central / State Government / Public Sector Undertaking and made Airmen eligible for seeking discharge on being selected to the said post; (v) in supersession of earlier AFOs in force, AFO No.33/2017 was introduced, drastically changing the scenario for Airmen seeking better career opportunities; vide the said AFO No.33/2017, additional conditions on the eligibility criteria for applying in a civil post under the State and Central Government were introduced; (vi) on 25th September, 2017, Central University of Karnataka called for eligible candidates to apply for appointment *inter alia* to the post of Assistant Professor and the petitioner applied for permission to apply in response to the said advertisement and which permission was granted to the petitioner vide order dated 24th October, 2017; (vii) on 8th March, 2019, HPSC issued an advertisement for recruitment of Assistant Professors (College Cadre) in Higher Education Department, Haryana; the petitioner, on 14th March, 2019 sought offline permission to apply for the aforesaid civil post; however the respondents neither accepted nor denied the same; (viii) since the last date for applying for the said post was 15th April, 2019, the petitioner, being eligible, applied therefor on 1st April, 2019 and was issued an admit card; (ix) the petitioner, on 16th April, 2019 applied for post facto permission to apply for the aforesaid civil post but which was denied for the reason that the petitioner's skill grade is 'B' and as per AFO No.33/2017 the petitioner was thus not eligible for applying for the aforesaid civil post; (x) the petitioner, on 24th April, 2019 applied for skill upgradation exam which was to take place in August, 2019; (xi) the petitioner, in the meanwhile, appeared in the

preliminary examination held by the HPSC and successfully qualified the same and became eligible to appear in the main examination; the petitioner appeared in the main examination and was declared pass and was called for interview on 28th June, 2019; (xii) the petitioner, on 25th June, 2019 after receiving the call for the interview, applied for issuance of NOC but received no response thereto and thus, even without any NOC, sat for the interview scheduled by HPSC on 28th June, 2019; (xiii) the petitioner submitted application dated 19th September, 2019 seeking discharge from service but again no response was received thereto; (xiv) the petitioner filed W.P.(C) No.7204/2019 praying for quashing or setting aside of Clause 6 of AFO No.33/2017 as being arbitrary and unreasonable and for issuance of a writ of mandamus directing the respondents to grant post facto permission to the petitioner to appear for the interview for recruitment to the post aforesaid; (xv) during the pendency of W.P.(C) No.7204/2019, the respondents issued the impugned speaking order dated 26th December, 2019 rejecting the application dated 19th September, 2019 of the petitioner seeking discharge from service on the ground of the same being violative of AFO No.33/2017; (xvi) W.P.(C) No.7204/2019 was disposed of vide order dated 7th January, 2020 with liberty to the petitioner to challenge the speaking order dated 26th December, 2019; (xvii) in the interregnum, the petitioner has given a skill upgradation examination for upgradation of his skill level from 'B' to 'A' and in the result of the said examination, the petitioner has scored 119 marks i.e. one mark short of the cut off marks required for skill level 'A', which was 120 marks; (xviii) the respondents have deliberately scored the petitioner with less marks, to extract vengeance against the petitioner as the petitioner had dragged the respondents to Court;

and, (xix) vide letter dated 16th September, 2019 of the Department of Higher Education, Chandigarh, the petitioner has been granted six months extension from 10th July, 2019 to 9th January, 2020 for joining as Assistant Professor (College Cadre) (Mathematics).

4. The counsel for the petitioner today states that the time for the petitioner to join the Higher Education Department of the State of Haryana as Assistant Professor (College Cadre) (Mathematics) stands extended till today.

5. The counsel for the petitioner has argued, that (i) the petitioner, during his service with the Air Force, has been permitted to study till MA (Mathematics) and to obtain NET qualification; (ii) the petitioner is today working in the IAF as a driver of a Specially Operated Vehicle (SOV); (iii) when the petitioner in the year 2017 was granted permission to apply for the post of Assistant Professor, Central University of State of Karnataka, there is no reason why the petitioner has been refused discharge for joining as Assistant Professor (Mathematics) in the Department of Higher Education, Haryana; and, (iv) the petitioner has been denied permission to join the Higher Education Department of State of Haryana as Assistant Professor (College Cadre) (Mathematics) only for the reason that the petitioner has skill grade 'B', while as per AFO No.33/2017, to be eligible to discharge from service, skill grade 'A' is required.

