

FORM NO – 4

(SEE RULE 11 (1))

IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORDER SHEET

APPLICATION No : O A 15/2012

APPLICANT (S)	Rect. Musn Newton S K
RESPONDENT (S)	<u>The Centre Comdt ASC Centre (N) & 2 Ors</u>
Legal Practitioner of applicant	Legal Practitioner for Respondent (s)
Mr. Subhash Chanda Hazra	Mr Anand Bhandari

NOTES OF THE REGISTRY	<u>ORDERS OF THE TRIBUNAL</u>
	<p>Order Sl. No. : <u>15</u> Dated : <u>03.07.2014</u></p> <p>Mr. Subhash Chandra Hazra, Id. adv. is present for the applicant. Mr Anand Bhandari, the advocate on record for the respondents is not present. However, Lt. Col. Anil Chandra, OIC, Legal Cell, HQ, Bengal Area being present on behalf of the respondents submits that Mr. Anand Bhandari, Id. adv. on record for the respondents is unable to attend the court due to his personal illness. Lt. Col. Anil Chandra seeks permission of this Court to make submission on behalf of the respondents in this matter. Such permission is granted.</p> <p>2. In this Original Application filed under Section 14 of the AFT Act 2007, the applicant has challenged his discharge from Army Service by order dated 21st December 2011 (Annexure P7) as arbitrary, illegal and bad in law and has prayed for setting aside of the same and for his reinstatement with full consequential benefits.</p> <p>3. The admitted facts of the case are that the applicant was enrolled as a Soldier (Musician Trade) in the ASC on 18-8-2009. On 19.10.2009 while undergoing Basic Military Training for six</p>

weeks, the applicant fainted during PT (Physical Training) exercise and was immediately sent to Military Hospital, Gaya for First-Aid. After check-up the Medical Authority diagnosed him as a case of *Pleuro Pulmonary Tuberculosis*. He remained admitted in MH, Gaya from 19.10.09 to 28.10.09 (stayed there for 10 days); thereafter was transferred to Military Hospital, Namkum (Ranchi) on 29-10-2009. He remained there under treatment till 20-3-2010, i.e. for 143 days. He was placed in Low Medical Category (P2) (T-24) w.e.f. 21.3.10 and continued in that medical category till 2.9.10 (166 days). He was again admitted to Military Hospital Namkum on 3-9-2010 and treated there till 26-11-2010, i.e. for 54 days. Thereafter he was sent to Military Hospital, Dehradun for further treatment from 27-10-2010 to 15-1-2011, i.e. for 81 days. He was upgraded to SHAPE-1 and returned to No. 2 Training Battalion on 15-1-2011. Thus he remained absent during training for 454 days. According to the respondents, during recruit training maximum period of absence that can be permitted is 210 days including 30 days Recruit Leave (RL). However, in the instant case the applicant remained absent from training for more than the admissible period. Therefore he was ineligible to continue on further training in accordance with rules. It is, however, admitted that the applicant recommenced his training on return from hospital in fit medical category (SHAPE-1) and completed the Basic Training. He was then sent for specialized technical training; but could not continue being ineligible due to the above reason of absence. Ultimately he was discharged from service vide order dt. 21.12.11 under Rule 13(3)(IV) of Army Rules 1954 being considered as 'not likely to become an efficient soldier'.

4. This order of discharge is challenged by the applicant as arbitrary and illegal. According to the applicant, he became

SHAPE-I after treatment and also completed his Basic training and therefore, he was fully fit to resume his further training on Technical aspect. It also appears that he was granted leave from 21st November 2011 to 18th Dec 2011 (P6) and immediately thereafter he was discharged on 21-12-2011 without assigning any reason or issuing any show cause. He has, therefore, prayed for quashing of this impugned order and for a direction to reinstate him in service with full consequential benefits.

