

**FORM NO. 21**

**(SEE RULE 102(1))**

**ARMED FORCES TRIBUNAL, KOLKATA BENCH**

**APPLICATION NO: O. A NO. 16 OF 2010**

**ON THIS 8TH DAY OF APRIL, 2014**

**CORAM: HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)**  
**HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)**

Sgt. Tiwari RK (Raj Kumar Tiwari),  
S/o Haribansh Tiwari,  
Service NO. 625390-F, Trade MTD,  
R/o Vill Belouti, PO Belouti, PS Sahapur  
Presently R/o 201B, MG Road,  
PO Burrabazar, Kolkata-700007  
Now posted at HQ, Eastern Air Command (Unit)  
IA, Upper Shillong, PO Nonglyer  
Meghalaya, PIN: 793 009 .....Applicant

-VS-

1. Union of India service through  
The Secretary, M/o Defence,  
New Delhi-1100011
2. The Chief of Air Staff,  
Air HQ – Vayu Bhawan,  
New Delhi-110 011
3. The Air Officer Commanding,  
Air Force Record Office,  
Subrata Park, New Delhi- 110 01o
3. The Commanding Officer  
HQ, Eastern Air Command, Air Force,  
Nonglyer PO, Upper Shillong-793009  
Meghalaya
5. Air Officer Commanding-in-Chief  
HQ, Eastern Air Command, Air Force,  
Nonglyer PO, Upper Shillong-793009  
Meghalaya .....Responents

For the Applicant : Mr. Subhash Chandra Basu, Counsel  
For the respondents : Mr. D.K.Mukherjee, Counsel

**ORDER**

**Per Lt. Gen. K.P.D.Samanta, Member (Administrative)**

This original application has been filed by the applicant Sgt. Raj Kumar Tiwari @ Tiwari R.K., who was working in the Indian Air Force, who was aggrieved because the authorities did not promote him to the rank of Junior Warrant Officer (JWO) for which, according to him, he was fully eligible.

2. The brief facts of the case are that the applicant was enrolled in the Indian Air Force on 19-6-1980 in the Trade of mechanical transport driver (MTD). He had an unblemished career with a clean and illustrious record of service. He did not earn any adverse remarks during his entire service and had been discharging his duties efficiently, honestly to the entire satisfaction of all concerned. He was promoted to the rank of Corporal in the year 1986 and further to the rank of Sergeant in 1995.

3. As per extant rules, the terms and conditions of an Airman entail an initial term of engagement for 20 years, which is extendable by six more years subject to fulfilling certain conditions. Passing of next promotion examination before expiry of initial engagement of 20 years is one such essential precondition for extension of service. The applicant's initial term of engagement was to expire on 18-6-2000. The applicant states that he passed the promotion examination for Junior Warrant Officer (JWO) before completion of the initial engagement of 20 years and had no adverse entry in the annual confidential reports (ACR) in the preceding eight years. He was also medically fit as required for grant of extension. Despite fulfilling all conditions, he was not granted extension of service, rather, he was discharged from service on and from 30-6-2000 i.e. last day of the month of completion of his initial term of engagement for 20 years. The applicant made several representations against his non-grant of extension despite fulfilling all conditions including passing of promotional examination to the rank of JWO, as required under the extension policy, but to no effect. Being aggrieved, the petitioner preferred a Writ Petition before the Hon'ble Karnataka High

Court vide Writ Petition No.19323 of 2000 seeking quashing of the discharge order as also grant of extension and promotion to the rank of JWO along with consequential benefits. However, the said Writ Petition was dismissed as infructuous vide order dt. 19-1-2005. Being dissatisfied, the applicant preferred a Review Petition being No. 425 of 2005 whereby by order dated 13-2-2005 the applicant was allowed to withdraw the said Review Petition with liberty to approach appropriate legal forum to redress his grievance (Annexure A10).

4. Thereafter the applicant preferred a representation to the authorities, who did not respond favourably. The applicant then filed another Writ Petition (No. 56 of 2006) before the Hon'ble Karnataka High Court. The said High Court by order dated 19-6-2006 allowed the Writ Petition in favour of the applicant by issuing the following directions:

"6. Hence, the petition is allowed. The impugned endorsement Annexure "D" is quashed. Consequently Annexure "H" and "L" are also quashed. The respondents are directed to consider the case of the petitioner for grant of extension of service by holding that the petitioner had passed the promotional examination in compliance with clause (d) of Item No.4 of the Air Force Order, even though apparently the result was announced 2 months 16 days before the expiry of regular term of engagement and **provide an extension of service after promotion as Junior Warrant Officer.** However, insofar as the petitioner's claim for wages during the period the matter was in dispute cannot be taken into consideration. The respondents shall comply with this order within a period of three months from the date of receipt of a certified copy of this order". (Underlining for emphasis)