6. On enquiry, it is informed that while the post held by the petitioner in the IAF is a group 'C' post, the post of Assistant Professor (College Cadre) (Mathematics) in the Higher Education Department of State of Haryana is a group 'A' post.

7. We have enquired from the counsel for the petitioner, the merits of the challenge by the petitioner to the speaking order dated 26th December, 2019, inasmuch as the same is in consonance with AFO No.33/2017 and as long as AFO No.33/2017 stands, the speaking order denying discharge to the petitioner cannot be found fault with.

8. Though the counsel for the petitioner has sought to contend that the petitioner has been wrongly awarded 119 marks instead of the requisite 120 marks for skill grade 'A' and also sought to contend that there is hardly any difference between 120 and 119 marks but no merit is found in either of the said contentions. Once the minimum marks for skill grade 'A' have been fixed at 120, the candidates securing 119 marks cannot claim to be in skill grade 'A'; if there is no difference between 120 and 119 marks, there would, on the same parity, be no difference between 119 and 118 marks and so on. Similarly, the plea that the petitioner was vindictively marked 119, is not found to be sufficiently supported by the pleadings. Thus, the only question to be considered is, the challenge by the petitioner to Clause 6 of AFO No.33/2017 on the ground of the same being arbitrary and unreasonable.

9. AFO No.33/2017 is titled "GRANT OF NOC FOR CIVIL POST:AIRMEN/NCs(E)" and Clauses 1 to 7, 19 and 20 thereof are as under:

"INTRODUCTION"

1. Airmen are enrolled in the IAF for an initial term of Regular Engagement (RE) for 20 years and NCs(E) are enrolled in the IAF to serve upto superannuation age of 57 years. Discharge of airmen/NCs(E) prematurely from the IAF, prior to completion of their regular engagement, affects the manning level in respective trades of the IAF and thus has an

adverse impact on the operational preparedness of the Air Force. Further, considering the fact that IAF is a technology oriented force dealing with sophisticated and specialized equipment, requirement of well trained and experienced manpower to handle such equipment needs no emphasis.

2. Minimum qualification criteria for enrolment of airmen in the IAF is 10+2 or equivalent except for Edn Inst and Musician trades. Pursuant to enrolment, airmen are imparted various forms of training, before they are deployed independently on operational duties. It is thus evident that IAF invests heavily on its workforce in moulding and grooming airmen to meet the operational needs of IAF. Each airman is trained for a specific role at a particular cost to the exchequer. The period of service should be commensurate to the expenditure, time and effort incurred on him by the nation for his training. It is also essential to man all the required posts at all levels (from worker upto supervisor) in order to achieve desired operational preparedness of the IAF at all times.

*3. Adequate opportunities are provided to airmen for their career progression within the Armed Forces. Besides time bound promotions up to the rank of Sgt, airmen are eligible for promotion to warrant rank on completion of 19 years of service along with other airmen of their trade and rank, based on merit. Eligible airmen are also considered for grant of Honorary Commission in the last year of superannuation. Airmen not eligible for promotion to higher rank are entitled for financial benefits in the form of **Modified Assured Career Progression (MACP)** scheme. Airmen with requisite qualification are eligible for Permanent Commission (PC)/Short Service Commission (SSC) in Flying/Tech/Non Tech branches of the IAF through AFCAT. Further, airmen in the age group of 34 to 42 years can appear for Service Entry Commission (SEC) in the IAF (these QRs are subject to change from time to time to keep in tune with the organizational requirements).*

4. In order to achieve the stated organizational aim, administrative policies have been framed to regulate premature discharge of air warriors from IAF, whilst, balancing their personal aspirations for better career prospects in civil life.

AIM

5. The aim of this Air Force Order is to lay down eligibility criteria and procedure in respect of airmen/NCs(E) for grant of permission to apply for civil posts/services (including CAPF) and issuance of NOC thereof.

EXECUTION

Eligibility Criteria

6. Airmen/NCs(E) of the IAF are eligible to apply for civil posts/services with prior permission from the Competent Air Force Authority. Airmen/NCs(E) including those on deputation shall be eligible for seeking permission to apply for the following category of posts:-

Category	Description of Post	Eligibility Criteria	Competent Authority to Issue NOC	Format of NOC
Category-I	Group A/I and Group B/II Gazetted posts through UPSC and State Public Service Commission only. (Recruitment advertisement must clearly mention the Group of the Post)	(a) Airmen with minimum Skill Grade A and seven years of service. (b) NCs(E) irrespective of length of service.	AOC, AFRO	Appendix A

Category-II	Any civil post in Govt/PSU/Private Sector	Airmen in the last year of residual service prior to expiry of their initial Regular Engagement (RE)/Extended RE provided they have submitted unwillingness/denied further extension of service.	AOC/Stn Cdr /CO#	Appendix B
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CO in the AFO refers to CO of an independent Unit.

