

**ARMED FORCES TRIBUNAL, CHANDIGARH  
REGIONAL BENCH AT CHANDIMANDIR**

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OA 1168 of 2011

<b>Lt Col Vinay Lakhera</b>	.....	<b>Petitioner(s)</b>
<b>Vs</b>		
<b>Union of India and others</b>	.....	<b>Respondent(s)</b>

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For the Petitioner (s) :	Col (Retd) NK Kohli , Advocate
For the Respondent(s) :	Mr. Gurpreet Singh, Sr. PC.

**Coram: Justice Vinod Kumar Ahuja, Judicial Member.  
Lt Gen (Retd) HS Panag, Administrative Member.**

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**ORDER  
30.07.2013**

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The petitioner has filed the present application seeking the following reliefs/directions:-

- (a) Quash non-empanelment of the application by No.3 Selection Board held in September 2008 and subsequent Boards.
- (b) Summon the records, viz the ACR dossier of the applicant and set aside the ACR for the period 07 September, 2002 -31 May 2003.
- (c) Confidential Reports of the applicant in the reckonable profile be reviewed and any aberration including gradings of '7' or below be expunged on ground of inconsistency and subjectivity.
- (d) Negative recommendations for promotion by the IO, if any, in the impugned report including in the form of 'may be promoted' be also expunged being inconsistent with overall profile of the applicant as also due to non communication being adverse input.

- (e) Assessment of less than 8 in PQ/DPVs or QAPs by any of the Reporting Officers or negative recommendation for promotion, if any, that may have crept in any report due to biased under assessment by the IO/RO may also be expunged and removed from record being inconsistent, subjective and not in congruence with overall career profile of the applicant as also due to non-communication being adverse input.
- (f) Direction to the respondents to consider the applicant for promotion to the rank of Colonel as a fresh case with original seniority based on his modified profile i.e. after effects of the aforesaid ACR have been removed in entirety.
- (g) Any other order or direction that Hon'ble Tribunal may consider appropriate under the circumstances of the case/
- (h) The application may please be allowed with costs throughout.

Shorn of unnecessary details, the brief facts leading to the instant application are that application was commissioned in the Regiment of Artillery on 19-12-1992. Subsequently, he was selected on merit for training as Internal Pilot and on successful graduation he was among the first officers to be posted in a SATA Battery to raise UAV Unit in December, 1998. In 2002 while working in the rank of Major with 122 SATA Battery, a Mess function was

organized in honour of Brig PK Chakravorty, the RO. In that function, Brig Chakravorty enquired from him about the health of his father, who being treated for cancer in Rajiv Gandhi Cancer Institute for Cancer. The applicant replied that that they as a family were “fighting “ with the disease and were hopeful of recovery of his father. The said officer for no apparent reason, felt offensive to the applicant’s using the word “fighting” with disease. Then Brig. Chakravorty told him that he should never use the word fighting and should reconcile to his father’s fate as whoever has come in this world would have to leave this world one day. The applicant realizing the sensitivity of the matter politely conveyed his disagreement with Brig Chakravorty on this aspect.

It is the case of the applicant that Brig Chakravorty taking this incident as an affront to his authority got annoyed and told him to put in his papers for release from the Army if his father’s health was so important to him. The applicant was taken aback by the reaction of Brig Chakravorty and told him that he had never allowed his personal problems to come in the way of performance of his duties. He further told him that as being his superior officer, he expected from him to boost his morale at such a crucial juncture, rather than demoralizing him. Then Brig Chakravorty tactfully changed his attitude and started showing sympathy with him. As averred in the application, thereafter this officer made it a point to humiliate him on slightest pretext throughout his tenure.

It is further averred that in the meantime Lt Col. P.J. Ninan, the IO, who had recently taken over the command of the unit, also felt perturbed by the said incident, which occurred during the first mess function hosted by him in honour of RO, Brig PK Chakravorty and rebuked the applicant for the same.

It is alleged in the application that in June 2003 he was handed out subjective and biased under-assessment both by the IO (especially in closed portion) and by the RO in his Confidential Report for the period 07 Sept 2002 to 31 May 03. The applicant feels that Col PJ Ninan, the IO, was influenced by his superior Brig PK Chakravorty, the RO.