5. The respondent authorities, while partially complying with the order by reinstating the applicant retrospectively from 1.7.2000 i.e. the date following the day of his discharge, were not satisfied with other part of the order directing the authorities to promote him to the rank of JWO. Therefore, they preferred a writ appeal before the Hon'ble Karnataka High Court being No.2065 of 2007 which was decided on 21-1-2008. As per the said order on the writ appeal, the order of the Single Bench passed in Writ Petition No.56 of 2000 dated 19-6-2006 was modified by making the following observations/directions:

"(6) Coming to the merits of the appeal, it is clear that the learned Single Judge has granted relief beyond the scope of the writ petition and the prayers in the writ petition. Even if the learned Single-Judge was of the view that the discharge of the petitioner from service was illegal and that he was liable to be reinstated and that

he should be granted extension of service, it was not open to the learned Single Judge to direct the promotion of the petitioner even before his reinstatement in service and grant of extension of service. Even if the writ petitioner would have been considered for promotion as Junior Warrant Officer had he continued in service without being discharged from service on 30.6.2000, the learned Single-Judge could have only directed the respondents to first reinstate him in service and grant extension of service and then consider petitioner's case for promotion in accordance with the rules and the procedure for promotion. By this order, the cart is put before the horse. Hence the impugned order is liable to be set aside to the extent indicated above.

(7) Hence the writ appeal is allowed to the extent of setting aside the direction in the impugned order to promote the petitioner as Junior Warrant Officer. However, we make it clear that the appellants are liable to consider the case of the writ petitioner for promotion to the cadre of Junior Warrant Officer in accordance with the rules and the procedure for promotion. Considering the facts and circumstances of the case, we are of the view that the appellants should consider the case of the petitioner for promotion as Junior Warrant Officer and pass appropriate orders as expeditiously as possible and within a period of three months from today. If the petitioner is aggrieved by such orders passed by the appellants, it will be open to him to challenge the same in appropriate proceedings.

(8) The writ appeal and I.A. are disposed of in the above terms."

(Underlining for emphasis)

6. Thereafter, the respondents issued a speaking order on 31-7-2009 (Annexure A15), wherein they stated that the applicant could not be promoted to the rank of JWO based on his seniority and also on merit.

7. The applicant again preferred an appeal before the respondent authorities against his non-promotion, but to no avail. The applicant raised the question of discrimination inasmuch three of his juniors, were promoted to the rank of JWO whereas he had been left out despite direction of the Hon'ble High Court. He was intimated vide letter dt. 15.12.08 & 11.6.09 (annexure-A1), he could not be promoted as he did not make the merit in his trade, rank and grade within available vacancies. Having failed to get any redress from the respondent authorities in the matter of his promotion to the rank of JWO, he has filed the instant application before this Tribunal praying for the following reliefs:

- “(i) To direct the respondent to grant the promotion to the Rank of JWO under the old policy i.e. AFO II of 1999 from retrospective effect by counting entire seniority of service.
- ii) To direct the respondent to release the amount of back wages from the date of reinstatement i.e. 28.09.2006 after having refunded the entire terminal dues;
- iii) To declare that the impugned order of rejection dated 10.09.2008 and 30.01.2009 being Annexure A1 collectively (*Actual dates of the impugned order as per Annexure A1 are 10.12.08 and 11.06.09*) void, vague and liable to be quashed or set aside”.

8. The respondents have contested the application by filing a written affidavit in opposition (A/O). It is admitted that the applicant was not granted extension of service beyond his initial term of engagement and the reason for not granting such extension has been stated to be not passing the promotional examination within the stipulated time in terms of Para 4(d) of Air HQ letter dated 6-11-1995 and AFO Order No.11/99. However, it is admitted that the applicant passed the promotional examination for JWO Part I during Oct 98–Mar 99 cycle and Part II examination during Oct 99–Mar 2000 Cycle. The result declaring him to have passed was published 2 months 16 days prior to his due date of discharge, whereas as per policy letter he had to pass 3 months prior to the date of discharge in terms of Para 4(d) of AFO 11/99. Be that as it may, after the order of the Hon’ble Karnataka High Court the applicant was reinstated in service from the date of his discharge and granted extension. In terms of the order of the Hon’ble High Court he was also considered for promotion to the rank of JWO under the then existing policy of 1998. As per the said policy, promotion was to be given on the basis of seniority subject to fulfilling certain other conditions. However, the applicant could not come within the available vacancies in terms of his seniority and in fact, persons of 1994-95 substantive seniority, who were senior to the applicant, were promoted at that point of time. Therefore, the question of promotion of the applicant, whose substantive seniority as a Sergeant was 1999, could not arise in any case. He would not have come within the available vacancies and therefore, could not be promoted. Thereafter, the policy for promotion was changed in 2002 to be

