

(2008) 09 DEL CK 0115

In the Delhi High Court

Case No : Writ Petition (C) No. 12928 of 2006

Ex. Rfn. Devi Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Army Rules, 1954 — Rule 13, 13(3)(3)

Citation : (2008) 09 DEL CK 0115

Hon'ble Judges : Sanjay Kishan Kaul, J;Mool Chand Garg, J

Bench : Division Bench

Advocate : S.M. Dalal, for the Appellant; Barkha Babbar and S.S. Pandey, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—Rule DB.

2. The petitioner was enrolled in the Army as a Sepoy Musician on 24.4.1996. On completion of his basic military training, the petitioner was transferred to the Administrative Battalion of Rajputana Rifles Centre in November 1996. It is the case of the petitioner that he was not given any formal training of his trade but was detailed to perform duties of general nature, not connected with the trade of a musician.

3. The petitioner was sent in September 2001 to attend a Young Bandsman Course at AEC Training College and Centre Panchmarhi. The course was scheduled for a period of nine (9) months but the same had to be prematurely terminated after about three (3) months due to Operation Parakaram. The petitioner has also pleaded that from December 2002 to April 2003 he was detailed for Young Bandsman Course but was found lacking in training because he had not been given sufficient pre-course training at the Rajputana Rifles Centre prior to his being detailed for the course.

4. A show cause notice was issued to the petitioner on 29.7.2003 in the following

terms:

SHOW CAUSE NOTICE

1. You are informed that you are in the Brass Band of Regimental Centre for the last 7 years. And your tests were taken on the following dates results of which is given against each:

the	test	was	held	S. No.	Date	By whom	Result
of	Army	Band,	Unfit	A	05 Nov 99	Inspector	Command
Absent				B	17 May 2002	-do-	
Major	Nasir	Hussain	Advisor	C	27 Aug 2002	Unfit	Army HQ
Inspector	of	Army	Band,	D	10 Feb 2003	Unfit	Western Command
Commandant	Unfit			E	13 Apr 2003	Capt R.K. Gurang	
19	Jul	2003	Commandant	F			Unfit
Young Band	Man-23	Sent back	AEC College & Center	G	08 Aug 2003	Course	
Course.							

2. From the above result it appears that you do not take any interest to attain proficiency in your work. Keeping in view all these matters, why disciplinary proceedings be not initiated against you under Army HQ Letter No. 1/13210/159/- dated 28 December 1999. Your reply should reach this office by 01 August 2003.

Sd/- Mandna

M.K. Mandna

Col.

Dy

Commandant.

5. The petition sent a reply in the following terms:

(a) Test was held on 5 November 99. At that time I was in Duty Company and was not present here because I was posted in the Duty Company.

(b) Test was held on 17 May 2002. At that I was posted as runner in the office of the Commandant. On receiving the information I gave the test but in which I was stated to be absent.

(c) On 27 August 2002 test was taken by Major Nasir Hussain in which I was stated to be absent. I had gone on GCM duty and I was not told about the test.

(d) On 10 Feb 2003 Capt R.K. Gurang, Inspector of Army Band Western Command took the test. At that time I had gone to Panchmarhi for attending the course.

(e) On 13 April no test was held by the Commandant.

(f) On 19th Jul 2003 the test was taken by the Commandant and at that time I was present. Nb Sub A.K. Barua Sahad told that this boy has not done the course therefore the Commandant did not listen any music from me.

(g) The test which is written on 8 Aug 2003, is totally wrong. I had come back on 1 April 2003 because I was out of the band for one year, therefore I went to the Course and the D.M. Sir took my test. I was week therefore I was sent back. I therefore request that I will not repeat such mistake again and will take full interest in my work.

6. A reading of the aforesaid shows that the petitioner, in fact, disputed the very basis of the show cause notice as it was his plea that exams were not held or he was not asked to attend the exams while he has been shown as having failed. This resulted in an inquiry being held which found merit in the plea of the petitioner and the proceedings against the petitioner were dropped in pursuance to the show cause notice. We must observe at this stage that it is strange that no action was taken against the persons who had issued a show cause notice based on false averments though they had knowledge to the contrary.

7. The travails of the petitioner did not end at this since the petitioner was sent to attend Young Bandsman Course at Panchmarhi from 6.9.2004 to 9.7.2005 when no progress was shown and the petitioner was shown as having failed in the course.

8. It may be noticed that a show cause notice dated 24.11.2003 had been issued to the petitioner after he had attended the course at Panchmarhi from December 2002 to April 2003. The said show cause notice is as under:

1. I have observed the following lapses on your part on perusal of proceedings of the court of Inquiry:

(a) You were RTU from YB-23 Course in Apr 2003, due lack of musical aptitude and as you did not show any interest in the course.

