

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A NO. 13 of 2010

IN THE MATTER OF:

Col. Sanjay Kumar**APPLICANT**

Through : Mr. Anil Srivastava, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS**...RESPONDENTS**

Through: Mr. Ankur Chibber, counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 11 .10.2011

1. This petition was filed before the AFT (Principal Bench) on 11.01.2010 as OA No.13/2010. It was dismissed at the admission stage on 18.02.2010. Thereafter, the applicant filed a WP(C) No.2667/2010 in the Hon'ble High Court of Delhi. Their Lordships vide order dated 29.04.2011 observed that the order of 18.02.2010 dismissing the OA No.13/2010 was without detailed reasons, hence they set aside the said order and remanded the case back to the AFT for fresh adjudication.

2. The applicant vide his OA has prayed for quashing of the order dated 19.10.2010 rejecting his statutory complaint (Annexure-A-1). He has also prayed for expunging the remarks and endorsement of the

Reviewing Officer (RO) in the ACRs covering the period Sep 2003 to Mar 2004 and Apr 2004 to Aug 2004, for subjectivity and inconsistency, thus considering the applicant afresh in the promotion board with the revised profile.

3. Brief facts of the case are that the applicant was commissioned in the Army (AD Arty) on 13 Jun 81. During his service the applicant was promoted as per his turn. He also held several important appointments and operated in all types of environment including Op Hifazat (Manipur), Op Meghdoot (Siachin), and was awarded the GOC-in-C's commendation card on 14 Jan 04, while he was commanding 126 Light Air Defence Regiment (Composite), (Annexure-A-7).

4. He was promoted to rank of Colonel in his own turn and was in command of 126 AD Rgt (Comp) located in Delhi w.e.f. 28 Oct 01 till 20 Mar 04. In Dec 03, a new RO was posted as Corps Commander located at Bhopal. His IO located at Pune initiated an ACR for the period Sep 03 to Mar 04. While his IO gave him an 'above average' report he apprehends that the RO downgraded the assessment as he had 'inadequate interaction' with him during the reporting year. Besides, he was awarded the GOC-in-C's commendation on 14 Jan 04 for command of his unit. Since the RO never visited his unit during the period, the applicant apprehends that because of the inadequate interaction the RO may have downgraded his report.

5. The applicant was posted to the AD Arty Bde at Pune as the Dy. Commander on 20 Mar 04, and he joined the new appointment in Apr 04. Though a new appointment, his IO and the RO remained the same. He submitted his ACR form in 08/04 because the IO was posted out. He apprehends that again due to the RO's mind-set and subjectivity, he was downgraded by RO while awarding points against each quality.

6. The Learned counsel for the applicant clarified that he was not assailing the technical aspect of the impugned ACRs as he had served under the RO for more than 75 days in both the impugned ACRs, but he is challenging the award of points by the RO as being subjective and inconsistent. He argued that the applicant's profile was enviable. He was always graded as "High Above Average" to "outstanding". His performance on professional courses too were consistently 'above average'. On the other hand, down grading by the RO to 'Low Above Average' resulted in the applicant not being approved by the Prestigious Higher Command/Higher Defence Management Course and finally in not being approved to the rank of Brigadier. He argued that there was no occasion in which the RO had warned him or counselled him. Ironically, in the first impugned ACR, he was commended for his 'command' tenure by the GOC-in-C on 14 Jan 04.

7. The Learned Counsel for the applicant further argued that the 'Aim' of the ACR as stated in the AO 45/2001/MS-Confidential Report on Officers, at para 5 states:-

“The aim of Confidential Report is to have an objective assessment of an officer’s competence, employability and potential as observed during the period covered by the report, primarily for organisational requirements. All reporting officers must, therefore, be fair, impartial and objective in their assessment.”

8. The Learned Counsel for the applicant argued that a non-statutory complaint was preferred by the applicant on 08 Dec 08 (Annexure A-2) which was rejected by the Chief of Army Staff on 18 May 09 (Annexure A-3). Para 4 of the order reads as under:-

“The COAS has perused the Non Statutory Complaint submitted by the officer and examined against his overall profile and other relevant document. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that all CRs in the reckonable period including impugned CRs 09/03-3/04 and 04/04-08/04 are performance based, well corroborated/moderated and in consonance with his overall profile. None of the CRs merit interference.”

