



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

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Date of decision: February 19, 2024

+ W.P.(C) 5273/2021

(56) WG CDR VIDHU SINGH

..... Petitioner

Through: Mr. Ankur Chhibber and
Mr. Anshuman Mehrotra, Advs.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Harish Vaidyanathan Shankar,
CGSC with Mr. Srish Kumar Mishra,
Mr. Alexander Mathai Paikaday and
Mr. Krishnan V., Advs. for UOI with
Group Captain CUV Rao &
Wg. Cdr. Ashish Kakkar

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

V. KAMESWAR RAO, J. (ORAL)

1. The challenge in this writ petition is to an order dated March 16, 2021, passed by the Armed Forces Tribunal, Principal Bench, New Delhi ('AFT', for short) in Original Application No.1967/2020 ('OA', for short), seeking quashing of the HR Policy ('HRP', for short) dated January 16, 2019.

2. According to the petitioner and as contended by Mr. Ankur Chhibber, the AFT vide order dated March 16, 2021 has disposed of the OA by directing the respondents to grant the petitioner another chance to appear before the Third Board of Officers and declined to interfere with the HRP dated January 16, 2019.

3. The facts as noted from the record are that the petitioner was commissioned as a Short Service Commissioned Officer ('SSC



Officer', for short) on January 02, 2007 in the Aeronautical Engineering Branch of Indian Air Force and trained on the Mirage 2000 Aircraft in the Aircraft Stream. According to her, she has unblemished service record with various awards and appreciations.

4. It is her case that, after she completed the initial ten years of service, four years extension was granted. At the time of filing of the application, she had completed 15 plus years of service.

5. The petitioner's case before the AFT was that, her case for grant of Permanent Commission ('PC', for short) was to be considered as per HRP 21/2006 dated May 25, 2006 whereas her case was considered as per HRP dated January 16, 2019, whereby new pre-requisites were added for the very first time, which were to be complied with for grant of PC, which are:-

- a. First a candidate should now possess a minimum score in the mandatory course as an average of 6 CGPA.
- b. Second condition was that he or she should also have a valid category of at least 'Cat C'.
- c. Minimum Average of 7 in last 5 ARs.

Whereas, the policy for extension of service or grant of PC in vogue at the time of petitioner's commission into the force was:-

- i. The required 'ACR grading' of 6.5 in 3 ARs for either extension or permanent commission;
- ii. A fit 'medical category'.

6. It was the case of the petitioner that the two new pre-requisites in the HRP of 2019, have been included / added in an arbitrary manner and a sudden change was brought with regard to the rules of the game.



7. It was the case of the petitioner that the new qualitative requirements, in fact, pertained to examination and courses which were already undertaken by an officer in the initial years of service and these courses were not given any weightage at that point of time, as they were merely in-service mandatory courses for professional growth. However, all of a sudden by prescribing a minimum qualitative requirement of mandatorily having 6 CGPA, the right which had accrued to the petitioner for consideration at the time of recruitment, HRP 21/2006 has been suddenly changed. It was also stated that, because of the arbitrary implementation of the new HRP, the petitioner has lost her three chances guaranteed under the policy for consideration. It was also stated that the petitioner's claim was put for consideration before the Board of Officers ('BoO', for short) for grant of PC within one month and fifteen days of the HRP, 2019 coming into force on January 16, 2019.

8. According to the petitioner, the first BoO was held in March 2019. The petitioner was held not qualified for want of 'Cat-C'. It was her case that it was not at all possible to be category "C" within one and a half month after the policy coming into effect on January 16, 2019. The petitioner appeared in the requisite examination and attained the 'Cat-C' certificate on July 25, 2019. Even thereafter in May 2020, the Second BoO has denied the benefit on the ground that she did not come within the merit list as per the vacancy.

9. In substance, it is her case that the merit criteria evolved on the basis of certain additional eligibility criteria brought into force with



regard to a course undertaken in the initial period of recruitment is unsustainable and is an arbitrary decision.