7. Permission to apply for civil post is a prerequisite for grant of NOC under Category-I. Competent Authority for grant of permission to apply for civil posts would be the AOC/Stn Cdr/CO. **However, the authority for grant of NOC in the format as per Appendix A and Appendix B shall remain with the authority as prescribed in Para 6 above.**

19. Grant of permission to apply for civil post by AOC/Stn Cdr/CO shall not be construed as NOC, which shall be issued later. **Authority to issue NOC rests with the Competent Authority and shall be subject to service exigencies.** Request for NOC shall be rejected in case the individual has not obtained prior permission of his AOC/Stn Cdr/CO before applying for civil post. Request for NOC shall also be rejected in cases where in the AOC/Stn Cdr/CO has erroneously granted the said permission which is either based on the undertaking given by the individual as per **Appendix C** of this AFO or in contravention to the expressed provisions of this AFO. **In case, it is found at a later stage that individual was prima-facie not eligible for the said post, however had obtained permission of AOC/Stn Cdr/CO by rendering erroneous /false undertaking, it would render him liable for**

disciplinary/administrative action as per laid down procedure. In case permission has erroneously been granted for whatever reasons, the error shall be rectified by the Station/Unit, at the earliest and the prospective employer is to be approached for cancellation of the candidature of the airman/NC(E).

*20. Permission to apply for civil post as well as grant of NOC are privileges and hence cannot be claimed as a matter of right. **No provisional or conditional NOC is to be issued by the Stations/Units.***

10. The post of Assistant Professor (College Cadre) (Mathematics), to which the petitioner applied, is a Category-I post within the meaning of AFO No.33/2017 aforesaid.

11. Though grant of permission under AFO No.33/2017 as per Clause 19 thereof, is subject to service exigencies and per Clause 20 thereof, is a privilege and cannot be claimed as a matter of right, but the speaking order dated 26th December, 2019 gives only the reason of the petitioner not satisfying the condition of AFO No.33/2017 of having skill grade 'A' and does not give any other reason, of service exigency viz. of the services of the petitioner being required by IAF, for denial of permission to the petitioner. It follows that if merit is found in the challenge in this petition to Clause 6 of AFO No.33/2017 as arbitrary, the relief sought by the petitioner shall follow.

12. The contention of the counsel for the petitioner is, that the condition in AFO No.33/2017 introduced for the first time with effect from 8th December, 2017, of only Airmen with minimum skill grade 'A' being eligible to apply for permission, is arbitrary.

13. I have enquired from the counsel for the respondents, whether not an Airman with skill grade 'A', is better qualified than an Airman with skill grade 'B'. The counsel for the respondents replies in the affirmative. I have further enquired from the counsel for the respondents, that if that is so, why are the respondents not insisting on retaining those with a higher skill grade in the service instead of retaining those with a lower skill grade, by refusing permission to them to apply for / join a civil post. Attention of the counsel for the respondents is drawn to Part-IV titled 'Directive Principles of State Policy' of the Constitution of India, provisions whereof per Article 37 though are not enforceable but principles laid down wherein are nevertheless fundamental in the governance of the country and the State obliged to follow those in making laws. It has been enquired, whether not it is the duty of the IAF as State to enable a citizen to upgrade himself from a group 'C' to a group 'A' post, to be able to have much more dignity and pride in his vocation, than as a driver, even if of a SOV in the IAF. The society in general bestows more respect to an Assistant Professor (College Cadre) (Mathematics), than to a driver even if of a SOV in the IAF. The counsel for the respondents is reminded of the duty of the petitioner as a citizen, under Article 51A(j) of the Constitution, to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement and to Article 51A(k) imposing a duty on a parent or guardian to provide opportunities for education to his child or ward between the ages of six to fourteen years. It has been enquired, whether not the respondents as State, in their role as *parens patriae*, are coming in the way of the petitioner enhancing his social, if not financial status. Supreme Court, in **Charan Lal Sahu Vs. Union of**

India (1990) 1 SCC 613, relating to Bhopal gas leak disaster, held that the words *parens patriae* mean ‘father of the country’ were applied originally to the King and are used to refer to State’s obligation to protect the rights and privileges of its citizens in discharging its obligation.