applicable from the panel year of 2003-04 as per the Air HQ letter dated 23-9-2002. As per this new policy, promotion is to be approved on the basis of merit. The applicant having remained out of service for about 6 years from 2000 to 2006, there were no ACRs initiated in his case during this period. However, the respondents considered his available ACRs for the preceding years; even then he could not come within the promotion zone on merit as per number of vacancies available and hence he could not be promoted. It is submitted that the respondents have complied with the directions of Hon'ble High Court but since the applicant could not come within the available vacancies on merit, he could not be promoted whereas his juniors were promoted as per merit from 2004-05 onwards.

9. Both sides have filed a number of supplementary affidavits/counter S/As bringing new facts/documents on record. The respondents also submitted all the original promotion board proceedings where the applicant was considered for promotion to the rank of JWO. Two officers from the Air Force Records were also present to explain the nuances of these boards and the cogent conclusions thereof.

10. We have heard the learned counsel for both sides at length and have perused the documents placed on record. The respondents have also produced the records relating to the promotion panel of different years, which have been perused by us.

11. Mr. Subhash Chandra Basu, the learned advocate for the applicant has contended that the applicant passed the JWO promotional examination during Oct 99–Mar 2000 Cycle; however, for delay in publication of result, he could not be held responsible nor be allowed to suffer. He was illegally denied extension for which he had to move the Hon'ble Karnataka High Court for relief and in terms of order of the Hon'ble High Court he was reinstated in service on 28-9-2006 vide letter dated 22-9-2006 in the rank of Sergeant with effect from the date of discharge, i.e. 1-7-2000, but no back wages were granted. On the contrary, the applicant returned his retirement benefits that he received during his discharge and joined the post. Since he was reinstated on the date of his discharge, he should be treated to have continued in service uninterruptedly. Therefore, he is

entitled to the back salary during the period from July 2000 to September 2006. By not paying the back wages to the applicant besides non grant of promotion, the respondents have caused gross injustice to the applicant.

12. The main thrust of the argument of Mr. Basu is, however, that since the applicant passed the promotional examination for JWO in March 2000 in terms of old promotional policy, therefore, he should have been considered for promotion on the basis of old policy i.e. on the basis of seniority and not in terms of the new promotion policy i.e. on merit, which came into force from the panel year of 2003-04. He has pointed out that three of his batch mates, viz. R.N. Pandey, M.K. Sharma and Munmun Mishra, who were junior to the applicant, were promoted to the higher rank of JWO while the applicant was deprived of such promotion. It was mainly due to the administrative lapse by the authorities for which he was discharged wrongly. Because of that he could not earn ACRs during that period, when he was kept out of service illegally for no fault of his own. He has contended that the applicant was promoted in the grade of Acting Sergeant in 1995 and therefore, he cannot be denied promotion in terms of old promotion policy.

13. The learned counsel for the applicant relying on various decisions of the Hon'ble Supreme Court has contended that existing accrued right cannot be taken away or conditions of service cannot be changed midway to the prejudice of an employee. He has referred to the following decisions of the Hon'ble Apex Court:

- a) (1972) 4 SCC 765 : AIR 1972 SC 628 (**Ex Major N.C.Singhal –vs- Director General, Armed Forces**)
- b) AIR 1989 SC 1071 : 1989 Supp (1) SCC 244 (**D.P.Sharma –vs-UOI**)
- c) JT 1991 (5) SC 35 : 1991 Supp (2) SCC 363 (**Nirmal Chandra Bhattacharjee –vs- UOI & Ors**)
- d) AIR 2003 SC 43 (**P.Tulsi Das –vs- Govt. of A.P.**)
- e) AIR 2001 SC 821 (**O.P.Lather –vs- Satish Kumar Kakkar**)
- f) AIR 1987 SC 415 (**T.R.Kapur & Ors –vs- State of Haryana & Ors**)