10. The AFT was of the view that, insofar as the HRP dated January 16, 2019 is concerned, it is a purely an administrative and executive decision, based on the requirement of service and the same cannot be the subject matter of judicial review. That apart, in the Second Board held on May 2020, 47 candidates were considered. The petitioner's position was at Sr. No.29 and as per the merit list all the available eight vacancies were filled up. In other words, her merit was much below the last selectee at Sr. No.8 and as such, she was rightly not granted the relief as has been prayed for. The AFT after hearing the parties disposed of the OA by stating in paragraphs 8 and 9, as under:

“8. In our considered view it is a well settled principle of law that judicial review of an executive instruction or a policy decision, which are based on a highly technical and scientific expert opinions, is normally not permissible, and until and unless it is found to be based on arbitrary or irrational consideration, contrary to constitutional mandate or statutory provisions, in the absence of these facts, judicial review of an executive policy should not be made. It is a well settled principle of law that the domain of policy making rests exclusively with the executive authorities and they are beyond the scope of judicial review until and unless they are found to be arbitrary or in violation to statutory rules or regulations. In this case except for contending that the policy operates harshly to the applicant, nothing has been brought to our notice to hold that the policy is unsustainable in law. Merely because it is inconvenient or harsh to the applicant, we cannot interfere with the policy particularly when as per the requirement of the policy the applicant not only gave her willingness to participate in the selection process but also got herself categorized by



*obtaining 'Cat-C' certificate in accordance to the policy. That being so the first ground canvassed to the effect that policy is unsustainable is rejected. However, having held so we find that in the policy in question an incumbent officer is granted three chances for consideration. Granting three chances for consideration is nothing but a thinking by the policy makers to the applicant that a candidate should get a fail' and reasonable opportunity for consideration and merely because on one or two occasions the candidate has been unsuccessful but if he or she has continued in service she may be granted one more opportunity. According to learned counsel for the respondents once the candidate has participated in the process of selection and when the note to the policy indicates that the candidate who is in service would only get the benefit of consideration, we are required to advert and consider this question in view of the order based in the case of **Suprita Kaur** (supra) rendered by a coordinate Bench of this Tribunal. We will advert to consider this question at a later stage. At this stage, we feel that the policy makers, when they changed the policy on 16th January, 2019, were conscious of the fact that the change in the policy may have adverse effect and may act in a manner which may be detrimental to the interest of some of the officers at the time of implementation and it seems to be the only reason why consideration for three chances has been indicated in the policy so that the officer gets time to improve his or her performance. Admittedly, for the purpose of improving the performance the applicant has to be in service and once he or she is out of service, the question of consideration would not be there. That being so, in our considered view when we analyze the facts of the applicant's case in the backdrop of her grievance, we find that the policy came into force on 16th January, 2019 and the applicant's first consideration was made in March 2019. At that point of time she was held ineligible as she did not possess the 'Cat-C' categorization certificate. However, she obtained this certificate before the second consideration was made in her case sometime in May 2020 and it is clear*



from the record that the applicant appeared and cleared the 'Cat-C' certificate examination on 25th July, 2019. When the second consideration was made in May 2020, she fulfilled all the conditions but 011 merit on account of non availability of vacancy she was not granted the benefit of PC.

*9. Now, the sale question before us is as to whether in the peculiar facts and circumstances of this case the applicant is entitled to a third chance for consideration or not? Even though based all Note-1 to the policy in the case of **Suprita Kaur** (supra) a Coordinate Bench of this Tribunal of which one of us (**Hon'ble Mr. Justice Rajendra Menon**) was a member has held that once the candidate is out of service he or she cannot be considered for grant of Pc. This was done by us not only based on the facts and circumstances of that particular case but also on account of the fact that the applicant ill that case invoked the jurisdiction of this Tribunal just five days before her release from service and as she had been released from service more than three months back, in the facts of that case the benefit was not granted. However, the case in hand is entirely different. The applicant invoked the jurisdiction of this Tribunal well in time, immediately after the impugned order was communicated to her and by virtue of an interim protection granted to her by the Delhi High Court she continues to be in service even as on that day. That being so, it is a case where the applicant still continues in service and considering the fact that the policy in question contemplates a provision for grant of three opportunities, interest of justice requires that the case of the applicant should be placed before the next available Board for consideration and based on the decision of the Board or its recommendation further action should be taken. Till such consideration is made, the applicant may be permitted to continue in service so that the period she has been in service till consideration is evaluated for the purpose of assessing her merit when consideration is made by the Board. We may clarify that the direction given for consideration of the*