14. The counsel for the respondents has contended that the petitioner, though required to seek prior permission, did not apply for the civil post after seeking prior permission and misrepresented to HPSC regarding his eligibility for the said post. It is argued that the petitioner for five years did not take the skill upgradation exam / test and was instead busy in appearing for other examinations, to prepare for joining a Category-I civil post. It is contended that no post facto permission is contemplated under the relevant AFO and if the petitioner, after having flouted the rules of his employment with the IAF, is granted the relief, the same would set the trend, with all Airmen wanting to leave the IAF, stranding the respondents’ service.

15. On enquiry, whether the duties of an Airman with skill grade ‘A’ are different from that of an Airman with skill grade ‘B’, the answer is in the negative. Also, the fact remains that the respondents, in the speaking order dated 26th December, 2019 have not pleaded any loss or harm to the IAF on the petitioner leaving the IAF and have only pleaded that the petitioner, as per AFO No.33/2017 is not eligible.

16. The counsel for the respondents has also drawn attention to page 145 of the paper book to contend that the online application for permission to apply for civil post / employment cannot be completed once the applicant fills his skill grade ‘B’. Attention is invited to page 157 of the paper book, being the letter dated 21st June, 2019 of HPSC to the petitioner informing

the petitioner that NOC from the appointing authority in case of subsisting service was required – otherwise the petitioner will not be interviewed. It is again contended that the petitioner has been misrepresenting to HPSC.

17. The respondents in their counter affidavit, in response to the challenge to Clause 6 of AFO No.33/2017, have pleaded that (i) in past few years, it was observed that Airmen are capable of clearing civil services exam conducted by UPSC/SPSC/Banking Sector, GATE, NET (UGC) and other national level exams, however they are not upgrading their skill level as Airmen are not serious and not paying any attention to upgrading of skill level to achieve perfection in their trade work where they have been trained intensively and also put up adequate length of service; they were not taking any interest to upgrade their skill level and are rather concentrating on applying for civil jobs; (ii) the skill of an Airman is a paramount requirement in handling highly sophisticated and specialized equipment and aircraft systems; (iii) the IAF has changed the policy for grant of NOC for civil posts as per the changing scenario and in line with the pay structure in the civil government sector; (iv) the intent to grant permission to the Airmen possessing skill level 'A' to apply for said civil posts is, to give incentive to the personnel who achieve high skill grade by involving themselves in hard work and gain more service knowledge; (v) the personnel who engage themselves dedicatedly towards the service and achieve higher skill grade, are entitled to get benefit of their career enhancement rather than the personnel who only desire career enhancement without dedication towards the service – this will spread a message amongst the Airmen to enhance their skill grade so as to enable them to enhance their career in civil services; (vi) the aim of AFO No.33/2017 is to motivate Airmen to enhance their

service knowledge as well as to advance their career in civil services; (vii) during 2015 to 2019 approximately 2706 trained Airmen have left the service before the expiry of the initial term of engagement of 20 years, which has resulted in a shortage of trained manpower to run the IAF smoothly and efficiently; and, (viii) for balancing the convenience, skill level criteria has been inducted in AFO No.33/2017, to achieve the stated organizational aim.

18. Though Article 14 forbids class legislation, it does not forbid reasonable classification; however to pass test of reasonable classification, the classification must be founded on intelligible differentia which distinguishes person that are grouped together from those that are left out of the group and that differentia must have a rational relation to the objectives sought to be achieved. I am unable to understand the aforesaid to be having any rationale nexus to the objective of AFO No.33/2017 viz. grant of NOC to Airmen for civil post. The IAF should not be concerned with the skill grade of the Airman, eligible to apply for NOC. If anybody should be concerned with the skill grade, it should be an eligibility criterion for the civil post, for applying whereof the Airmen are seeking NOC. It is understandable for the civil authority, while making Airmen eligible to apply for a post, insist on the Airmen having skill grade 'A'. However, I am unable to understand how it is the concern of the IAF and or in the interest of the IAF to allow better skilled Airmen to leave the IAF but not allow those with lesser skill to leave the force. No further explanation is forthcoming.

