

(2009) 10 DEL CK 0325
In the Delhi High Court
Case No : WP (C) No. 9088 of 2008

Cpl. N.K. Jakhar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-10-2009

Acts Referred:

Citation : (2009) 10 DEL CK 0325

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Jyoti Singh and A.K. Trivedi, for the Appellant; Ashwani Bhardwaj, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—Rule DB.

2. As requested by learned Counsel for the parties, the writ petition is heard for final disposal.

3. On 20.6.2001, the petitioner was appointed as an Aircraftsman and undertook to serve in the Indian Air Force for a period of 20 years. He was promoted as a Corporal on 20.6.2007.

4. As per Air Force Order No. 4/2007 (Annexure P-5), vide para 1, airmen who have completed 7 years of their engagement including training period are permitted to apply for civil posts under Central/State Government in Group A. and B. (Gazetted) and equivalent posts in public sector undertakings including para-military forces.

5. In May 2006, UPSC invited applications to fill up Group A. posts of Assistant Commandant in BSF.

6. The petitioner applied and was selected by the UPSC. On 20.1.2008 a formal appointment letter offering post of Assistant Commandant was issued in the name of the petitioner.

7. Petitioner applied to the Air Force Authorities for being discharged. Permission was refused vide order dated 12.12.2008 informing the petitioner as under:

1. Please refer application dated 03 Dec 08 submitted by above named air warrior of your unit at Help Desk, AFRO. His application for discharge from service has not been forwarded by his Station Commander and through proper channel.

2. The case of the air warrior for discharge from service on being selected as Assistant Commandant in BSF was examined at appropriate level. On perusal of the application it is revealed that the air warrior had not applied for the said post as per the laid down procedure on the subject. Hence, his request for discharge from service is not acceded to. Further, application for discharge from service needs to be processed through proper channel and not submitted directly to Help Desk, AFRO.

3. You are requested to appraise the air warrior in accordingly.

8. It is not in dispute that the petitioner did not apply through proper channel for being considered for appointment to the post of Assistant Commandant in BSF, in that, did not get routed his application through the Air Force Authorities. He directly submitted the application to UPSC.

9. In the counter affidavit filed a three-fold defence has been taken. Firstly it is stated that the petitioner was bound to apply for being considered for employment to the post of Assistant Commandant in BSF through proper channel and having not so done cannot claim the benefit of Air Force Order No. 4/2007. Second contention urged is that when petitioner applied for being considered for appointment as Assistant Commandant he had not completed 7 years. service under the Air Force. Lastly it is urged that there is shortage of corporals in the trade in which the petitioner is functioning and hence even for said reason he cannot be relieved.

10. It is not in dispute that Air Force Order No. 4/2007 had replaced an earlier Air Force Order No. 5/2003 and that the two orders are *pari materia*. Somewhat similar issues arose for consideration in WP(C) No. 8760/2008 Pradeep Kumar v. U.O.I. and Anr. which was decided by a Division Bench of this Court on 16.12.2008.

11. The Division Bench opined as under:

There are three reasons given in the counter affidavit for such rejection:

(a) The petitioner having volunteered at the stage of enrollment to serve the Indian Air Force for a period of 20 years.

(b) The ineligibility of the petitioner to apply for civil post till completion of 7 years of service as per AFO 5/2003 and

(c) Shortage of manpower in the trade.

Learned Counsel for the respondents states that though these are three reasons referred to for rejection, a reference has also been made in the counter affidavit to the fact that an NOC was not obtained at the stage of interview.

Learned senior counsel for the petitioner has drawn our attention to AFO 14 dated 29.6.2001 which provides for discharge from service on compassionate grounds and one of the grounds as contained in para 1(g) is Having been selected for Group A. post. This office order is stated to have been amended by AFO 16/2008 dated 19.9.2008 where this ground (g) does not exist, but the ground existing in 2(f) is Other valid personal reasons deserving sympathetic consideration. It may also be added that Clause 6 of this Air Force Order provides that the discharge and selection to civil posts are to be dealt with under a separate policy. The said clause is as under:

6. Selection to Civil Posts. Discharges on selection to a civil post are dealt under separate policy. These cases will be considered, if airmen have been issued with NOC by the Air Headquarters/Stn/Unit under the existing policy on the subject.

