

FORM NO. 21**{SEE RULE 102(1)}****ARMED FORCES TRIBUNAL , REGIONAL BENCH, KOLKATA****APPLICATION NO : O. A NO. 26 OF 2013****ON THIS 30th DAY OF AUGUST, 2013****CORAM****HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)****HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)**

Havildar Vijay Pal,
332 Medium Regiment,
C/O 99 APO

.....Applicant

-VS-

1. Union of India
Through Secretary,
Ministry of Defence,
New Delhi-110 011
2. The Chief of Army Staff,
Through Adjutant General (ADGPS)
Army Headquarters
New Delhi – 110 011.
3. The Director General of Artillery,
Army Headquarter,
New Delhi – 110 011
4. The Senior Record Officer,
Artillery Records,
Nasik Road Camp,
Maharashtra – 422 102.
5. Colonel Tarun Kumar
C/O Military Secretary,
Army Headquarters,
New Delhi – 110 011.

..... Respondents.

For the petitioner : Major K Ramesh, Advocate.
For the respondents : Mr.B K Das, Advocate. (Resp. Nos. 1 to 4)

ORDER**Per HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)**

The applicant is a serving Havildar in the Army, Regiment of Artillery (for short Arty.), who is currently posted in 332 Medium Regiment which is a newly raised Artillery Unit. Being aggrieved with his supersession for promotion to the rank of Naib Subedar, the applicant has filed this OA which was taken up for hearing.

2. The brief facts of the case are that the applicant was enrolled in the Army on 26th August, 1993 in the Regiment of Artillery and was posted in 38 Medium Regiment. He was promoted to the rank of Naik with effect from 15.12.2001 and subsequently to the rank of Havildar from 10.09.2007. The applicant has all through been in 38 Medium Regiment, which was his parent Unit. As per policy in the Regiment of Artillery, the personnel once assigned to one particular regiment/unit have to ordinarily remain in that Unit and are promoted to higher ranks as per vacancy which occurs within that Unit. However, there are variations whenever on account of expansion of Army, new regiments/units are raised and personnel of different ranks and service brackets are required to be posted to make such newly raised units functional.

3. In the present case, we find that a new unit (332 Medium Regiment) in the Regiment of Artillery was in the process of 'raising' during August, 2011. The Artillery Records (respondent No. 4) directed 38 Medium Regiment to post one Havildar of Gunner Trade between service bracket of 16 to 20 years to this newly raised unit (332 Medium Regiment). Such order was issued by a letter dated 02.08.2011 that originated from Artillery Records (Annexure R-1). In accordance with the said instructions, the Commanding Officer (CO) of 38 Medium Regiment (Respondent No 5) selected the applicant to be posted out from 38 Medium Regiment to 332 Medium Regiment. The applicant submits that, although he was within the promotion zone, he was deliberately chosen to be posted out from his parent unit i.e. 38 Medium Regiment to 332

Medium Regiment in clear violation to policy as stated in Artillery Records letter dated 01.06.2010; copy was attached for compliance of the donor unit (38 Med Regt) by Artillery Records with instruction for posting order issued vide letter dated 02.08.2011 (Annexure R-1).

4. The main ingredient of the *ibid* policy stipulates that an individual who is posted out from his parent unit to a new unit should not be in the unit promotion zone as per his seniority for another two years. The applicant has drawn our attention to appendix B to their letter dated 02.08.2011 (*impugned order*) wherein a certificate has been endorsed by the CO of the donor unit to the effect that “the individual is not in unit promotion zone as per his seniority for another two years”. The *ibid* certificate which is a mandatory requirement to be signed by the CO of the donor unit contains ten conditions (qualitative requirement) which need to be fulfilled before a NCO is transferred to the new unit. The applicant’s case is that he was well within the zone of promotion. In fact he was the senior most among the Havildars of his trade (Gunner) who were qualified for promotion to the next rank. Therefore, as soon as one vacancy accrued, which, according to him, was going to occur within a year, he was to be promoted. However, the applicant feels that he was deliberately moved out of the unit, perhaps to make way for another junior Havildar for promotion. Therefore, the applicant submits that perhaps the CO, for different reasons, picked up the applicant to be transferred to the new raising unit by endorsing a wrong declaration in Para 10 of the Certificate (*impugned order*) so as to make way for someone junior to him to be promoted. To substantiate his point further, the applicant submits that he was qualified in all respects to be promoted to the rank of Naib Subedar as early as in June, 2009. Yet he was posted out to 332 Medium Regiment (new raising Unit) in August, 2011 knowing fully well that a vacancy could occur for his promotion in 38 Medium Regiment within 2012, which actually did occur in Dec 2012. In fact, he submits that a promotion board (Annual Unit Promotion Board) was held in September/November 2011 in 38 Medium Regiment, barely within two months of him being posted out, wherein another Havildar (Havildar Rajinder Singh)