- g) AIR 1987 SC 1858 (**Ex Capt K.C.Arora –vs- State of Haryana & Ors**)
- h) (2007) 9 SCC 743 (**Vijay Singh Charak –vs- UOI & Ors**)
- i) (2010) 4 SCC 290 (**Uoi & Anr –vs- Hemraj Singh Chuhan & Ors**)
- j) (2010) 4 SCC 301 (**H.S.Vankni & Ors –vs- State of Gujrat & Ors**)
- k) AIR 1997 SC 250 (**Pilla Sitaram Patrudu & Ors –vs- UOI & Ors**)

14. Mr. D.K. Mukherjee, the learned advocate for the respondents has submitted that the applicant was considered for promotion but due to the fact that he was low in seniority than those promoted within available vacancies, he could not be promoted in terms of the old policy that was in accordance with his seniority. Subsequently, when the new policy came into effect, his case was also considered; but here again he, being low in merit, could not compete with others and therefore could not be promoted.

15. Wing Commander Monika Bijlani from Air Force Record Office, New Delhi, appeared before this Tribunal during the course of hearing and explained to us the promotion policies – both old and new and the considerations that were made in respect of the applicant. Some documents relating to the proceedings of promotion boards have also been produced before us for scrutiny.

16. We have given our thoughtful consideration to the submissions of both the sides.

17. Most of the facts are admitted. The applicant was initially enrolled in the Air Force on 19.06.1980 in the trade of MTD. He was promoted as Corporal in the year 1986 and then to the rank of Acting Sergeant in the year 1995, although his substantive seniority in that rank was 1999. It is also not in dispute that under the extant Rules, an Airman on completion of initial engagement of 20 years was entitled to extension of six years subject to certain conditions as laid down in Air Force Order No.11/99 dated 13.08.99 (Annex.A2). Para 4(b) of the said Air Force Order stipulates as follows:

“4(d) **Passing of Promotion Examination.** Extension of engagement will be granted only to those airmen who have passed all parts of their promotion examinations which make them eligible for promotion to their next higher rank. However, those airmen who have already appeared at promotion examinations before submission of their applications for grant of extension or those who are likely



to appear at such promotion examinations which will make them eligible for promotion to the next higher rank may be considered for grant of extension of engagement if they pass the promotion examinations three months prior to the expiry of their regular engagement. Airmen who do not attain the rank of Cpl within 15 years will be discharged by AOIC AF Records vide Para 12(a)(i) of AFI 12/S/48 as amended by AFI 21/79.”

18. Thus, it is seen that as per this provision of the rules, promotional examination is to be passed three months prior to the expiry of the regular engagement. According to the applicant, he passed both Part I and Part II examination before expiry of his initial term of engagement of 20 years and also fulfilled other criteria. In spite of that he was not granted extension and discharged from service with effect from 30.06.2000. According to the respondents, the result of the examination of the applicant was published two months sixteen days earlier from the date of expiry of initial engagement and not before three months. Therefore he was entitled to extension and consideration for promotion in terms of the rules.

19. We, however, need not emphasize on this controversy because admittedly the applicant went before the Hon'ble Karnataka High Court by filing writ petition No.56 of 2006 which was decided on 19.06.2006 in favour of the applicant. In compliance of the Hon'ble High Court order dated 19.06.2006 the applicant was reinstated in service by way of granting extension with effect from 1<sup>st</sup> July, 2000 i.e. the day following the date when he was discharged, without, however, any back wages vide order dated 22.09.06 (Annex. A18 to the supplementary affidavit filed by the applicant on 24.11.2010).

20. The operating portion of the order of the Hon'ble High Court dated 19.06.2006 has been quoted above. It appears that Hon'ble High Court directed that the applicant be given extension after promotion as Junior Warrant Officer. It appears that the respondent authorities were aggrieved by this part of the order and preferred a writ appeal being 2065 of 2007 before the said High Court which was decided on 21.01.2008 by which the earlier order was modified by directing the respondents to consider the case of promotion of the applicant as JWO and pass appropriate orders. Accordingly, the respondents considered the case of promotion of the applicant in the light

of the existing promotion policy but the applicant could not come up to the desired seniority during the first consideration as per old policy and later could not come up in merit for promotion to accrue to him. A speaking order dated 31.07.2008 was issued. Relevant portion is quoted below:-

“20. AND WHEREAS the appellant/respondent have considered your case for promotion in he light of the existing promotion policy.

21. AND WHEREAS had you continued in service beyond 30 Jun 2000, as per your seniority, you would have come up for consideration for promotion to the rank of JWO in the promotion in the year 2003-04 only. Promotion can be granted only on fulfilling all laid down eligibility criteria as mentioned in the promotion policy for warrant ranks issued vide Air HQ/S 40651/3/PA(CPC) dated 23 Sep 02. As per this new promotion policy, seniority and merit depending on past performance of seven years is taken into consideration which was applicable from the promotion year 2003-04.