19. The counsel for the respondents has also referred to ***Amit Kumar Roy Vs. Union of India*** (2019) 7 SCC 369. The counsel for the respondents contends that the Supreme Court therein negated the contention of the Airmen, of having a fundamental right under Article 19(1)(g) to choose his place of employment, holding that though a citizen has a right to choose his employment but once has exercised the said choice, is bound by the rules of his service.

20. Supreme Court therein, as distinct herefrom, was concerned with an Airman who wanted to leave the Air Force before completing the mandatory period of service of seven years. From a reading of the judgment, there does not appear to be any challenge in that case to the rule prescribing minimum service of seven years for being eligible to seek NOC. The petitioner here has qualified on that account and has laid challenge *inter alia* to Clause 6 of AFO No.33/2017 prescribing eligibility / condition of skill grade 'A' for grant of NOC on the ground of the same being arbitrary.

21. The respondents along with their counter affidavit have also filed (i) copy of the order dated 13th September, 2019 in W.P.(C) No.3995/2019 titled ***Dilip Kumar Vs. Union of India***; (ii) copy of the order dated 12th December, 2019 of the Supreme Court in SLP(C) Nos.25509-25510/2019 titled ***Dilip Kumar Vs. Union of India***; (iii) copy of the order dated 7th December, 2017 of the Supreme Court in SLP(C) No.16448/2017 titled ***Union of India Vs. CPL BK Verma***; (iv) judgment dated 21st January, 2019 in W.P.(C) No.567/2019 titled ***SGT Pradeep Kumar Rai Vs. Union of India*** and other connected petitions, but has not referred thereto and thus the need to deal therewith is not felt. Only in passing, it is mentioned that in ***Union***

of India Vs. CPL B.K. Verma supra the dicta of this Court holding the rule of the IAF making eligible only those officers who had put in 15 years of service for study leave to be discriminatory, was set aside observing that the Courts may not be satisfied with the policy but if any modifications are to be made, it is for the IAF to take a call. I am afraid, the same would also have no application to the facts of the present case where the respondents have been unable to plead or contend any rational nexus for the condition of upgradation to skill grade 'A' for grant of NOC to Airmen for applying to a civil post.

22. The counsel for the petitioner, to meet the argument of the counsel for the respondents of the petitioner having flouted Rules and having not sought prior permission, has drawn attention to *CPL N.K. Jakhar Vs. Union of India* 2009 SCC OnLine Del 3317 (DB) holding that not applying through proper channel relates to a procedure of the law and not the substance of the law and unless otherwise mandated by the language of a procedural law which leaves no scope to interpret a rule governing a procedure as mandatory, every attempt has to be made to read a rule relating to procedure as being directory and not mandatory. Reliance in this context is also placed on (i) *Charan Singh Bhanvariya Vs. Union of India* 2010 SCC OnLine Del 2508 (DB); (ii) *Rajiv Ranjan Vs. Union of India* 2016 SCC OnLine Del 3539; and, (iii) order dated 28th July, 2016 in W.P.(C) No.5145/2016 titled *CPL Ranjeet Kumar Vs. Union of India* (SLP(C) No.22476/2016 preferred whereagainst was dismissed on 2nd December, 2016).

23. The condition of having skill grade 'A' in Clause 6 of AFO No.33/2017 is thus not only found to be having no relation to the objective

thereof, of granting NOC to Airmen for civil posts, but is also found to be arbitrary and unreasonable and is thus struck down to the said extent.

24. The petitioner otherwise fulfills the conditions of AFO No.33/2017 and no other reason of service exigency or otherwise has been given in the speaking order dated 26th December, 2019 for denying permission to the petitioner, serving as Corporal and driving SOV in the Air Force, as Assistant Professor (College Cadre) (Mathematics) in the Education Department of State of Haryana. The refusal of permission by the respondents to the petitioner to improve his status in life is also found to be a misapplication of AFO No.33/2017 in governing its personnel and contrary to Part-IV of the Constitution of India prescribing the Directive Principles of State Policy.

25. The petition thus succeeds and is allowed. A writ of mandamus is issued to the respondents no.1 to 3, to forthwith discharge the petitioner from service, for joining the post of Assistant Professor (College Cadre) (Mathematics) in the respondent no.4 State of Haryana.

26. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

SANGITA DHINGRA SEHGAL, J.

MARCH 11, 2020

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