It is also averred in the application that in the year 2003-04, he took part in all operational flights in OP PARAKARAM as well as operations against ULFA Camps (Bhutan) in OP RHINO and OP RISING SUN. He also successfully and safely inducted his troop from Bikaner to Hasimara for the said operations and later de-inducted it back to Bikaner, a distance of more than 2500 Kms. Apart from it, he also claims certain professional achievements to his credit stating that in the years 2005 he became QFI (IP) and was employed as first ever indigenous Instructor for training his own officers as Internal Pilot. He successfully completed Internal Pilot Course from August 2005 - May 2007 and graduated seven internal Pilot thereby bringing self-dependency for training in UAVs. During the year 2007 he qualified in the Chief Qualified Flying Instructor Course from Israel.

In September 2008 the case of the applicant for promotion to the rank of Colonel by No. 3 Selection Board was considered, but he was not empanelled. Against his non-empanelment, he filed a non-statutory complaint dated 9-11-2008 which was rejected by the Chief of the Army Staff vide order dated 8 April 2009. Feeling aggrieved by the rejection of the Non Statutory complaint, the applicant preferred a Statutory Complaint dated 25-08-2010 in which he had highlighted his service profile including having operated in Operation PARAKRAM, Operation RISING SUN & Operation BRAZEN CHARIOT besides his performance & achievements during his service. It was also rejected by the Ministry of Defence vide order dated 26-4-2011 (Annexure A-4).

Faced with this situation, the applicant has filed the present application challenging his non-empanelment by No.3 Selection Board to the rank of Colonel, which, according to him, is apparently based on the adverse assessment recorded by the IO Lt. Col. P.J Ninan and RO Brig PK Chakravorty in his Confidential Report for the period 07 September 2002 to 31 May 2003 and sought for the reliefs/directions referred to above.

Notice was issued to the respondents, whereupon the reply was filed on their behalf.

In the reply it is inter alia stated that that the Army has a pyramidal rank structure, as such, the number of vacancies in higher ranks are limited. As per the base of the pyramid, only those officers, whose records of service within a particular batch are found

better, are selected to fill up the vacancies available in the higher rank. According to the promotion policy applicable till December, 2004, promotions from Major to Lt Col and above were decided through Selection Boards (Policy contained in Para 108 of Regulations for the Army 198 and Army HQ letter dated 06 May 1987). The Quantified System of Selection was introduced vide IHQ of MOD letter No.04502/MS Policy dated 31-12-2008.

It is further stated that as per applicable policy each officer is entitled to only three considerations for promotion to the selection ranks i.e. Fresh Consideration, First Review and Final Review. In case an officer is not approved as a Fresh case, but approved as a First Review or Final Review case, he loses seniority accordingly vis-à-vis his original batch. After three considerations, if an officer is not approved, he is deemed to be finally superseded. Prior to January 2002, the assessment of officers in ACRs was regulated by SAO 3/S/89 which stood replaced by Army Order 45/2001/MS and made applicable w.e.f. 1 January 2002. As per the policy, the grading is awarded for assessment of officers which are numerical from 1 to 9 (overall as well as in Personal Qualities and Performance Variables in different qualities) and in the form of pen picture also. The entire assessment of an officer in any ACR consists of assessment made by three different Reporting Officers i.e. Initiating Officer (IO), Reviewing Officer (RO) and Senior Reviewing Officer, whose assessment are independent of each other.

It is further stated in the reply that while considering an officer for promotion to a higher rank, the Selection Board takes into consideration a number of factors such as war/operational reports, ACR performance in command, honours and awards, disciplinary background and not only the ACR or one/few ACRs etc. Selection is based upon the overall profile of an officer and comparative merit within the Batch as evaluated by the Selection. As pleaded in the reply, the applicant did not make the grade due to preferential merit based on his overall profile as evaluated by the Selection Board. The assessment of the Selection Board is recommendatory in nature and not binding unless approved by the competent authority viz Chief of the Army Staff.

Apart from the above, in the reply certain preliminary objections have also been raised by the respondents. In para 1 of Preliminary Objections regarding the assertion of the petitioner that the impugned ACR for the period 2002-03 was not conveyed to him, it has been maintained by the respondents that the impugned ACR was communicated to the petitioner in June 2003. For the impugned ACR, the applicant attributes it to the incident alleged to have taken place in Mess function hosted by the IO Lt Col PJ Ninan in honour of Brig Chakravorty. The applicant alleged that due to that incident the IO got influenced and that is why his assessment was subjective and biased. The stand of the respondents is that impugned ACR was recorded in the year 2003 and he was satisfied by the assessment and did not challenge it till November 2008. For the first time, he

submitted the Non-statutory complaint dated 9-11-2008 against his non-empanelment for promotion. Therefore, the challenge to impugned Confidential Report for the period September 2002 to May 2003 is barred by period of limitation.