We heard learned Counsel for the parties. In our considered view, there can be no doubt that the policy of release of Airmen after completion of 7 years of service is with the object of furthering career prospects. It is not as if for every post such permission can be granted. A special importance is attached to Group A (Class I) posts because those provide for a jump in the stature and career prospects of a person.

A mandatory period of 7 years. service is still required. The object of providing application to be submitted after 7 years is to ensure that a person has put in this mandatory period of service before discharge. In the facts of the present case, the application of the petitioner was made undoubtedly before completion of 7 years of service, but was forwarded by the unit in its wisdom or the lack of it. A problem would have arisen if the release of the petitioner in pursuance to the selection would have resulted in the petitioner not completing 7 years of service. This is not so in the present case as the petitioner completes 7 years of service on 18.12.2008 while the last date of joining with the BSF is 20.12.2008. Thus, release of the petitioner from service would be after 7 years of service.

We do feel that the respondents cannot get away from their responsibility by merely claiming it as a mistake, especially when the very object of the policy is satisfied, i.e. a minimum 7 years. of service in the Air Force. We also cannot lose sight of the fact that the petitioner is being recruited as an Assistant Commandant in the BSF, a para-military organization. This is a movement from the Air Force to the BSF where the petitioner will be an officer in Group A service as against the post of an Airman in the Air Force. This would even satisfy the test of an compassionate ground laid down in the policy as enunciated in the AFO 16/2008.

If the three reasons for rejection of the application of the petitioner are examined, it is found that though the petitioner had volunteered to serve for a

period of 20 years in the Air Force, the policy of the Air Force itself allows exit after 7 years and the conditions of the policy are satisfied by the petitioner. This discharge to be issued by the Air Force would be after the petitioner completes 7 years of service and would not violate any policy of the Air Force. This is also the reason why the second ground of rejection is unsustainable. The respondents themselves forwarded the application of the petitioner and the allegation as to shortage of manpower is clearly a motivated subsequent thought process to somehow prevent the petitioner from seeking an exit and attempt to cover the mistakes of the concerned officers, if any. Despite an opportunity granted to the Air Force, they did not come with a reasonable stand in furtherance of the interest of an Airman who has served them for 7 years and who was going to another para-military organization to again serve the country in a Group-A post. We must deprecate such a conduct of the Air Force.

A writ of mandamus is issued directing the respondents to issue the discharge certificate in the forenoon of 19.12.2008 (on completion of 7 years. service by the petitioner) and the respondent No. 4 to permit the petitioner to join on 20.12.2008 in pursuance to the discharge certificate. The petition is accordingly allowed with costs of Rs. 5,000/-.

12. We are informed that the mandamus issued in WP(C) No. 8760/2008 has been complied with.

13. Pertaining to the plea of shortage of manpower raised in the counter affidavit in the instant case, we may note that the same is an apparent after thought for the reason letter dated 12.12.2008 communicating the rejection to the petitioner does not so record. Only one reason has been given in the letter, being that the petitioner did not apply for being considered for being appointed to the post of Assistant Commandant, BSF through proper channel.

14. It is trite that orders passed by the authorities have to be sustained on the reasons given in the order and cannot be supplemented with additional reasons in counter affidavit.

15. Pertaining to the eligibility of the petitioner for applying under para 1 of the Air Force Order in question, no doubt when he applied, the petitioner had not rendered 7 years service under the Air Force.

16. But, same was the position of the petitioner in WP(C) No. 8760/2008.

17. Noting that by the time the petitioner was offered the letter of appointment by BSF he had completed 7 years. service under the Indian Air Force and adopted the reasons of the Division Bench in WP(C) No. 8760/2008, we hold that the petitioner should be entitled to the same benefit.

18. That the petitioner did not apply through proper channel relates to a procedure of the law and not the substance of the law. Unless otherwise mandate 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.

19. A co-ordinate Division Bench of this Court has already held that the policy in question is a salutary policy and is a beneficial policy and hence must be construed liberally.

20. We allow the petition and issue a mandamus to the Air Force Authorities directing the authorities to issue a discharge certificate to the petitioner with a week from today.

21. We issue a further mandamus to respondent No. 5 to permit the petitioner to join as Assistant Commandant under BSF; noting the fact that vide interim order dated 19.12.2008 it was directed that the option given to the petitioner to join BSF as Assistant Commandant shall not lapse and the vacancy shall not be filled.

22. No costs.