of the same unit, junior to the applicant, was approved for promotion to the rank of Naib Subedar for a vacancy foreseen in 2012. This clearly shows that the CO of 38 Medium Regiment had illegally, in total violation to the policy, managed to transfer the applicant to a new raising unit so as to create a vacancy for a junior (Havildar Rajinder Singh) to be promoted to the rank of Naib Subedar in 2012, which was legitimately due to the applicant had he not been posted out of 38 Medium Regiment to a new raising unit.

6. Soon after such injustice, the applicant represented before the Artillery Records i.e. respondent No. 4, which was taken up by 332 Med Regt vide their signal dated 08.10.2011 (Annexure R-2), intimating the Record Office with the details and asking the Records to revert the applicant back to 38 Med Regt after being relieved by a suitable NCO, since the applicant was likely to be promoted to Nb Sub in Mar 2013 as per vacancy accruing in 38 Med Regt, which was his parent unit. The Artillery Records, having realized the injustice caused upon the applicant, instructed 38 Medium Regiment on 09.01.2012 (Annexure R-3) to immediately post a suitable relief to 332 Med Regt, upon whose arrival the applicant would be reverted back to his parent unit (38 Med Regt), so as to ensure justice to the applicant.

7. Unfortunately the ibid instructions were not complied with by the CO, 38 Medium Regiment and the respondent No. 4 without assigning any reason cancelled the said instructions dated 09.01.2012 on 05.04.2012 by sending a signal message to the effect that reversion of the applicant issued vide their letter dated 09.01.2012 was to be cancelled. The applicant is of the view that it was a conspiracy by the CO 38 Med Regt and the Arty Records to some how manage a situation where promotion could be denied to the applicant.

8. Being aggrieved with the entire situation wherein repeatedly justice was denied to the applicant, he filed a statutory complaint under relevant rules to the Chief of Army Staff (COAS) on 16.10.2012 which was routed through the respondent No. 4. Unfortunately he has not received any response to the ibid statutory complaint till the time he filed this OA. The

applicant, therefore, prays that the promotion, which was denied to him by illegally transferring him to 332 Medium Regiment, be restored and he should be promoted to the rank of Naib Subedar ahead of his junior Havildar Rajinder Singh of 38 Med Regt, who was promoted to that rank on 01 Dec 2012 after being approved for such promotion vide Board held in September/November 2011 in 38 Medium Regiment. The applicant was conveniently posted out of 38 Med Regt to 332 Med Regt, though against policy in vogue, in Aug 2011 so that a situation could be created where he, being the senior most eligible Havildar (Gunner), would not be available for consideration for promotion in Sep/Nov 2011. The applicant's promotion to the rank of Naib Subedar, as prayed for should be with effect from 01.12.2012, the date when his junior, Hav Rajinder Singh, was promoted. The applicant has further prayed that subsequent to his posting out to the new raising unit, the ACR that was initiated for the year 2011 by Col. Tarun Kumar, CO, 38 Medium Regiment should be quashed because it would be inconsistent with his general profile.

9. Mr. B K Das, learned counsel appearing for the respondents relied on the affidavit-in-opposition (A/O) filed by him. He further submits that the applicant, Havildar Vijay Pal was meeting the entire requisite qualitative requirement (QR) for posting to 332 Medium Regiment (new raising unit) when he was posted to 332 Med Regt. At the time of his posting, neither his name was placed in the Annual Unit Promotion Board (AUPB) during November, 2010 nor was his name likely to come up in seniority to be included in the AUPB scheduled during November, 2011. On scrutiny of vacancy position as shown in the AUPB of 2010 specific to 38 Medium Regiment, only one vacancy of Naib Subedar in Gunner trade was foreseen in 2012, but the same got cancelled when CO's pool vacancies were withdrawn, as explained in Para 6 and 7 of the revised A/O. Moreover, Mr Das, further emphasizes that the applicant was fourth in the seniority among Hav (Gunner) in 38 Med Regt at the time he was posted out to 332 Med Regt in Aug 2011. Therefore, at that point of time neither could the applicant have been considered to be

in the promotion zone nor could he have been expected to have been promoted in the next two years. Under such circumstances as obtaining in Aug 2011, the applicant was stated to be fully eligible and fulfilled all QR to be posted to a new raising unit (332 Med Regt) and the certificates endorsed by the CO were in the impugned order dated 02 Aug 2011 were quite justified.