(b) You have no acquired basic skills, even after having been afforded ample opportunity and time, having served in the Band pl for seven long yrs now you have poor performance is the result of your lack of interest in your trade and your negative attitude towards it.

2. It appears to me, from the available evidence, that you have proved yourself undesirable for retention in service. I afford you an opportunity to explain your conduct as to why you should not be discharged from service under the provisions of para 2 (a) of Army Headquarters letter No. A/13210/152/AG/PS2 (c) dt 28 Dec 88 and 13(3)III(v) of Army Rules 1954.

3. You should submit your reply to this show cause noticed by 30 Nov 2003 failing which it shall be assumed that you have no grounds to urge against the proposed action and the said action shall be proceeded with.

4. Relevant extracts from the proceedings of the court of Inquiry are enclosed for your perusal please.

9. A perusal of the aforesaid show cause notice shows that the subject matter of the same is the performance of the petitioner prior to the issuance of the show cause notice dated 29.7.2003 which contains false allegations against the petitioner and thus, the same could not have formed the basis of any disciplinary proceedings. The petitioner having failed in the examination as per the result declared on 6.10.2005 was never issued a show cause notice. The respondents without issuing a show cause notice and relying on the earlier show cause notice of 24.11.2003 passed the impugned dismissal order of 17.11.2005 in the following terms:

1. I have considered the reply to the show cause notice submitted by Number 2891533F Lance Naik (Musician) Devi Singh of the Rajputana Rifles Regimental Centre.

2. I have concluded on the basis of previous enquiries that even after nine years in the Band Platoon you have not acquired the skills required of a musician and have twice not made the grade in the Young Bandsmen Course at Army Education College & Centre, Panchmarhi (MP) in April 2003 and July 2005, thus you have proved himself undesirable for retention in service.

3. I, therefore, direct that under the provisions of Army Rule 13(3)III(v) of 1954 and Army Headquarters letter Number A 1321/159/AG/PS2 (c) dated 28 December 1988, Number 2891533F Lance Naik (Musician) Devi Singh of The Rajputana Rifles Regimental Centre be discharged from service this 17th day of November, 2005.

10. It is the aforesaid decision which is sought to be challenged by the petitioner.

11. Learned Counsel for the petitioner inter alia has raised the plea that the petitioner was being detailed for jobs other than for the trade for which he was recruited and thereafter being penalized for not performing up to the mark. A further plea raised by Learned Counsel for the petitioner is that there was no show cause notice issued prior to the discharge of the petitioner. Learned Counsel has also emphasized that the own policy of the respondents dated 28.12.1988 deals with the procedure for the removal of undesirable and inefficient JCOs, WOs and ORs, which contains the following stipulation in para 3:

JCO"s, WOs and OR WHO HAVE PROVED INEFFICIENT

3(a) Before recommending or sanctioning discharge, the following points must be considered:

(i) If lack of training is the cause of his inefficiency, arrangements will be made

for his further training.

(ii) If an individual has become unsuitable in his arm/services through no fault of his own, he will be recommended for suitable extra-regimental employment.

12. We have heard learned Counsels for the parties and perused the record.

13. It is quite apparent that the show cause notice dated 29.7.2003 was a mindless exercise by the concerned officer. The petitioner was shown as unfit, absent, failed when he had actually never appeared for the examination on the said dates. The inquiries held by the respondents found force in the plea of the petitioner. The respondents, thus, dropped the proceedings in pursuance to the said show cause notice without taking any action against the persons responsible for such mindless show cause notice having been sent.

14. The second show cause notice sent by the respondents dated 24.11.2003 refers to the conduct of the petitioner in sub-para 1 (b) which actually is the subject matter of show cause notice dated 29.7.2003 and has been found to be false. Not only that even the facts of sub-para 1 (a) existed prior to the show cause notice dated 29.7.2003. The show cause notice dated 24.11.2003 thus could not have been relied upon. Despite this fact the impugned order has been passed relying on the said show cause notice. No show cause notice was sent to the petitioner after the petitioner is alleged to have failed in the examination for which results were declared on 6.10.2005 and the action under Rule 13 of the Army Rules could not have been so taken without a show cause notice which is an undisputed fact. This is a clear stipulation of Army Rule 13(3)III(v). Not only that there has been no examination of the case of the petitioner in terms of the own policy of the respondents dated 28.12.1988 for detailing the petitioner for some other trade.

15. We are, thus, of the considered view that the impugned order of dismissal dated 17.11.2005 cannot be sustained and consequently a writ of mandamus is issued quashing the said order and restoring the petitioner to service with all consequential benefits including of pay and allowances and continuity of service.

16. The respondents are at liberty to hold a fresh examination to determine the suitability of the petitioner for the trade of a musician and in case the petitioner does not succeed, his case can be examined for a remustered trade.

17. The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.