22. AND WHEREAS taking into consideration your performance of last seven available assessments prior to your discharge and after your reinstatement, it is evident that you could not make the merit for promotion to the rank of JWO in the promotion panels 2003-04 to 2008-09.

23. NOW THEREFORE, having considered your case in compliance of the Hon’ble High Court order dated 21 Jan 08, in light of the above mentioned facts and rule position, I am of the opinion that it is not feasible to grant JWO promotion to you.”

21. The main plank of argument of Mr. Basu, Id. adv. for the applicant is that since the applicant passed the promotional examination in the year 1999, his promotion to the rank of JWO should be governed by the old rules i.e. policy dated 20.10.1998 (Annex.R2 to the supplementary A/O filed on 15.03.2011). It appears that criteria for promotion as stipulated in Para 5 thereof is in the order of seniority in the respective trades and minimum marks in ACR based on preceding five years reports as 70% i.e. minimum 350 out of total 500. Apart from that, weightage for “honours and awards” were also to be incorporated. Negative marking for punishments etc. was also stipulated. The new policy which was made applicable from the panel year of 2003-04 was issued on 23.09.2002 (Annex.A17 to the O.A.) As per Para 14 of this new policy, promotion is to be approved on the basis of merit. As per this policy, instead of preceding 5 years ACR, 7 years ACR are to be considered and the marks allotted for ACR was 70% i.e. minimum 490 out of total 700. It is clearly provided in Para 28 of the new policy that the earlier promotion policy dated 20.10.1998 will stand superseded.

22. The case of the respondents is that the applicant, subsequent to his reinstatement, was considered for promotion to the rank of JWO in 2000, 2001 and 2002 panel years in terms of old policy. But he could not come within the zone of consideration in his seniority within the available vacancies. The respondents in their A/O have given a comparative chart which is appropriate to be reproduced here for understanding the submission of the respondents:-

Promotion year	No. of airmen considered	No. of airmen promoted	Date of substantive seniority	Remarks
2000-01	210	130	07 Jan 94	Date of substantive seniority in respect of 625390-F Sgt RK Tiwari MTD is 03 Jan 99
2001-02	169	108	09 Mar 94	
2002-03	210	114	11 May 94	

23. It is clear from this chart that persons who were promoted in terms of old policy during the years 2000-01, 2001-02 and 2002-03 against available vacancies were having substantive seniority of the year 1994. They were thus much senior to the applicant, whose date of substantive seniority was 03.1.99 though he was promoted as Acting Sergeant in 1995. Since, as per the old promotion policy, promotion was to be approved on the basis of seniority in the respective trades, the applicant could not come within the zone of consideration in his seniority. In the case of **Srbajit Singh –vs- Ex Major B.D.Gupta & Ors**, (2000) 7 SCC 67, it has been held by the Hon'ble Apex Court that fundamental right to be considered for promotion is available to a candidate only if he falls within the prescribed zone of consideration. Similarly, in **B.V.Sivaih & Ors –vs- K.Addanki Babu & Ors**, (1998) 6 SCC 720 explaining the principle of "seniority-cum-merit" in promotion, it has been held as follows:-

"Seniority-cum-merit in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance which in turn may be based on service record and interview and prescribing the minimum marks which would entitle a person to be promote on the basis of seniority-cum-merit."

24. Turning to the present case, we find that during the period from 2000 to 2003, when old promotion policy was in operation, persons, who were much senior to the applicant, were promoted. Therefore, the claim of the applicant that he should have been promoted at that time does not hold much water. Further, it is also not the case of the applicant that any of his junior was promoted during that period.

25. At this stage, we may also consider the main contention of the Id. adv. for the applicant that the applicant should have been considered in terms of old promotion policy of 1998 all through since he had passed the promotional examination when the old policy was in vogue. As per him, the new policy that was based on merit cum seniority should not have been made applicable to him at all. His contention is that conditions of service cannot be altered abruptly and that existing accrued right cannot be taken away to the prejudice of the concerned employees. His argument is that the applicant, having been promoted to Acting Sergeant in 1995 and also having passed the promotion examination for JWO in the year 1999-2000, should have been considered for promotion in terms of the promotion policy that was in vogue at that point in time and not under the new policy which could not be made applicable to the case of the applicant. In support of his contention he has placed reliance on a number of decisions of the Hon'ble Supreme Court as indicated above. We may now consider these decisions to see as to what extent they are applicable to the case of the applicant.