10. Therefore, as clarified by Mr. Das, promotion prospects of the applicant in 38 Medium Regiment as on 31.08.2011 was such that there was no likelihood of a Naib Subedar vacancy in his trade before 1st March, 2014. In accordance with such calculation, the CO of 38 Medium Regiment was well advised to certify that the applicant would not be in promotion zone for the next two years. Accordingly he signed the requisite certificate vide Para 10 of the Arty.Records letter dated 02.08.2011.

11. Mr. Das further explained relying on the contents of Para 5 of their A/O that 38 Medium Regiment received a reversion order of the applicant vide which he was to be reverted back from 332 Medium Regiment to 38 Medium Regiment since the applicant had represented that one NCO junior to him was promoted and he was wrongly transferred to a new raising unit (332 Medium Unit) knowing fully well that he would be in the promotion zone within next two years. 38 Medium Regiment, however, contested this reversion order and got it cancelled by the originator which was Artillery Records on 05.04.2012 (Annexure R-4), on the ground that the seniority of the applicant stood 4th in 38 Medium Regiment and no vacancy was foreseen in the Unit for next two years. It has further been submitted in Para 8 of the A/O by the respondents that one unforeseen vacancy of Naib Subedar in Gunner trade got created on 01.12.2012 under certain peculiar circumstances when one JCO of gunner trade had to be discharged prematurely being in a permanent low medical category. This was stated to be 'unforeseen' by the respondents. When such an unforeseen vacancy occurred, the applicant had already been posted out to a new raising unit and therefore, Havildar Rajinder Singh, who at that time was the senior most qualified Gunner Havildar in 38 Med Regt, got promoted to Naib Subedar. Mr. Das further

argues that this being an unforeseen vacancy there was no ulterior motive or malaise on the part of the Unit (38 Medium Regiment) or its CO in denying the applicant his promotion or in causing a situation wherein someone junior to the applicant could be promoted. In view of the circumstances as explained, Mr. Das reiterated that transfer of the applicant to a new raising unit was justified, legal and within the rules; promotion of Havildar Rajinder Singh, though junior to Havildar Vijay Pal, to the rank of Naib Subedar with effect from 01.12.2012 was in order and in accordance with the rules; and reversion of the applicant from the new raising unit back to 38 Medium Regiment was correctly contested by the Unit and then its cancellation was obtained in a proper manner. Therefore, the applicant has no case and he should await his promotion in the Unit to which he has now been posted. Mr. Das has further submitted in Para 9 of the A/O that as per some assessment made by the respondents, the applicant is likely to be promoted in his new unit which is 332 Medium Regiment with effect from 01.02.2014, whereas in case he is posted back to 38 Medium Regiment he would only be promoted on 01.03.2014 as per the present state of affairs of seniority in both the units. The respondents have further submitted in Para 10 of the A/O that there was no vacancy of a Naib Subedar which was foreseen in 38 Medium Regiment at present or for that matter for the next two years. Therefore, it would be futile to even consider reverting the applicant back to 38 Medium Regiment with a hope that he would be promoted.

12. We have examined the affidavits submitted by both sides in detail and have also heard the learned counsels from both sides who have argued at length. In this entire matter there are two issues that emerge, which would need our application of mind in detail.

13. Firstly, was it correct for CO 38 Medium Regiment to assume that the applicant, who in August 2011 was among the senior most eligible Havildar (Gunner) for promotion to the rank of Naib Subedar, would not be promoted for the next two years thus making him available for transfer to the new raising unit?

14. Secondly, was it proper for the CO 38 Medium Regiment to approve Havildar Rajinder Singh for promotion just within three months of departure of his senior, who was the applicant and then promote him after one year, without making any efforts to get his senior Havildar Vijay Pal/applicant reverted back to the unit to undo the injustice done to him?