The second preliminary objection of the respondent is that since the applicant has made the allegation of bias and subjectivity against the Lt Col PJ Ninan, Initiating Officer as well as Brig PK Chakravorty, Reviewing Officer, after six years, he should have impleaded both the officers as parties in the present application. These allegations cannot be dealt with without hearing them. On this score also, the instant application is not maintainable and is liable to be dismissed.

The third preliminary objection is that the Confidential Report is not the subject matter of a judicial review unless bias, malafide or technical infirmity is established as per the law laid down by the Hon'ble Supreme Court and Principal Bench and also by the Chandigarh Bench. On this ground also, the application is not maintainable.

Their further stand is that only one Officer had assessed the applicant as "Outstanding" till date. He has done only Artillery Course in which his gradings were 'B' (Average) or Qualified. In one course he got 'A' grading i.e. Advance Gunnery Course. He has no honours or awards to his credit. It has also been maintained that his non-empanelment was due to being lower in overall profile vis-a vis his course mates and comparative merit depending upon the vacancies. The assessment of the applicant was corroborated by three



different reporting officers and all of them cannot be wrong in their assessment. When his performance had improved, he was assessed better by Lt Col PJ Ninan, the same Initiating Officer. In case Lt Col PJ Ninan was biased against him, he would have carried forward the said bias to the next reporting period and had not assessed him better.

It is also the stand of the respondents that the Statutory Complaint dated 25-08-2010 submitted by the applicant against his non-empanelment was examined by the competent authority of the Central Government in the light of his career profile, relevant record and analysis/recommendations of Army Head Quarters. After consideration of all aspects of the complaint and viewing it against the redress sought, that all the CRs in the reckonable profile including the impugned CR September for the period September 2002 to May 2003 were found well moderated, corroborated and performance based. There being no evidence of any bias or subjectivity, none of the CRs merited any interference by the competent authority. Therefore, his Statutory Complaint was rightly rejected by the Central Government. On these pleadings, the respondents have prayed for the dismissal of the application.

The applicant has also filed the rejoinder in which he has reiterated his averments made in the application.

We have heard the learned counsel for the parties and have carefully gone-through the documents, placed on record.

At the very outset we are of the view that there is no force in the respondents' first preliminary objection regarding

limitation. The cause of action to the petitioner firstly arose in 2008 when he was not empanelled for promotion to the rank of Colonel by No.3 Selection Board. Against non-empanelment, he filed a Non Statutory Complaint dated 09 November 2008 which was rejected by the Chief of the Army Staff vide order dated 8 April 2009. Thereafter feeling not satisfied with this rejection, he preferred the Statutory Complaint dated 25-10-2010 and it was also rejected by the Ministry of Defence vide order dated 26 April 2011. Lastly, the cause of action arose to the applicant when his Statutory Complaint was rejected by the competent authority i.e. 26-04-2011. The present application was filed on 16-08-2011, thus well within the period of limitation i.e. six months. Hence, we find no delay in filing the present application and the objection of the respondents that the application is barred by limitation is rejected.

As far as the second preliminary objection regarding impleadment of Lt Col PJ Ninan, the Officiating Officer and Brig PK Chakravorty, Review Officer, as parties in the present application is concerned, we find that no specific allegation of bias or malice was raised in the course of arguments and it was only apprehension of the applicant that due to the incident which occurred in between the applicant and Brig PK Chakravorty during Mess Function, negative assessment has been made in the impugned ACR. Therefore, their impleadment is not necessary in the present application. This objection being not sustainable is also rejected.

Regarding their third objection that the Confidential Report is not the subject matter of a judicial review unless the allegation of bias and mala fide is established as per the law laid down by the Apex Court, we are of the considered view that now it is settled principle of law that if the Court finds that adverse entries made in the ACR or grading given to an officer/employee are vitiated by extraneous considerations, the Court must interfere therein and quash them. Also it is settled principle that in case the ACR in question stands out as an aberration in the overall profile, then it can be interfered with. It is essential to maintain the integrity and sanctity of the ACR of an officer/employee and the legitimacy of the conclusions relating to his overall performance. In this context, we can gainfully refer to the decision in the **State of U.P. Vs. Y.P. Misra**, in which it was observed that the officer entrusted with the duty to write confidential report has a public responsibility and trust to write the confidential report objectively, fairly and dispassionately while giving, as accurately as possible the statement of facts on an overall assessment of the performance of the subordinate officer/employee. In the light of this decision, the Courts can and must interfere if the adverse entries made in the ACR or grading given to an officer are vitiated, or are highly subjective or technical invalid or stand out as aberrations. So, this objection of the respondents is also not sustainable and hence it is also rejected.