a) In **Ex Major N.C.Singhal** (supra) the appellant while holding medical licentiate qualification was taken in Army Medical Service as EC officer in the rank of Lt. He worked for three years and relieved. Thereafter, he was again taken as SSC where he worked for more than seven years. He was again called for reserved service as specialist. At that time Army Instruction No. 1/S dt. 27/5/54 was in vogue according to which previous SSC and EC service will be taken into account for pay fixation. However, the said AI was subsequently modified in 1965 by AI 176 according to Para 7 of which previous service will be counted but persons holding licentiate qualifications the previous commissioned service less than two years will

count for pay and promotion. This has caused the grievance because according to the applicant as per earlier instruction he was entitled to count full service in that qualification. In that context, the Hon'ble Supreme Court held that conditions of service of the appellant could not be altered or modified to his prejudice by a subsequent administrative instruction. Turning to the present case, the facts are totally different. Here the applicant was indeed considered for promotion in terms of old rules so long it governed the field. Therefore, no prejudice was caused to him. Hence, this decision is not applicable.

b) In **DP Sharma** (supra) the facts were also different. In that case the inter se seniority was earlier fixed on the basis of length of service prior to framing of 1968 rules which was changed to date of confirmation. It was held that seniority of employees long prior to framing of rules cannot be disturbed on the basis of rules. The facts of the case in our hand are totally different and hence, this decision is of no avail to the applicant.

c) In **Nirmal Chandra Bhattacharjee** (supra), the appellant was already selected in terms of the old rules for promotion to the post of Ticket Collector but in view restructuring of posts, he could not be promoted. In that context, it was held the principle of service is that no rule should work prejudice to an employee. In the instant case, the applicant was not selected in terms of earlier rules and hence this decision is also not applicable in his case.

d) In **P. Tulshi Das** (supra) the disputed question of fixation of pay scales of teachers after formation of the State of AP. By the impugned rules, different pay scales were fixed for differently qualified teachers. In the process, those teachers, who were earlier getting higher scale in a particular grade of school was sought to be lowered and in that context, the Hon'ble Apex Court held that retrospective reclassification by a fixation to nullify the lawful rights acquired during the past period was bad. However, prospective effect can be given. The facts in the case before us are distinguishable and hence this decision is inapplicable.

e) In **O.P.Lather & Ors** (supra) the question involved promotion to the post of Executive Engineer and eligibility for the post was degree or diploma holders. Thus, the facts are obviously different.

f) In **T.R.Kapur** (supra), here also there was retrospective amendment of rules making degree in engineers essential for promotion to the prejudice of diploma holders. In that context, the rule was declared ultra virus. This decision is also not applicable in view of difference in facts.

g) In **Ex Capt. K.C.Arora** (supra). There the rule was changed by the Haryana Govt. whereby ex army personnel, who were earlier getting seniority on appointment under the said Govt. based on their past military service, was sought to be amended, which affected their right to accelerated seniority. In that context, it was held by the Hon'ble apex Court that amendment of definition of the expression 'military service' in rule restricting the benefits of military service up to a particular date was bad. This decision is also not applicable to the present case as facts are entirely different.

h) In **Vijay Singh Charak** (supra) the dispute was regarding preparation of select list for IFS officers. Clubbing of vacancies and non preparation of select list every year were the subject matter of controversy. The facts are clearly distinguishable and hence this decision is not applicable.

i) In **Hemraj Singh Chauhan** (supra) also the facts are distinguishable where IAS Rules and their amendment were under dispute. In **H.S.Vankani & Ors** (supra) also the dispute was in relation to inter se seniority of promotee rangers with lesser qualification and direct recruits with higher qualification. This decision is also not applicable. In **Pilla Sitaram** (supra) the dispute was delay in appointment for no fault of a candidate. Thus, none of the decisions referred to by the Id. adv. is found to be relevant to the present case.

26. We have already indicated above that it is not that the applicant was not considered under the old policy. According to the respondents, after reinstatement of the applicant retrospectively, his

case was considered as per old promotion rules for the years 2000-01, 2001-02 and 2002-03 but he could not make it according to his substantive seniority which was 1999 whereas persons with substantive seniority of 1994 were promoted during those years. Therefore, in our considered view, the applicant cannot have any grievance because admittedly, as per the old promotion policy, promotion is to be approved according to seniority.

27. The old promotion policy was amended in September 2002 to be effective from the panel year of 2003-04. In terms of new policy, promotion was to be approved based on merit; for which preceding 7 years' ACRs are considered. The respondents have indicated that the applicant was out of employment for six years i.e. 2000 to 2006. Therefore, no ACR was available for him during this period. Therefore, in terms of extant policy, the respondents considered his preceding 7 years ACR for the period from 1993 to 1999 for promotion to JWO but he could not be selected on merit vis-à-vis others.