5. Mr.S.C. Hazra, learned Counsel for the applicant during the course of hearing has submitted that the applicant had completed the Basic training and was upgraded to medical category SHAPE-I on 15.1.11. There was thus no good reason to discharge him suddenly without allowing him to complete remaining part of technical training. It is his case that the applicant was found to be suffering from TB after his induction in military service and as per Government policy, after he was fully cured and was placed in medical category SHAPE-I i.e. acceptable medical category, he should have been given adequate opportunity to complete training to become an efficient soldier. His further contention is that despite such illness the applicant did not fail in his Basic Training rather he passed out the same with flying colours and thereafter it is quite clear that his illness did not stand in the way of his performance. In that situation, the respondents most arbitrarily discharged him without giving him adequate opportunity to complete the Training without giving an opportunity of show cause or even assigning any reason. He further submits that the applicant is now quite fit but due to want of any employment, he is suffering with his family and is not in a position to meet both ends meet. Therefore, it is a fit case for this Tribunal to interfere and to issue direction upon the respondents to take back the applicant in service with all

admissible benefits.

6. Lt. Col. Anil Chandra has drawn our attention to the Supplementary Affidavit filed by the respondents and pointed out that the applicant remained absent from training for a total period of 454 days on medical ground whereas maximum permissible period of absence is 180 days + the recruit-leave period, i.e. total 210 days. Therefore, the applicant, despite being in medically category SHAPE-1, could not be allowed to undergo further training; he became ineligible for such training and hence there was no other alternative but to discharge him under the aforesaid rule.

7. We have considered the matter carefully and perused various documents placed on record.

8. There is no dispute that the applicant immediately on joining as a Recruit in the trade of Musician in August 2009 became ill during training in Oct 2009 and was admitted in hospital. He was treated for the disease *Pleuro Pulmonary Tuberculosis*. Initially he was placed in the low medical category P2 (T-24) on 21.3.10 after first spell of treatment. He remained in that category for 24 weeks i.e. upto 2.9.10. At that time he was in the Training Centre for a period of 166 days and no action was taken by the respondents to discharge him on medical ground. Subsequently he was again hospitalized for recategorisation – first at MH Namkum for 54 days (3.9.10-26.10.10) and thereafter at MH, Derhadun for 81 days (from 27.10.10 to 15.1.11) and was upgraded to SHAPE-I, after which he returned to his Training Centre on 15-1-2011. He was there at the training centre from 15.1.11 till he was discharged on 21.12.11 under Army Rule 13(3)(iv) on the ground of “unlikely to become an efficient soldier”. Thus, after upgradation of his medical category to

SHAPE –I on 15.1.11, he remained at the centre for more than 10 months and, perhaps, during this time, he completed his basic training. From annexure-P6, it also appears that he was granted recruit leave for the period from 21 Nov 11 to 18 Dec 11 for going home, which is normally granted to recruits on completion of Basic Recruit Training. He was asked to report to the unit in the evening on 18 Dec 11. From the above facts, it is quite clear that after he was upgraded to an acceptable category (SHAPE-1) in January 2011 he was taken in the centre and there was no contemplation to discharge him. Even while he was granted leave to go home on 21 Nov 11, he was also asked to report back on expiry of leave on 18 Dec 11. It is, thus, clear that the respondents had full intent to retain him in service. However, as soon as he came back from leave, it appears that all on a sudden, the respondents took a decision to discharge him on 21.12.11 taking the ground that he missed training for more than 210 days as per rules.

9. The respondents in their Supplementary Affidavit have produced two policy letters, one dated 28-2-1986 on the subject of “Relegation of Recruits” and the other dated 26-7-2006, which deals with “Amendment to para 442 in respect of RMSAF-1983” pertaining to cadets/recruits etc. suffering from TB/Leprosy. In support of discharge of the applicant, Lt. Col. Chandra has referred to these two policy letters as the authority.

It will be profitable to quote the relevant portion :

“Relegation on Medical Ground :

5. The maximum period for which a recruit can be relegated on medical grounds will be six months. A recruit falling ill due to disease or injury during training whether attributable to or aggravated by service, on discharge from hosp may be placed in a temporary medical category for not more than three months

provided there is a reasonable prospect in the opinion of medical specialist that the individual is likely to be fit for training and the total absence from training including hospitalization period is not likely to be more than six months. If on the other hand he is unlikely to be fit for training within six months of first absence from duty due to illness, the individual will not be discharged from hospital in temporary medical category but will be invalided out of service.

