

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH  
NEW DELHI**

**T.A NO. 295 OF 2009  
(WRIT PETITION (C) NO. 5389 OF 2008)**

COL. RAM NIWAS, S/O. SRIRAM  
R/O H. NO. 332,  
DEFENCE OFFICERS' ENCLAVE,  
DHAULAKUAN PART II, NEW DELHI.

THROUGH: MR. MOHAN KUMAR, ADVOCATE

**.. PETITIONER**

VS.

1. UNION OF INDIA, THROUGH SECRETARY,  
MINISTRY OF DEFENCE, SOUTH BLOCK,  
NEW DELHI – 110 011.
2. CHIEF OF THE ARMY STAFF  
SOUTH BLOCK,  
NEW DELHI.
3. THE GOC-IN-C NORTHERN COMMAND  
HQ NORTHERN COMMAND  
UDHAMPUR (J & K)
4. THE MILITARY SECRETARY BRANCH  
ARMY HEADQUARTER,  
DHQ PO, NEW DELHI-110 001.
5. COL. C.N GIRISH  
MA TO ARMY COMMANDER  
HQ EASTERN COMMAND, FORT WILLIAM,  
KOLKATA (WB).

THROUGH: MS. JYOTI SINGH, ADVOCATE ASSISTED BY LT. COL.  
S. GEORGE

**.. RESPONDENTS**

**CORAM**

**HON'BLE MR. JUSTICE S.S KULSHRESHTHA, MEMBER**  
**HON'BLE LT. GEN. S.S DHILLON, MEMBER**

**JUDGMENT**

15.02.2010

1. This is an appeal preferred by Col. Ram Niwas (the appellant), who is aggrieved against his Annual Confidential Report (ACR) for the period from 1.9.2002 to 30.6.2003. He desires that the initiating officer's portion therein be set aside as being subjective as well as the Central Government order dated 26.5.2008 rejecting his statutory petition be quashed. He also pleads that based on such changes in ACR profile consequent to setting aside the Initiating Officer's report as pleaded above, he be considered afresh for detailment on the higher command/ equivalent courses.

2. As a backdrop, the petitioner has listed his over all career in order to establish his relative standing amongst his peers. His record of excellence started on 9.3.1985 when he passed out first in his batch from the Officers Training Academy at Chennai. Throughout his career of almost 20 years till the time of this impugned ACR, his record of service in terms of ACRs as well as grading in courses of instruction have been outstanding and there has been no adverse remark or any “dip” in his performance. He has pleaded that he held all the top-notch professional postings that could be desired of an officer doing well in the Army. He has obtained excellent gradings on various courses of instruction, including Staff College. He has given details of the various field/ high altitude/counter insurgency areas wherein the officer has served with distinction. All in all, he establishes the fact that from the date of his commission in the Army till the date of the impugned ACR, his performance, according to established criteria of the Indian Army, has been outstanding.

3. During the period of the impugned ACR, the officer was posted as second in command of 44 Rashtriya Rifles in the Jammu & Kashmir valley. He was able to establish his credentials and achieve great success in counter terrorists operations in the valley. He has been given various letters of commendation by various senior officials in support of his performance. He has also given some data to substantiate his claim that when he was officiating as Commanding Officer (CO), the performance of the unit has been better than when the actual incumbent was present. Possibly, on account of the petitioner's excellence, his CO perceived himself as being over-shadowed and accordingly gave him a lukewarm report in the impugned ACR, whereas the same CO had given him an excellent ACR in the preceding year.

4. When the impugned ACR was given to the petitioner, he was aggrieved by the award of two 7 points in personal qualities. He considered this a "dip" in performance and appealed against this impugned ACR on 26<sup>th</sup> August 2003 in the form of a non-statutory complaint to the COAS. He was given redress by the Army Commander, Northern Command,

wherein these two 7 pointers as well as 2 others (which he was unaware of being part of the hidden component of the ACR which is not shown to the ratee) were set aside by the Army Commander. On receiving information of this action by the Army Commander, the petitioner felt relieved and presumed that suitable corrective measures had been taken against the Initiating officer's (IOs) subjective assessment and that all was well. However, when he was not detailed for the higher command course, keeping in view his overall professional standing vis-a-vis his peers, he was once again alarmed and perceived that it could only be the same impugned ACR which is once again adversely impacting on his career. Accordingly, he put up a statutory complaint on 27<sup>th</sup> August 2007 to the Government of India, which was rejected in the form of the impugned order dated 26.5.2008. He, therefore, seeks setting aside of whatever subjective assessment of the IO remains in the impugned ACR. He pleads that the entire IO's portion of the ACR be set aside.

