

(2010) 11 P&H CK 0091
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 5153 of 2001

Bishamber Dutt

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-11-2010

Acts Referred:

Citation : (2011) 1 ILR (P&H) 228

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Permod Kohli, J.—Denial of promotion to the petitioner HIV has persuaded him to file this petition for seeking justice against the alleged discriminatory treatment meted out to him by the authorities on mere apprehensions. The petitioner was initially recruited as a Constable (GD) on 11th July, 1987. He was allocated to 2nd Battalion Dehradun. On the basis of merit and seniority, he was promoted to the rank of L/NK on 21st January, 1992. The next promotion is to the post of Naik (GD) for which the petitioner was eligible. On consideration alongwith other eligible candidates, he was empanelled for promotion, vide Director General Order No. 1.19012/3/ 95 Estt.B.21705. dated 16th November. 1995 with effect from 14th November, 1995 giving effect of promotion from 14th November, 1995 in the pay scale of 950 1,150 1-B- 25 1,400/plus original, special pay and other allowances admissible from time to time. The empanelled promotes were granted actual promotion vide the order of respondent No. 4. dated 12th December. 1995 and the petitioner's name did not figure in this promotion order, though some empanelled juniors to him were promoted. This promotion order has reference to the order of Director General. ITBP. dated 16th November. 1995. Prior to his empanelment. the petitioner was examined by one Dr. M.V.K. Rao on 13th July. 1994 and the said doctor declared the petitioner unfit for further job in ITBP on the ground that he was found HIV positive. On the basis of the aforesaid report of Dr. M.V.K. Rao, the petitioner was not considered for promotion, as is evident

from Annexure P-3. The petitioner has referred to another report of one Dr. Sunil Chaudhary, Base Hospital, ITBP, Delhi who declared the petitioner (It for service and to be kept in category AYK. It is also stated that later on, the petitioner was again examined by Dr. M.V.K. Rao on 6th June, 1996 and declared him for further service, but under medical surveillance as is evident from Annexure P-5. The petitioner claims that he is fully fit for force service and does not suffer from any physical or mental infirmity, notwithstanding I [IV positive. The petitioner made a representation, dated 17th October, 1996 for his retrospective promotion to the post of Nayak (GD). Receiving no response, legal notice was served through his Advocate. Since no action was taken on the representation/legal notice, the petitioner filed this petition seeking a direction for his promotion to the post of Nayak (GD) from the date persons junior to him were promoted on the basis of approval for promotion.

2. The respondents have filed written statement. Approval of petitioner's promotion by the Directorate General, ITBP vide order dated 16th November, 1995 is not only admitted, but a copy of the same has also been placed on record as Annexure R-1 which clearly shows that the petitioner has been approved for promotion and his medical category has been depicted as AYE. It is further mentioned in Annexure R-1 that no departmental vigilance enquiry is pending against the petitioner. The name of the petitioner figures at Sr. No. 58 of the Promotional Panel. It is stated that the petitioner is a case of HIV + and his case was sent to the Headquarters for decision and in the light of medical branch Memo, dated 6th December, 1995 (Annexure R-3), his name was not included in the formal promotion order, dated 12th December, 1995. It is, however, admitted in the reply that four persons senior to the petitioner and two persons junior to the petitioners have been promoted being in medical category AYE and no departmental/vigilance case was pending or contemplated against them. Exclusion of the petitioner from promotion is only in the ground that he is a HIV positive case. The assertions of the petitioner that he has been found medically fit for further job by two doctors of the ITBP is also not denied.

3. During the course of the arguments, learned counsel for the petitioner has placed on record government instructions issued by the Ministry of Home Affairs, Department of Personnel regarding Health Care System in Central Para Military Forces. This instruction relates to classification of the personnel serving in Central Paramilitary Forces and norms for their promotion. Following norms have been laid down for various medical categories for the purpose of promotion in the ranks of Paramilitary Forces :-

(ii) The Force Personnel above the age of fifty five years placed in the lower medical category of S1 H2A1 PI E1 (without hearing aid); S1 H1 A1 PI F2 (dominant eye should not be worse than 6/9 with correction) and S1 111 and A1 P2 E1 (for dental reasons only) will be treated at par with medical category SHAPE-1 and will be eligible for promotion to the higher ranks in a normal manner.

(ii) As regards officers, who have been put in lower medical classification by the medical board/review medical board of S1 H1 A2 P1 E1 and S1 H1 A1 P2 E1, who are otherwise fit for promotion, their suitability for promotion will be re-assessed by a Board, consisting of the Home Secretary as the Chairman, DO of the concerned Force. ADO (Med). MHA and a Specialist nominated by DGHS. as Members. The Board will assess the suitability of the officer, who is otherwise fit for promotion, but is in the above mentioned medical categories, in consideration of the following parameters.

(a) The Officer is capable of performing the normal duties of the rank to which he is being promoted.

(b) Any defect, disability or discomfort which the Officer is suffering from is not likely to be aggravated by the service conditions.

(c) The Officers assessed fit for promotion by the Board will be promoted to the next higher rank as per the recommendations of the DPC.

(d) The Board's assessment will be final.