6. However, if a recruit is being discharged for being absent from training for more than 180 days purely on medical grounds the period of absence may be extended to 210 days provided the recruit forgoes his annual leave of 30 days which he is entitled during recruit training. This period of annual leave will be utilized for carrying out important aspects of training misused (missed) during his absence on medical grounds.

7. These instructions will be incorporated in the GS publication on Basic Military Training for Recruits which is under revision at this Headquarters”.

Relevant portion of amended RMSAF-1983, para 442 dealing with cases of TB vide MoD letter dt. 26 Jul 2006 on which reliance has been placed by the respondents is also quoted below for ease of understanding :-

“For

If any of these personnel are suffering from pulmonary tuberculosis/leprosy, they will be invalided out of service. They may, however, be transferred at Govt Expense to Military Hospital (Cardio Thoracic Centre) Pune/MH Namkum/MH Dehradun in the case of those suffering from pulmonary tuberculosis and to Armed Forces Hospitals where beds for leprosy are allocated in the case of those suffering from leprosy unless they themselves do not wish to be admitted **and will be afforded free treatment for a maximum period of six months** during which they or their parents or guardians, as the case may be, will be asked to make private arrangements for their further treatment if

necessary. Free conveyance will be admissible on discharge from the hospital to their home/sanatorium/hospital as admissible to an OR or his equivalent in the Navy and Air Force suffering from pulmonary tuberculosis/leprosy.

Read

If any of these personnel are suffering from TB(Pulmonary/Intrathoracic) they will be transferred at Govt expense to a designated Military Hospital and will be afforded free treatment for a maximum period of six months. Patients who do not recover fully require more than 6 months of anti tubercular treatment will be invalided out of service. Free conveyance will be admissible on discharge from the hospital to their home/sanatorium/ hospital as admissible. *Cases having no residual disability with normal functional capacity may be considered for continuing training in case such continuation is acceptable to the Commandants of respective training establishments. Their suitability for retention has to be assessed after four months of institutional treatment and acceptability of their trainees must be obtained before completion of five months of institutional therapy. Those who are being retained in service will be placed in low medical category P2/equivalent in Air Force and Navy for 24 weeks on completion of six months of institutional treatment. Observation in LMC for minimum six months after completion of treatment is required because the cadets/recruits may not be fit enough to resume the training immediately after completion of anti-tuberculosis treatment. The cadet would lose 2 terms and will have to be relegated by one year before they will be permitted to resume recruit/cadet training. The trainees who have residual disease and/or functional incapacitation as determined by the exercise tolerance and spirometry will be invalided out of service".*

10. On a perusal of the aforesaid policy letter of 1986 it is quite clear that if a recruit falls ill due to disease or injury during training, irrespective of attributability/aggravation aspect, on discharge from hospital he is to be placed in temporary medical category for not more than three months provided there is a

reasonable prospect in the opinion of medical specialist that the individual is likely to be fit for training and the total absence from training including hospitalization period is not likely to be more than six months. If, however, he is unlikely to be fit for training within six months of first absence from duty due to illness, the individual will not be discharged from hospital in temporary med category but will be invalidated out.

11. In the instant case, the applicant fell ill during training on 19.10.09 and remained in hospital in the first spell for a total period of 153 days and was thereafter placed in LMC P-2 for 24 weeks w.e.f. 21.3.10 to 2.9.10 and was discharged from hospital. Thus, his hospitalization period is less than 180 days and he was in LMC for six months i.e. more than three months. In such cases, opinion of the medical board ought to have been obtained whether he was unlikely to be fit for resuming training within six months of first absence from duty due to illness. No such medical opinion was there, rather we find that after 24 weeks LMC period, he was sent for re-categorization – first at MH Namkum and then to MH Deradun where he remained admitted for 135 days for this purpose and was finally upgraded to SHAPE I and became fit to resume his training. In fact, he returned to centre on 15.1.11 and continued to be attending training there till his discharge on 21.12.11 except for one month leave period as mentioned earlier. It is, therefore, presumed that the medical authority thought him likely to become quite fit and therefore no opinion about his unlikely to become fit was given, or else he would have been considered to be invalidated out of service rather than being upgraded to SHAPE-1. Accordingly, the respondent authority also allowed him to rejoin the training centre and continue training with full intent to take him back.