5. The respondents, while admitting that the petitioner has a good professional career, contended that no bias has been established by the petitioner to warrant the IO giving him such seemingly low grading in his ACR. The report is based on performance and it was not mandatory for them to go by the earlier reports that have been written on the officer. The IO of the impugned ACR was well within his rights to give the petitioner any grading that was commensurate with his performance during the period of review and that the earlier outstanding ACRs do not automatically entitle the petitioner to such continued ACRs in future also. There was no subjectivity in the impugned ACR which is well corroborated with the earlier ACRs earned by the petitioner in his service. They are of the view that the petitioner tries to take undue credit for the achievement of the unit i.e. if a unit performs well in counter insurgency environment, it may not necessarily be on account of the so-called outstanding performance of the second in command. The performance of a unit is the net result of the hard work, good leadership, training, intelligence, leadership and co-ordination by a team of 800 Officers/JCOs and soldiers

and the petitioner is unnecessarily taking credit for it. The petitioner has been unable to specifically state as to how he has contributed to such achievements of the unit and that merely being the officiating CO when some good operations were conducted cannot be construed to have been solely on his effort.

6. The respondents have also indicated that the Reviewing Officer (RO) and the Senior Reviewing Officer (SRO) have also commented on the impugned ACR wherein they have the authority to recommend expunction of any portion of the IO's assessment should they feel that any such bias is evident. Both these officers have endorsed the IO's portion of the ACR as "justified" and have not utilised this prerogative of expunction of the IOs assessment, neither have they indicated that there was any bias or subjectivity in the IOs report. Therefore, if these officers are now recommending that IO's portion of the ACR be set aside, it is an after-thought and cannot be given the same credence. They have also stated that the petitioner's case has been reviewed thrice by the concerned authorities i.e. firstly on

processing the non-statutory complaint, secondly after lodging of the statutory complaint and thirdly when asked to do so on the earlier direction of this Tribunal. They conclude that they have gone into the complete merits of the case in great depth and do not find any grounds for intervening.

7. Since it is primarily an issue pertaining to an ACR, it would be necessary to briefly explain the lay out, method of reporting and redress mechanism for an ACR. An ACR has four parts viz:-

(i) Validation and authentication of data; (only factual information).

(ii) Basic assessment, which includes Personal Qualities (PQs) and Performance Variable (PVs) by both the Initiating Officer (IO) and the Reviewing Officer (RO). It also has box grading and a pen picture by the SRO (This part of the ACR is communicated to the ratee and his signatures obtained);

(iii) Technical and special to Corps assessments (Not relevant in this particular impugned ACR and has been left blank);

(iv) Potential for promotion to include qualities to assess potential (QsAP)/recommendations for



promotion/employment and courses (This portion is classified and is not communicated to the ratee. It is against this portion of the ACR that the petitioner is aggrieved).

In the ACR, there are three important aspects viz. Numerical grading, pen picture and recommendations and these aspects are commented upon by three officers in the chain of reporting i.e. IO, RO and SRO. While the pen picture and the recommendations are self explanatory, the numerical rating ranges from 1 to 9, with 9 being the best. We are also informed that keeping in view current inflationary reporting tendencies, the sprinkling of a few 7 pointers in and ACR can be “fatal” especially if corroborated by RO/SRO. The redress mechanism for any person aggrieved with the ACR is to put up either a non-statutory complaint to the Chief of Army Staff and/or a statutory complaint to the Central Government.

8. After having heard both sides, we find merit in the contention that a ratee cannot insist on past performance/good ACRs to justify a similar ACR for future. Creditable performance

reflected in the ACRs of the preceding years may not necessarily lead to a conclusion that the ratee's performance would have been equally good during the period of the impugned ACR as well. However, if the petitioner is able to show that his performance has been deliberately under-rated due to malice, bias or on account of any such extraneous reasons, he has judicious cause for redressal. Mere citing of better ACR rating during the preceding or subsequent years would not constitute a valid ground to upset the recorded ACRs.

9. The petitioner has attributed personal bias against the IO. Bias may be pecuniary, personal or with regard to the subject matter. But mere general statement attributing bias or malice would not be sufficient. There must be cogent evidence on record to prove that there was bias or mala fide downgrading the petitioner which resulted in miscarriage of justice. For the ascertainment of bias it is not mere apprehension, but surrounding circumstances are also required to be considered and conclusion is also required to be drawn. The IO has, undoubtedly, the right to assess the ratee on the basis of his

performance during the period under review. Out of the four parts of the impugned ACR, only two parts, viz. Part II (PQPV) or shown portion, and Part IV (QAP) or the unshown portion, have material relevance to this case. An examination of these two parts reveals:

(i) In the numerical assessment of PQPV all three reporting officers have more or less a similar opinion of the ratee. The difference in numerical assessment appears in QAP wherein while the RO and the SRO continue in the same streak, the IO down rates his assessment.

(ii) While the pen picture given by the IO is lukewarm, the RO and the SRO are laudatory in their appraisal;

(iii) While the IO has given some negative recommendations in QAP, the RO and the SRO have given no negative recommendations.