28. It is well settled that authorities can always amend the recruitment & promotion rules even by executive instructions; the only safeguard being it should be done prospectively unless it is specifically provided in the rules for their retrospective effect. It is also trite that consideration for promotion is a valuable right but not the promotion or chance of promotion. Promotion depends on various factors and selection is made by the Promotion Board depending on the criterion stipulated in the relevant rules/policies. Court or Tribunal cannot interfere in such matters unless mala fide or infraction of any statutory rules is alleged. Reference may be made in the case of **State of Haryana – vs- Piara Singh**, (1992) 4 SCC 118 wherein in Para 21 as under:-

“Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or (in the absence of such rules) by issuing rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor

should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. The State must be a model employer.”

29. A contention has been raised by the Id. adv. for the applicant that the 1998 policy was issued by the Air Chief Martial vide annexure-R1 to the Suppl. A/O filed by the respondents dated 6.1.11, whereas the 2002 policy was issued by ACAS (PA &C) for AOP. Therefore, it has no statutory force and hence cannot be acted upon. However, during the course of hearing, it is submitted by the Id. adv. for the respondents on instruction that under delegation of powers by the MoD, promotion policy of officers up to the rank of Colonel and equivalent including promotion of PBORs can be issued by the Dy. Dir/Asst. Director with the approval of CAS. Therefore, there was nothing wrong in 2002 policy which specifically mentioned that the earlier policy of 1998 stood superseded. Subsequently, also on 15 May 2007, a further policy was issued on the subject by similar process by superseding the 2002 policy as well. In that view of the matter, we are unable to accept the contention of the Id. adv. for the applicant that 2002 policy could not have been acted upon since it was not issued by the Air Chief Martial. For administrative convenience and under rules of business, such delegated powers are always conferred upon subordinate authority and this is the usual practice in various Govt. departments. It is also to be noted that the 2002 policy was applied for all including the juniors whose cases have been cited by the applicant himself. Therefore, it is an absurd proposition that only the applicant is to be governed by old rules, as contended before us. Any service rule is to be applied universally to all employees concerned and not to the exclusion of any particular individual, as is claimed by the applicant. We find no merit in this contention of the applicant.

30. The respondents have given a chart showing the percentage of marks obtained by persons last promoted during the panel years 2003-04 to 2010-11 along with percentage of marks secured by the applicant during these years, which is reproduced below:



YEAR OF ASSESSMENT MARKS	PERCENTAGE OF LAST PERSON EMPANELLED	PERCENTAGE OF ASSESSMENT MARKS OF THE PETITIONER	GRADE OF CONSIDERATION
2003-04	86%	73%	I
2004-05	87%	73%	I
2005-06	88%	74%	I
2006-07	88%	74%	I
2007-08	89%	74%	I
2008-09	93%	75%	I
2009-10	93%	80%	I
2010-11	93%	83%	I

31. It appears that based on merit, the applicant could not come within the available vacancies based on the inputs available for him. As already stated, preceding seven years ACRs are taken into consideration as per new policy. However, during the period from 2000 to 2006, the applicant was out of service, and, therefore, no ACR during these period could be raised in respect of the applicant. In this context, the respondents have produced a policy letter dt. 15 May 2006 regarding revision of ACR. It has been stated therein that when ACR/Assessment is not available for a year or two, average of past seven reports are to be taken as mark for these years. In terms of this policy, the respondents have taken into consideration past seven years ACRs of the applicant which was available when the applicant was in service and average assessment was made for the purpose of consideration of his case as per new policy, but unfortunately he could not come in competition with others and therefore could not be promoted.

32. We have also gone through original promotion board proceedings for different years as were produced before us and we find that the respondents have followed the procedure correctly and empanelled those who secured better marks than the applicant. When criteria for promotion are merit based, a senior person can be superseded by his juniors and steal a march over his senior.

The principle of merit-cum-seniority has been clarified by the Hon'ble Apex Court in **B.V.Sivaih & Ors (supra)** where it has been held as under :-

“The principle of “merit-cum-seniority” lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. On the other hand, as between the two principles of seniority and merit, the criterion of “seniority-cum-merit” lays greater emphasis on seniority. But an officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.”

33. Similarly in the case of **UOI –vs- Lt. Gen. Rajendra Singh Kadyan & Anr**, (2000) 6 SCC 698, which relates to Armed Forces, it has been held by the Hon'ble Apex Court in Para 12 that “merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All India services necessarily involves assessment of comparative merits of all eligible candidates and selecting the best out of them.