9. He further argued that the applicant again preferred a statutory complaint on 25 Apr 09 (Annexure A-4) which was turned down vide impugned order of 19 Oct 09 (Annexure A-1). Para 3 of the impugned order states:-

“The statutory complaint of the officer has been examined against his overall profile and other relevant documents. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerges that all CRs in the reckonable period including impugned CRs 09/03-03/04 and 04/04-08/04 are objective, performance based and well corroborated. None of the CRs merit any interference.”

10. Reading of the above orders clearly shows that mind has not been applied and complaint has been disposed off in purely mechanical manner.

11. The Learned counsel for the applicant in support of his contentions cited **Hon’ble Orissa High Court judgment dated 05 Sep 08 given in the case No.3323/2006, Col. Narender Kumar Vs UOI and others**, where their Lordships have observed at para 4 and 5 as under:-

“.....It is further indicated that the PPS of the ratee reflects a consistent profile wherein, the ratee has been graded 9/8 in box in the past five years. In the past five years, the ratee has not

been graded '7' in box but has earned '7' in figurative on three occasions in one report. So in the overall analysis as indicated in the second CR for the duration 15th February, 2004 to 31st August, 2004 corrected vide order dated 22.9.2008, all the reporting officers have endorsed '8' pt report and recommended 'should promote' at RPMN. In the overall analysis, in point No.9, it is stated that in the last five years, the ratee has a consistent profile with grades of 9/8 in box and his always been recommended 'should promote' at RPMN. However, ratee has earned '7' in figurative on three occasions, albeit in one report. The ratee at report No.18 has earned '7' at figurative twice in tech variables. Significantly, the HTO in report No.18 is the same as in the impugned CR. In point No.11, it is stated that in view of the foregoing, the 'seven pt' assessment by the HTO with 'may promote' at RMPN w/o any justification in the pen picture, suggests subjectivity and biased reporting. Then ultimately, in the recommendation part, it is recommended that the entire assessment of HTO, in the impugned CR, be expunged by the COAS on grounds of subjective and biased reporting. Further it was also recommended for expunction of the entire assessment of HTO on the ground of biased reporting and inconsistency with the past profile."

5. *The records so produced before us and the recommendations made therein strengthen the objections of the petitioner to the reporting made by S.K. Dahiya. Perusal of the report shows that effort has been made by the authorities to give a fair deal to the petitioner, but ultimately, for the reasons not known to the petitioner, he has been deprived of the same. Looking at the records and the recommendations of the authorities at different point of time, as indicated in the aforesaid records, we are of the opinion that the grading given by S.K. Dahiya, who had never visited and seen the petitioner working, should not be a cause for depriving the petitioner of the promotional rank, as there is no adverse remark ever recorded against him. Paragraph 118 of the Army Order also speaks that the assessment contained in the CR will be restricted strictly to the performance and potential as observed during the period covered by the report. Therefore, the assessment of Mr. S.K. Dahiya without visiting to his place of work and without seeing the petitioner and without scrutinizing his work is not in consonance with the Army order. We may here further reiterate that paragraph-5 of the Army Order stipulates that the aim of a Confidential Report is to have an objective assessment of an officer's competence, employability and potential as observed during the period covered by the report."*

12. The Learned Counsel also cited **Hon'ble High Court of Jharkhand judgment dated 10.12.2008 given in case No.WP(S) No.5756 of 2007, Brig Rakesh Sharma Vs UOI & Others.** In that case, their Lordships observed as under:-

"13. According to the petitioner, his Confidential Report for the period from September 1999 to June 2000 was governed by the Special Army Order No.3/S/89, para 5 of the said Army Order envisages that all reporting officers must be fair, impartial and objective in their assessment. However, the said order has been give a go bye and there has been unjust, arbitrary and whimsical assessment of the petitioner's confidential report. The reporting officer has to ensure with regard to the box grading that it should explain and be in conformity with the potential of the officer. In the impugned confidential report the box grading is 8 by all the reporting officers, but grading in Qualities to Assess Potential has been made low particularly by the respondent No.5 in connivance with the respondent No.3 due to extraneous reasons. In practice the grading in QAPs is treated as adverse while Grade '7' is termed as above average and its effect is that of an adverse entry as presence of single '7' is being used to deny the empanelment. A few '7's have annulled the value of balance of nearly 99.8% of 9's and 8's. Even that biased

perception has been indicated by the assessment of 12 very senior officers.”