15. In the first instance, we find that the applicant, though fourth in the seniority, was the senior most eligible Havildars for promotion. Despite that, he was posted out from 38 Medium Regiment to the new raising unit i.e. 332 Medium regiment in August, 2011. After going through the contents of the A/O from Para 6 to Para 8, we are quite convinced that a simple calculation and forecast of vacancy of the rank of Naib Subedar for gunner trade would reveal that one to two vacancies were definitely foreseen in 38 Med Regt within the next two years. Therefore, it is grossly inappropriate to post out the applicant to a new raising unit with total disregard to the policy on the subject i.e. *“those who are likely to be promoted within two years and thus be in the promotion zone shall not be posted to a new raising unit”*. In the process, guidelines specified in Para 3(l) and (m) of the Artillery Records letter dated 02.08.2011 (Annexure R-1) as QR for selection to a new raising unit have been violated. Para 3(l) of the ibid policy letter clearly lays down that, *“ensure while posting out of an individual, the promotional/career prospect of the individual are not harmed”*. In fact, as a donor unit, 38 Medium Regiment has not only violated the conditions of QR as laid down in the ibid policy letter, but the CO has given a wrong certificate by stating in Para 10 of the impugned order that, *“the individual is not in the unit promotion zone as per his seniority for another two years”*.

15. All these violations and inappropriate endorsements on certificate appear to have caused great injustice upon the applicant who was posted out of his parent unit (38 Medium Regiment) to a new raising unit (332 Medium Regiment) at a most inappropriate time, knowing fully well that such a transfer would jeopardize his promotional avenue and his career prospect in a Regiment where he has been serving ever since his enrolment. This kind of administrative

action that lacked transparency and fairness, not only gives rise to avoidable genuine grievances of soldiers like the applicant but also reflects on poor man-management resulting in low morale of troops, who always expect fair-play from their CO in management of their career.

16. The irony of the fate which we noticed is that even after the flaw was brought to the notice of the Artillery Records who made attempts to revert the applicant back to his parent regiment; such efforts were ultimately cancelled for unseen reason. Such actions are indicative of lack of transparency in career management of military personnel by their own officers for reasons other than the operational or administrative efficiency.

17. The least that CO, 38 Medium Regiment could have done is that, even when a Promotion Board was being held just after a month or within a year after the applicant was transferred on account of so called 'unforeseen' vacancy, he could have taken up a case with the Artillery Records to get back the applicant who was senior to Havildar Rajinder Singh, but got approved for promotion, so as to rectify the error and impart justice even at that stage. It is strange to note that the Artillery Records did not even intervene and the applicant was allowed to suffer and get superseded by a junior Havildar in a manner that was created to make it appear as normal and justified. Therefore, the entire episode does not appear to be transparent and appropriate; but appears to be a well managed orchestration of injustice by making it look well within rules. It would not be in-appropriate at this stage to say that CO 38 Medium Regiment, perhaps in collusion with the Artillery Records, has done great injustice to the applicant by creating a situation by which the applicant would be denied his rightful, legitimate and timely promotion. We are of the view that such action must be viewed very seriously by higher functionary like DG, Artillery so that they take corrective measure to ensure that such actions are not repeated in future.

18. In view of the discussions made above, we allow the application with following directions:-

- (a) The applicant shall be put through a special promotion board from Havildar to Naib Subedar by 38 Medium Regiment with his profile as obtaining on September, 2011, when his junior was considered for promotion. He shall be approved for promotion if found eligible in all respects. This special board will be held within 30 days of receipt of this order.
- (b) The applicant shall be, subject to being approved for promotion to the rank of Naib Subedar in the ibid special promotion board, shall be considered for promotion to the rank of Naib Subedar at the earliest opportunity when the first vacancy arises in 38 Med Regt, but shall be given seniority with effect from 01.12.2012 i.e. the date when his junior, Havildar Rajinder Singh was allowed to be promoted.
- (c) For the purpose of promotion, the applicant's profile as on September 2011 will be taken into consideration because in normal course he would have been considered in the Promotion Board on that date (September/November 2011) in 38 Medium Regiment.
- (d) We direct the Artillery Records to revert the applicant back to 38 Medium Regiment at a time when administratively convenient but under no circumstances his promotion to the rank of Naib Subedar should be delayed.
- (e) The prayer with regard to the quashing of his ACR of 2011 rendered by Col. Tarun Kumar, Commanding Officer of 38 Medium Regiment cannot be considered at this stage by the Tribunal. The applicant may, if advised, file a statutory complaint in accordance with rules to set aside the ACR in case he is so aggrieved.

(f) Although upon promotion, the applicant will be granted seniority with reference to the date of promotion of his junior as indicated above, but he will not be entitled to any salary of the higher post from the date of his notional promotion, which will accrue to him only from the date of assumption of charge of the promotional post.

(g) The Director General Artillery shall take note of our observations at Para 17 above and carry out necessary investigations in this entire matter and take actions as deemed appropriate so that such injustice in career management of troops is avoided in units.

(f) No costs.

19. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(Lt. Gen K P D Samanta)
Member (Administrative)

(Justice Raghunath Ray)
Member (Judicial)