On merits during the course of arguments it was vehemently argued by the learned counsel for the applicant that the

overall performance of the applicant throughout his service career has been graded as “above average” and outstanding, except the only one ACR for the period September 2002 to May 2003 which is under challenge being inconsistent and subjective. According to the counsel, the applicant has earned more than 11 ACRs in reckonable period till date. In none of the other ACRs he has been graded ‘7’. The reason for this adverse report has been assigned by him to an incident allegedly took place between him and Brig P.K. Chakravorty, the RO, in some Mess Function in 2003. In all other Confidential Reports, his assessment has been graded as ‘8’ and ‘9’. In other words his contention is that once the performance of an officer is assessed as very good or outstanding, then only one report contrary to the consistent track record of an officer has to be ignored and his performance for a small service period cannot be dubbed as average. In support of his contention, the learned counsel for the applicant placed reliance on the decision of the Hon’ble Supreme Court in the case of **S.T. Ramesh vs. State of Karnataka & another reported in 2007 (2) SCT 238.**

On the other hand, the stand of the respondents is that the service record of the applicant has not been assessed as “above average” and “outstanding” as claimed by him. His assessment in the impugned ACR for the period September 2002 to May 2003 was as per his performance and has been compared by the RO and SRO. Since the service record of his other Batch-mates was found much better than him by No.3 Selection Board, he was rightly ignored for promotion.

We perused the entire ACR dossier of the officer in detail. We find that the impugned CR for the period 7 September 2002 to 31 May 2003 stands out like a sore thumb in the overall career profile of the officer. In the impugned CR, the officer has been given a grading of '7' in two PQs and one DPV by the IO. The RO has given a grading of '7' in three PQs and one DPV. The IO has given him the grading of '7' in two QsAP. The RO has given him the grading of '7' in four QsAP and the SRO has given him the grading of '7' in three QsAP. The IO and RO have assessed him as '8' in the box grading. The SRO also assessed him as '7' in the box grading. There were 9 CRs in his reckonable profile when No.3 Selection Board was held. Apart from the gradings of '7' mentioned above in the impugned CR, the applicant has earned only one grading of '7' in one of the PQs in the CR for the period June 07 to April 08. Thus, we find that the assessment of the IO, RO and the SRO in the impugned CR is inconsistent with the career profile of the officer, particularly in the reckonable career profile. We are conscious of the fact that a grading of '7' is also above average. But in the quantified model adopted by the Promotion Boards, a few gradings of '7' in PQs/DPVs/QsAP can make the difference between selection and rejection. Thus, the impugned CR of the officer deserves to be expunged in totality.

We have also gone-through the decision of the Apex Court relied upon by the learned counsel for the applicant as referred to above. The controversy in that decision before the Hon'ble

Supreme Court as well as in the present application is almost similar as in both the cases only one ACR is under challenge while the performance in respect of all other ACRs was adjudged “Outstanding” and “Above average.” From its careful perusal, we find that this decision fully supports the case of the applicant. The Hon’ble Supreme Court in para 20 of the judgment has held as under:-

*“The confidential report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievement in his career. This Court has held that the performance appraisal through CRs should be used as a tool for human resource development and is not to be used as a fault finding process but a developmental one. Except for the impugned adverse remarks for a short period of 150 days, the performance of the appellant has been consistently of a high quality with various achievements and prestigious postings and meritorious awards from the Present of India. We have already seen that the appellant has been graded as “very good” “excellent” and “outstanding” throughout his career. It is difficult to appreciate as to how it could become adverse during the period of 150 days for which the adverse remarks were made.”*

In the above case, the civil appeal was ultimately allowed by the Apex Court and the authorities were directed not to treat the applicant’s performance during the period in question as “average”.

In view of the foregoing discussion, the application is allowed and the impugned Confidential Report of the applicant for the period 07 September 2002 to 31 May 2003 is set aside in totality. Consequently, his non-empanelment by No.3 Selection Board is also quashed. The respondents are directed to consider the petitioner as a fresh case for promotion to the rank of Colonel in the next scheduled No.3 Selection Board, without taking impugned petition into consideration, as per existing Rules and Regulations. In the event of his being empanelled for promotion, his seniority will be protected and he would be deemed to have been promoted with effect from the date on which his Batch-mates were promoted. However, he will not be entitled to pay and allowances upto the time he is physically promoted.

**Justice Vinod Kumar Ahuja)**

**(Lt Gen (Retd) HS Panag)**

**30 .7.2013**

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Whether the judgment for reference to be put up on website – Yes/No