From these assessments, it is clear that while the RO and the SRO have a common, consistent and more appreciative assessment of the petitioner, the IO not only has a lower assessment, but also an inconsistent assessment between the two parts of his ACR. Such inconsistency is in the numerical rating as well as in the recommendations.

10. As against such inconsistency, complaint was made by the petitioner to the Army Commander, who was pleased to pass the following order on 12<sup>th</sup> December 2003 granting partial redress to the petitioner by way of expunction of the assessment of the IO on the ground of subjectivity and inconsistencies:

(a) **Demonstrated Performance Variables (DPVs)**

- (i) Para 10(d). Ability to motivate his Command.
- (ii) Para 10(e). Effectiveness in carrying out administration of his command.

(b) **Qualities to Assess Potential (QAP)**

- (i) Para 24(a). Foresight and Planning
- (ii) Para 24(c). Vision and Conceptual Ability"

It is clear from the above order that certain inconsistencies were noticed and the same were expunged. Though there appears no mention of bias or malice on the part of the IO, but the attending circumstances and the partial redress would render to conclude that there were circumstances for the petitioner to attribute bias against the IO. The bias alleged is strengthened in the surrounding circumstances which speak that the same IO in the first part of the ACR gave 8 pointers, but made aberration in

the other part, viz. QAP; wherein there is no leeway/scope for the RO/SRO to carry out any moderation or recommend deletion of any portion of IO's assessment. However, there is consistency with regard to the assessments of RO/SRO about the perception of the ratee even at the stage of processing the complaint of the petitioner.

11. The IO made departure from the assessment of 8 pointers given by him in the first part of the ACR. This would substantiate the allegation against him of bias or malice. It shall be useful to refer to the observations made by the apex Court in **G.N Nayak v. Goa University and others** (2002(2) SCC 712 at p. 723), which read as under:

“34. It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest – whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a

reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.”

From the reasons assigned above, it is clear that the IO himself departed from the assessment of pointer/grading made in the first part and such inconsistencies were also noticed by the RO & SRO which clearly demonstrated bias on his part. While making the statutory complaint dated 27.8.2007, the petitioner had clearly pointed out the bias on the part of the IO, which was rejected by the Central Government vide Order No.36501/8075/INF/04/MS-19/406/SC/2007-D(MS) dated 26.5.2008, as is clear from the subsequent order dated 28.1.2010 also. Suffice to say that partial redressal of the adverse remark/assessment was found to be not justified by the Commanding Officer and that was expunged on the basis of the complaint made by the petitioner. There were also allegations of prejudices. From non mentioning of such prejudices in the order dated 12.12.2003, it could be inferred that the assessment of the IO was based only on subjectivity and inconsistencies and not on his actual career profile. Once the GOC-in-C, Northern Command granted partial

redressal to the petition on the non-statutory complaint it only lends substance to such apprehension. There could be no reason for not considering those inconsistencies also for the ascertainment of remaining pointers/grade. There appears to be reasonable apprehension on the part of the petitioner of bias. Above circumstances also refer a real likelihood of bias. It would be profitable to quote some of the observations made by the apex Court in *M. Nagaraj and others v. Union of India and others* (2006(8) SCC 212 at p. 277):

“118. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis.”

This pointer assessed by the IO also suffers with subjectivity and inconsistencies. As in the first part of the ACR, he assessed him to be of Pointer ‘8’.

12. Another relevant issue is that while analysing the petitioner's complaint, the moot point is not whether the impugned ACR averages against his overall profile, but whether the impugned ACR is biased or not. On the other hand, the petitioner's plea all along has been unchanging and consistent right from the beginning that it is this impugned ACR and that too only the IO's portion of it which has damaged his career and it is biased, subjective and distorted.

13. Considering the contending view points as well as the analysis of various factors, as assessed above, the primary issue is whether we can permit one third (IO portion) of one ACR to adversely impact of the career of an officer spanning a few decades, especially when the IO is seen as somewhat wavering in his assessment? All said and done the language, consistency of assessment/recommendations and appreciation of the petitioner by the RO and the SRO inspire confidence and appear impartial and objective. Their consistency is discernible in the numerical rating, pen picture, recommendation in the ACR as



well as in their recommendations while processing the non-statutory and statutory complaint of the petitioner. The fact that no evident bias of the IO against the petitioner has been established does not detract from the fact that the RO/SRO and the Army Commander perceive bias/subjectivity in the IO portion of the impugned ACR and are unanimous in recommending/delivering redress to the petitioner.

14. We, therefore, find merit in the contention of the petitioner and direct that the IO portion of the report in the impugned ACR be set aside and the petitioner be considered afresh for HC course on his merit and in accordance with existing rules.

**(LT. GEN. S.S DHILLON)**  
**MEMBER**

**(JUSTICE S.S KULSHRESHTHA)**  
**MEMBER**