

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

O.A. No. 384 of 2010

BRIG. S.S ANAND

....APPELLANT

VERSUS

UNION OF INDIA & ORS.

...RESPONDENTS

CORAM :

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

ORDER

07-01-2011

Present :

Mr. Diljit Singh, Advocate for the appellant.
M/s.Anil Srivastava & Amit Kumar, Advocates for
the respondents.

Dismissed, vide separate judgment.

**S.S.DHILLON
(MEMBER)**

**S.S.KULSHRESTHA
(MEMBER)**

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.APPLICANT

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ADVOCATES

**MR. DILJIT SINGH FOR THE APPLICANT
M/S. ANIL SRIVASTAVA & AMIT KUMAR FOR THE
RESPONDENTS**

CORAM

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

J U D G M E N T
07.01.2011

1. This petition has been brought for quashing Letter No. 18836/PB (M) No. 1/Maj.Gen/AMC/2008/DGAFMS/DG-IX dated 13.1.2009 of the Government of India, Raksha Mantralaya, whereby the applicant was informed about his non-empanelment for promotion to the rank of Major General. Simultaneously, prayer has also been made for quashing the subjective grading by Senior Reviewing Officers viz. DGMS (Army) and DGAFMS.

2. It is contended by the applicant that after getting commissioned in the Army Medical Corps on 30.11.1975, he strove hard to achieve excellence both academically and professionally. He got appreciations from his superiors and got successive promotions in respective cadres. He became a Brigadier on 7.6.2007. Because of his unblemished career, the applicant got the privilege of serving in prestigious institutions such as HAWS, IMTRAT, Command Hospital (South Command) Pune, INHS Asvini, Army Hospital (Research and Referral) and HQ 15 Corps. He is at present deployed as Brig Medical at HQ Delhi Area, which, according to the applicant, is a challenging

assignment as far as Management of Medical Resources is concerned. He is the senior-most serving Specialist Officer in Nuclear medicine in the Armed Forces Medical Services. Nuclear Medicine is amongst the youngest disciplines of medicine in India and he had overseen its growth and development in the Armed Forces Medical Services to the level of acquisition of the PET-CT scan and Medical Cyclotron (Nuclear Reactor) at Nuclear Medicine Centre Army Hospital (R&R), which was the third such centre in India when established in 2006. He brought certain achievements as Head of the Department, Nuclear Medicine & Radiology, Army Hospital (Research & Referral). Some of the achievements relate to his academic and professional fields. He has also initiated modernisation by introducing most sophisticated, complex and highest valued project of Army Hospital (R&R) i.e. Positron Emission Tomography with CT Scan (PET/CT Scan) and Medical Cyclotron (Nuclear Reactor) for in-house production of ultra short lived radioisotopes. This project has put the Nuclear medicine Department of Army Hospital (R&R) on the world map of Molecular and Functional Imaging and has radically improved patient treatment protocols. His efforts were appreciated by the General Officer Commanding-in-Chief, Western

Command during his first visit to the Nuclear Medicine Department by awarding him GOC-in-C Commendation on the spot.

3. The applicant was considered for promotion to the rank of Major General by Promotion Board (Medical) No.1, which was held on 17.10.2008. Surprisingly, he was not selected by the Board presumably on account of the aberrant reporting on him. Nuclear Medicine Departments are established in secluded areas of the hospital to ensure radiological protection, where patients needing radioactive materials for diagnostic and therapeutic purposes are managed. There is a little awareness of intricacies involved in the working of Nuclear Medicine Department (NMC) in general. In the year 2007, none of his Senior Reviewing Officers (SROs) visited the NMC despite creation of immense value addition to the Armed Forces Medical Services and Army Hospital (R&R), in particular by means of setting up of new PET-CT centre. Despite his meritorious service, he got no chance to show his work to the SROs and hence their individual perception of his contribution could not have been objective. After getting promotion to the rank of Brig in January 2007, he had earned only one Annual Confidential Report (ACR), which was the only new output for consideration and compilation of merit for

promotion to major General. He was made to understand that the block ratings given by the SROs in the ACR lacked objectivity and was inconsistent, being not in conformity with his ACR average of 2007, which resulted in his non-empanelment.