13. The learned counsel for the applicant also cited **(1996) 2 SLC 363, UP Jal Nigam Vs Prabhat Chandra Jain and (2006) Supreme Court Cases 368, UOI & Ors., Vs Maj Bahadur Singh**, which lays down that an employee cannot be downgraded in the CR unless he has been warned or counselled to improve himself. Since the applicant was never warned or counselled, his 'low above average' marks (7's) constitutes downgrading and should be expunged.

14. The learned counsel for the respondents stated that there are no disputes regarding the facts of the case. He argued that while assailing the RO's portion of the impugned ACRs, he has not made RO party in his petition. So any challenge to subjectivity and inconsistency can only be answered by the RO.

15. Learned counsel for the respondents also argued that impugned ACRs are of 2003-04. However, the applicant only preferred the non-statutory complaint in Dec 08, on apprehension that the RO has downgraded his ACR. The case was therefore, belated and time barred.

16. The learned counsel for the respondents further argued that the concept of three tier reporting in terms of IO, RO and SRO are essentially for checks and balances. The RO has several means and

inputs and therefore, has the power to moderate the ACR. If the RO has to award the same marks as that of the IO, the concept of three tier reporting will be defeated. The RO makes his own assessment of the officer by observing the officer during the period of reporting. The learned counsel cited the AFT order dated 12.03.10 in case of **TA No.260/2010 in Col. Aneel Misra Vs UOI & Ors.**, which laid down that physical proximity of a ratee and RO is not essential.

17. The learned counsel for the respondents cited **(2006) 1 Supreme Court Cases 368 UOI Vs Maj Bahadur Singh** in which the very first sentence states that UP Jal Nigam case has no universal application. Their Lordships further held that only 'adverse entry' requires to be communicated to the officer. Besides, these entries should be preceded by counselling, warning so as to an opportunity to improve himself. Elaborate instructions exist. However, a grading 'seven' cannot be considered as adverse.

18. The learned counsel for the respondents further cited **(2001) 10 Supreme Court Cases 424, Amrik Singh Vs UOI & Ors.**, in which their Lordships held that *"single adverse remark in ACR within the period of consideration followed in subsequent years by good remarks and even categorisation as outstanding, such adverse remark, held, nonetheless relevant."*

19. He also cited a clutch of AFT orders dated 20.01.10 in **TA No.150/2009, Col. Amar Narwat Vs UOI & Others**, where their Lordships observed that “ *In the present case there is no question of downgrading the ACR of the petitioner. He has been rated ‘above average’ and ‘high average’, which is the normal grading in the ACR grading of Army officers*”. In the case of **OA No.217/2009 Brig Rakesh Sharma Vs UOI & Others**, their Lordships observed that “ *In any case figure ‘7’ is an ‘above average’ grading and cannot be construed as adverse*”. Similar observation has been made in **TA No.198/2010 Col. P.K. Nair Vs UOI & Others** dated 04.05.2010 “ *that ‘6s’ and ‘7s’ cannot be construed as adverse grading. In OA No.644 of 2010 Col. C.R. Dalal Vs UOI & Ors., dated 06.05.2011, their Lordships observed that “the petitioner allowed the impugned CR to remain intact without being challenged till he filed a non-statutory and statutory complaint in 2009.”*”

20. Having heard both the parties at length and examined the records in original, we are of the opinion that there is no technical infirmity in the impugned ACRs. The applicant has also not pressed the case on technical infirmity.

21. As regards the endorsement by the RO, no malafide has been made out. The applicant was emphatic in his argument that it is ‘inadequate interaction’ which has led to the downgradation of endorsement by the RO in various qualities of Personal Qualities (PQ),

Demonstrated Performance Variables (DPV) and Potential for Promotion (QsAP). Hence RO was not made one of the respondents.