34. The applicant has complained that three of his juniors have been promoted to his exclusion which is discriminatory, The respondents have, however, submitted that the aforesaid juniors of the applicant viz. M.M.Mishra, R.N.Pandey and N.K.Sharma were promoted in the year 2006-07, 2006-07 and 2004-05 respectively on merit i.e. as per new policy. However, the applicant could not come up with his merit in those years panel, and therefore, he could not be promoted. They have given a comparative chart in this regard which is reproduced below:-

Ser No.	Rank	Name	Promoted to Act. JWO	Promotion Panel Year	% of marks scored by the individual	% of marks scored by the petitioner
627017	JWO (now WO)	MM Mishra	01 Aug 06	2006-07	90%	74%
626159	JWO	RN Pandey	01 Dec 06	2006-07	89%	74%
626670	JWO	NK Sharma	01 Jan 05	2004-05	89%	73%

35. It is quite evident from the above comparative chart that the applicant could not come within the zone of promotion in view of his low merit position. We have also seen his ACRs

subsequent to his reinstatement i.e. for the period from 1<sup>st</sup> Nov 2006 till Aug 2012. We find that he earned excellent remarks and his average numerical grading was approx 80 whereas persons with higher grading were promoted during these years as already indicated in the chart quoted earlier.

36. Considering the matter very carefully, we are of the opinion that the prayer of the applicant so far as promotion to the rank of JWO is concerned, cannot be accepted in the facts and circumstances indicated above.

37. Now coming to the other prayer of the applicant for back wages, the contention of the applicant is that after his discharge on 30<sup>th</sup> June 2000, he was reinstated in service after the order of the Hon'ble Karnataka High Court as indicated earlier, vide order dt. 22.9.06 (annexure-A18) with retrospective effect from 1<sup>st</sup> July 2000 and he actually joined on 28<sup>th</sup> September 2006. Therefore, the respondents could not deny him salary for the period he remained out of service i.e. from 1<sup>st</sup> July 2000 till 28<sup>th</sup> September 2006. We, however, find that the Hon'ble Karnataka High Court, vide order dated 19 June 2006, while directing the respondents to grant extension to the applicant in Writ Petition NO. 56 of 2006, declined to pass any order regarding back wages on the ground that the issue was disputed. Therefore, while issuing the reinstatement orders in terms of the order of the Hon'ble High Court, the respondents have stated that no back wages will be payable. Since the Hon'ble Karnataka High Court has already considered the question and declined to pass any order on back wages, it will not be proper for us to reopen the issue and pass any order. Therefore, such prayer of the applicant stands rejected.

38. However, in the reply to the supplementary A/O filed on 4.1.12, we find that the applicant has submitted that he was not granted any increment during the period from July 2000 to September 2006 as a result, his pay had been fixed much below than his four years' junior (Sgt. I.Kumar MTD). He has stated that as on 28.9.06, his pay was fixed at Rs. 4490/- whereas his said junior was getting basic pay of Rs. 5000/-. The applicant made representations on 4 Dec 2009 and the matter was referred to the higher authority vide letter dated 20 Jan 2010 by the A/C department.

39. We are of the view, even if back wages cannot be granted to the applicant, he cannot be deprived of increments during these six years notionally and actual payment will be available from the date he physically joined on reinstatement. It is the general principle in service jurisprudence that no senior should get lesser pay than his juniors in the grade. In this case, the applicant was reinstated retrospectively from a date following the date of his discharge. Therefore, he should be deemed to be in continuous service without any break. Hence, he cannot be denied his due increments during the period. We, therefore, are of the considered opinion that the respondents should take immediate step to re-fix his pay by way of granting notional increments that fell during the period 1<sup>st</sup> July 2000 till 28<sup>th</sup> September 2006. Actual payment will be available on and from 28<sup>th</sup> September 2006 i.e. date of joining.

40. In view of our findings made above, the application is allowed in part on contest but without any order as to costs. While we are unable to accede to his main prayers for promotion to the rank of JWO or back wages, but by way of moulding relief, as prayed for in the Supplementary affidavit, we direct the respondents to grant notional increments to the applicant which fell due during the period from 1<sup>st</sup> July 2000 to 28<sup>th</sup> September 2006, as indicated in the preceding paragraph, and re-fix his pay wef 28.09.2006 along with consequential benefits. The ibid action shall be completed within 90 days from the date of communication of this order.

41. Let records be returned to the respondents on proper receipt.

42. 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)