4. The medical classification for HIV positive has been specifically made to consider their suitability for promotion in para (iv) of the aforesaid instructions which reads as under :-

(iv) The medical classification for HIV positive personnel will be done as provided below :-

P-1 IIIV Positive Asymptomatic Fit for all duties anywhere

Not on ART

CD8 Count Normal

Other Parameters like Viral Load

Normal

P-2 IIIV Positive

Weight Loss more than 10% CD4. (Above 200 Cells/ Microlitre). CD8, Count within normal range Total Lymphocyte Count Above 1200/mm³ Minor Mucocutaneous Manifestations/minor infections With or without ART

Lit for all duties anywhere except at difficult and solitary locations, preferably where ART facilities are available.

P-3 HIV Positive Weight loss more than 10% CD4 Count less than 200 cells/ microlitre Viral load more than 50,000 copies. Unexplained chronic. Diarrhea/ fever more than 1 month Opportunistic infections :-

(1) Pulmonary TB (2) Oral Thrush (3) Herpes Zoster more than 1 month (4) Leukoplakia etc. on ART

Lit for sedentary duties only and only at location where advance medical facilities are available

P-4 Hospitalisation/leave due to HIV related diseases/AIDS

P-5 Unsatisfactory response to ART, (CD4 count less than 200 cells/microlitre with ART) HIV wasting syndrome Disabling Neurological/

Psychiatric problems

Disseminated Tuberculosis

Poor Physical endurance

Malignancies associated with AIDS

functional disability more than 50%.

Temporary unfit for Force duties.

Permanently UN ITT for any type of service invalidation.

5. From the medical report of the petitioner, the Doctor after examining the petitioner reported about his health status as under: -

Pube : 76/nt, regular, normal volume

BP 110/80mmhg arm supra cubital

MR 16/nt regular

No pallor. cyanosis. clubbing, keratonychia. no lymphadenopathy. JVP. P. Oedema, no icterus

CVS :

Chest : VAD

Abd :

CNS :

Imp. HIV + ve (Asymptomatic)

Stage-II-NO AIDS indicator disease/symptoms present/As per 1993 classification stage-A.

In view of patient being asymptomatic and long incubation period for developing AIDS (8-10 years).

He was found +ve in December, 1993. He was just completed two years and considering that there may be some breakthrough regarding its treatment in this time gap. Patient is recommended :

I. To be retained in service.

II. To remain at "AYE" till some symptoms like fever, diarrhea for more than one month, weight loss appear.

III. To remain under Surveillance of the Unit medical officer and to be sent at 6 months/or on set of symptoms whichever is earlier.

IV No drugs.

(Sd). (Dr. Sunial Chaudhary) M.D. (Med.) DRM Specialist in Medicine and Nuclear Medicine.

6. Kven Dr. MVK Rao who initially recommended boarding out the petitioner again certified that he is fit for Government duty. Nothing abnormal has been found in case of petitioner except that his blood test has shown HIV Positive. Thus, in terms of the guidelines of Ministry of Home Affairs, the petitioner at least falls in Category E-2.

7. The petitioner has also referred to some proceedings from the Rajya Sabha. Specific question was raised in the Rajya Sabha about the employment of HIV positive people. The relevant question is as under :-

(c) What is the policy of World Health Organisation and what is the policy of Government of India regarding the employment of HIV positive people and also about those who are already in service and have been found to be HIV positive ?

8. he then Hon"ble Minister of State of Ministry of Defence, Shri Mallikarjun answered the aforesaid question and his reply is quoted as under :-

(A) to (C) Twenty six personnel in the army on return from the UN Peace keeping mission in Cambodia were found HIV positive during the last five years. None of them developed AIDS till date. These persons are still in service and are on regular surveillance. However, one master warrant officer (M. W.O.) from the Air Force has died of AIDS in Lucknow. The source of his infection could be repeated blood transfusion received by him in 1989 when he was on an assignment in Botswana. Besides these two personnels from para military force tested HIV positive on return from the mission abroad. Of them one is still in service while other has been dismissed from service on disciplinary grounds (Not on grounds of HIV infection). The World Health Organisation advocates non discrimination with the people who are HIV positive. India is one of signatory to this resolution.

9. This fact has not been disputed in the reply filed. The Government instructions reproduced here-in-above and the policy of the Government of India clearly provides for continuance of HIV Positive personnel in the job in Para Military Forces, except those falling in unfit category. From the reply of the Minister of State for Ministry of Defence in the Rajya Sabha and the Government instructions, no room is left to say that mere HIV Positive itself is not sufficient to deny service or even promotion to a member of the Para Military Forces. To the contrary, the service and promotions are protected in such cases where the ailment is Asymptomatic. The petitioner also appeared in person before this

Court today. He appears to be quite young, hale and hearty and apparently, a healthy person. In any event, he has been retained in service. Even though he was detected HIV Positive in the year 1995, but he continues to be in service till date. There is no reason to deny him the promotion.

10. In view of the above, this petition is allowed. Respondents are directed to promote the petitioner to the post of NK (GD) with effect from 12th December, 1995, the date when persons junior to him were promoted. He shall be entitled to all the consequential benefits, including the emoluments of the promotional post, seniority etc. and to be considered for further promotion, if any.