22. Having examined the documents in original and also having perused the Master Data Sheet, we note that the applicant has always been getting overall above average grading i.e., “8s” in the box. The same is the case in the impugned ACRs. We also note that in the PQs, DPVs and QsAP, the IO has graded him ‘outstanding’ to ‘above average’. While the RO has graded him ‘above average’ and ‘outstanding’ in ‘moral courage’ and ‘integrity’. Both the impugned ACRs are similar as far as endorsements of IO and RO are concerned.

23. We also note that ‘pen picture’ in both the impugned ACRs are good and contain no adverse/advisory remarks. The impugned ACR of 04/03-08/04 has the pen picture IO which reads “..... **hardworking and professionally competent officer who is honest and displays high sense of responsibility... mature and balanced officer with pleasing mannerism who willingly accepts additional responsibilities and produces desired results even under difficult situation...**”. RO has marked IO’s assessment as ‘justified’ and writes “**quiet and capable officer who commanded the regiment well... soft spoken, simple, transparent and honest,... stood up to pressure as confronted by a unit in Delhi and has remained unfazed.....**”. In the impugned ACR of 04/04-08/04, the pen picture by RO states “..... **quiet and simple personality who is dedicated and**

competent possesses knowledge of strike corps operations and the role that Air Defence plays..... capable of independent functioning...clean and transparent.”

24. We also noticed that HSCRO, in his technical reporting has awarded “above average” making in all qualities while HTO has awarded “above average” to “outstanding”.

25. However, what comes to notice is the incongruous “recommendations for promotion” by the RO in the ACR of 09/03 to 03/04 where he has recommended “may promote”. It appears incongruous because this recommendation is not in consonance with either the pen-picture or the marks endorsed by the RO, which are “above average”. The same RO with similar pattern of award of marks and pen-picture has recommended for promotion as ‘should promote’ in the ACR covering the period 04/04 to 08/04. Para 119 of SAO 45/5/2001/MS reads as under:-

“119. On receipt in the MS Branch, a CR will be scrutinised for consistency in reporting. Criteria for the same is defined below:-

(a) XXXXXXXXXXX

(b) Wide Variations. Variations of three ore more grades in PQs, DPVs, QsAP, Technical Qualities and two points in box grading by the various reporting officers, need to be explicitly elaborated by the reporting officer(s).

(c) Inconsistent Recommendations for Promotion and Employment. The Recommendation for Promotion will be primarily based on

the QsAP. No reason is required to be endorsed by the reporting officers for endorsing a particular shade of Recommendation for Promotion including NOT YET and NOT. However, variation of three points or more in figurative grading of QsAP and/or three grades in Recommendation for Promotion between reporting officers will be elaborated. Any rate Not Recommended for Promotion will be communicated the same by the concerned reporting officer(s) and extracts duly signed by the ratee will be forwarded to the MS Branch.”

26. We have also considered the **Hon’ble Orissa High Court judgment in the matter of Col. Narender Kumar Vs UOI and others (Supra)**, where their Lordships have observed that the petitioner was graded ‘above average’ to ‘outstanding’ in the overall analysis. It was incorrect for the RO to give ‘may promote’ in the column for recommendation for promotion. Especially so, since the RO had never visited the unit and had not carefully observed the ratee during the period covered by the report nor any warning or counselling had ever been given by him. In this case also, the respondents have not contested the fact that the RO never visited the applicant’s unit during the period of report. The respondents have only contested that there was no question of inadequate inter-action. It is in view of this and the fact that the applicant got an ‘above average’ grading in PQs, DPVs and QsAP in the figurative assessment as also in technical qualities, therefore, grading him as ‘may promote’ in recommendation for promotion is inconsistent. There is no whisper of his being unworthy of

promotion under the category 'should promote' in the pen-picture either. In view of the above, we feel that to the extent of RO's remarks in the ACR covering the period September 2003 to March 2004 are perverse and liable to be set aside.

27. In view of the foregoing, we expunge the RO portion of the ACR covering the period September 2003 to March 2004. We find no reasons to interfere in the ACR covering the period April 2004 to August 2004. The applicant will be held entitled to all the consequential benefits as per his revised profile.

28. The application is partly allowed. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 11th day of October, 2011.