*applicant for the third chance has been made by us looking to the fact that the applicant continues to be in service by virtue of the interim protection granted to her and looking to the fact that the Hon'ble Supreme Court while dealing with the issue of granting PC to women officers in the Armed Forces particularly in the case of **Annie Nagaraja** (supra) has emphasized and laid down the principle that consideration for grant of PC should be done in an objective and reasonable manner and the consideration should not be an empty formality. Even though, we have not made any observation with regard to the manner in which consideration has been made but taking note of the spirit of the law laid down by the Hon'ble Supreme Court and the facts and circumstances of this case, we deem it appropriate in the interest of justice to give the third opportunity to the applicant to be considered for grant of PC."*

11. Mr. Chhibber submits that the HRP having been implemented w.e.f. January 16, 2019, the petitioner could not fulfil the requirement of possessing 'Cat-C' certificate though in similar circumstances, sufficient time was given to the officers to qualify the new eligibility condition which has been prescribed by the respondents, in respect of similar scheme. Whereas, no such procedure was evolved for getting the 'Cat-C' certificate. He states, denial to give sufficient time for attaining category "C", the BoO held in March 2019 should have been held as per the eligibility conditions laid down in HRP 21/2006. Insofar as the Second BoO is concerned, the submission of Mr. Chhibber is that the condition of having 6 CGPA is also an arbitrary provision and the petitioner appears to have been found unmerited on this ground only. He seeks the PC of the petitioner in terms of the prayer as made before the AFT.



12. On the other hand, Mr. Harish Vaidyanathan Shankar, learned CGSC appearing for the respondents would justify the order of the AFT by submitting that pursuant to the directions of the Tribunal, the case of the petitioner was considered by the Third BoO held on May 2021, but she did not make it to the merit list for grant of PC. He justified the HRP dated January 16, 2019. According to him, as the petitioner did not had category “C”, her case for PC was rightly rejected in first BoO. Insofar as the second BoO is concerned, he submits as the petitioner did not achieve the requisite merit, she was not given the PC.

13. During the course of hearing, we had perused the record produced by the respondents with regard to the first and second BoO. Insofar as the first BoO is concerned, as per Minimum Performance criteria for consideration, Uniform Qualitative Requirement (QRs) in the HRP dated January 16, 2019, the petitioner did not meet the requirement of ‘Cat-C’ certificate, which is prerequisite for consideration of PC.

14. During the course of hearing, Mr. Vaidyanathan’s submission is that the ‘Cat-C’ course was an option available to an Officer. That is it was not the obligation of the employer to send an officer for ‘Cat-C’ course. The petitioner having, not opted to undergo ‘Cat-C’ course, the same has resulted in her non-selection in the first BoO held in March 2019, is appealing.

15. Insofar as the Second BoO is concerned, we have perused the record and proceedings of the Board to find that all the candidates have been assessed on similar criteria. We find that, the petitioner was placed at Sr. No.29 of the merit list, much below the last selectee at Sr. No.8.



It is neither the case of the petitioner nor contended by Mr. Chhibber that the assessment undertaken by the Second BoO was arbitrary. Hence, the challenge to the proceedings of the Second BoO is not tenable. Insofar as the Third BoO is concerned which was undertaken in terms of the order of the AFT, neither any challenge is made nor any submissions made in that regard, the same is not gone into.

16. Mr. Chhibber has relied upon the judgment of the Supreme Court in the case of *Lt. Col. Nitisha & Ors. v. Union of India & Ors., W.P.(Civil) No. 1109/2020*, to support his submissions. We may note that the above referred judgment of the Supreme Court is with respect to the grant of PC at par with the male counterparts and not on the merit of the conclusion of the Board. Hence the judgment is not applicable to the facts of this case.

17. We are of the view that no fault can be found with the order passed by the AFT. The writ petition being without any merit, the same is dismissed.

V. KAMESWAR RAO, J

SAURABH BANERJEE, J

FEBRUARY 19, 2024/aky