12. The matter becomes further clear from the subsequent

policy letter dt. 26 Jul 2006 as quoted above. It is evident that a cadet/recruit suffering from TB, if not recovered fully within six months will be invalidated out. Here the applicant was temporarily downgraded to P2 and then upgraded to SHAPE-1 after six months of his treatment and was released having normal functional capacity. Therefore, there was no bar to take him back for tainting. However, his suitability for retention is to be assessed within four months after six months' LMC period. The case of the applicant clearly fits in according to this policy guideline. Therefore, as per this policy, such cadet/recruit would lose 2 terms and will have to be relegated by one year before he will be permitted to resume recruit/cadet training.

13. Possibly, based on this policy, after the applicant became SHAPE-I and rejoined on 15.1.11, he was relegated but before completion of one year admissible relegation period, he was discharged, which was not proper and contrary to policy as indicated above. As already stated above, it is evident that the concerned authorities had full intention to take him back and therefore they did not take any step to invalidate him out. But possibly it dawned on them to discharge him counting his total absence as more than 210 days on the basis of para 6 of the *ibid* policy letter quoted above, which apparently was not proper. It is quite evident that the policy of, "no absence beyond 210 days" is a general policy with exception for TB case as clear from the second policy letter dated 26 Jul 2006 *ibid* of the MoD.

14. Even otherwise, such cadet/recruit is required to be invalidated out if considered necessary. Invalidment is always done through an IMB but in the instant case, the applicant was discharged by administrative decision as per rule 13(3)(IV) and not by applying rule 13(3)(III)(iii) through IMB which is for

invalidment on medical ground.

15. For the reasons stated above, we are of the opinion that the discharge of the applicant under administrative order is wholly unjustified and not according to rules and policy of Govt. Under such circumstances, the discharge order is liable to be set aside. However, we notice that more than two and half years have passed since the applicant was discharged on 21.12.11. At that time he was in SHAPE-I. It is not known as to his present medical conditions. Ordinarily, this Court does not encourage a discharged person to be reinstated in service after long lapse for obvious reasons. But here we notice that the applicant's trade was 'Musician' which is not the same as general duty (GD) Sepoy in Infantry in combatant category; heavy or arduous nature of duty is avoidable in this trade. In such circumstances, in our view, justice will be meted out to this applicant, who was discharged illegally and against the rules, if he is allowed to be reinstated after proper medical examination.

16. Accordingly, the application is allowed in part on contest by issuing the following directions :-

- i) The impugned discharge order dt. 21.12.11 is hereby set aside.
- ii) The applicant is directed to report, within 30 days from this date, for medical examination before MH, Namkum in order to determine his suitability for resumption of residual training in the trade of Musician.
- iii) The authorities of the said hospital shall conduct such medical test of the applicant. For the purpose the respondents will take steps to forward all his

medical documents to the said hospital immediately.

- iv) If the applicant is found to be medically fit to be reinstated as trainee recruit, the respondents shall take him back to the ASC centre for undergoing further balance of training from the stage he was discharged on 21.12.11. However, he will not be entitled to get any back wages/stipend etc. as admissible to a trainee recruit during the intervening period.
- v) If, however, he was found medically unsuitable for reinstatement as trainee recruit, then the authorities shall take steps to invalidate him out of service as per rules/policy from the date of his medical examination as directed above.
- vi) There will be no order as to costs.

17. The original records shall be returned to the respondents with proper receipt.

18. 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(A)

(JUSTICE RAGHUNATH RAY)
MEMBER(J)