4. His statutory complaint dated 23.1.2009 against his non-empanelment was rejected by the Central Government by a cryptic order dated 9.9.2009. Soon thereafter, the Director General Armed Forces Medical Services (DGAFMS) issued Policy Note No.17267 dated 13.10.2009, which admitted the universal principle of rounding off as highlighted by the applicant in his statutory complaint. It tacitly admitted arbitrary marking by SROs without having to justify their downward grading in the pen picture. Despite his non-empanelment by the Promotion Board, the applicant continued to excel and perform with distinction in a sensitive and operationally active environment in Jammu & Kashmir to the satisfaction of his superiors. He was again graded "NS" (not selected) by the promotion Board (Med) No.1 held on 12.11.2009. Surprisingly, subjective under-assessment was not noticed and corrective action as mandated by DGAFMS policy Note No. 17267 dated 13.10.2009 was not taken in the case of the applicant. The only other possibility

could be that the DGMS (Army) and DGAFMS omitted to grade him to avoid being in contravention of the policy note by awarding a lower grading when average grading by other ROs was 8.75 or above. Such a step is in gross violation of Para 32 of Special Army order 8/S/91, which mandates them to assess all officers of the rank of Brigadier.

5. The petition is resisted by the respondents contending, inter alia, that the applicant could not get timely promotion because of his service profile on previous occasions when the Promotion Board met on 7.12.2005. His statutory grievance was partially redressed and his candidature was considered by the Review Board held on 13.11.2006. The applicant was given a second chance and he was found fit and was promoted to the rank of Brig. But he became junior to his own batch mates by not having succeeded in getting empanelled in his second chance. On 17.10.2008, while working as DGMS, 15 Corps, he was considered for promotion to the rank of Major General by the promotion Board (Med) No.1. He could not get promotion to the rank of Major General. His statutory complaint dated 23.1.2009 was also rejected. His name was again considered by the Promotion Board (Med) No.1 on 12.4.2009 along with the ACR of 2008 as a fresh input. Aggrieved by this

recommendation of the promotion Board, statutory complaint was made on 8.1.2010, which was rejected by the Central Government on 30.7.2010. It is next submitted by the respondents that in the existing ACR form, numerical scale is from 1 to 9, where No.1 is "exceptionally poor" and the maximum rate of 9 is termed as "exceptionally outstanding". The box grading of 8 is "outstanding" and there is no classification of outstanding technology. There is a multi-tier reporting system, which is presently in vogue with the inherent addition of RO/STO being as intermediate assessors and SRO/STO being the balancer. The SRO/HRO/DGMS (Army) as head of the service and the DGAFMS as head of the organisation and the cadre controlling authorities are required to give figurative assessment to the officer in the box provided for the purposes, commonly known as box grading in whole number only. The assessment is not numerical average made in other parts of the report by IO/RO/FTO/STO but it contains an overall assessment. While giving box grading, the STO/SRO/Head of Service/Head of Organisation takes following points – (i) conformity to the assessment made by the reporting officers as regards the personal qualities and demonstrated performance of the ratee; (ii) its conformity to the potential of the ratee

officer The applicant was also given all the weightage as per policy for his possessing Post Graduation Qualification (MD) in Radiology which he acquired prior to the Diploma in Radiation Medicine as per the evaluation position without any aberration. Further, it is submitted by the respondents that despite being rated between outstanding through exceptionally outstanding, the applicant failed to make the grade due to comparative merit and lesser number of vacancies available in the higher ranks in the overall cadre strength. His statutory complaint was scrutinised and no substance was found in it.

6. Before appreciating the arguments raised from the side of the parties, it may be mentioned that there is a two fold prayer made from the side of the applicant, one with regard to appraisal of ACR of 2007 and the other with regard to his non-empanelment. Since the non-empanelment of the applicant is dependent upon his ACR of 2007, challenge to it is made first from the side of the applicant. It is submitted on behalf of the applicant that a closed system of reporting was followed in making assessment by the reporting officers and the same was not revealed to the ratee. The numerical grading by Initiating Officer (IO)/First Technical Officer (FTO)/Reviewing Officer (RO)/Senior Technical

Officer (STO) entails numerical grading upto two decimal places with a maximum of 9.00. The Senior Reviewing Officers (SROs) and NSROs - DGMS (Army) and DGAFMS grade in whole numbers only. If CR average of an officer is 8.75, the grading of SRO, NSRO, DGMS (Army) and DGAFMS is to be a whole number, i.e. 7 (high average) or 8 (low outstanding) or 9 (high outstanding). The ACR average is worked out by taking average of the first part of the ACR i.e. IO+RO+SRO+DGMS+DGAFMS and average of the other part of the ACR, i.e. technical reports of FTO+STO+HTO. These two averages are re-averaged to give final average of a particular ACR, which is called 'period average'. Overall average is thereafter worked out by assigning weightage to various ACRs in the reckonable period. In 2009, the gradings of DGMS (Army) and DGAFMS were marked in arbitrary manner without having to justify grading in the pen picture, which necessitated the policy revision and acknowledged the number of grading i.e. an average of more than 8.75 should be rounded off to 9, the nearest whole number.

7. It is strenuously argued on behalf of the applicant that in the year 2007 because of his yeoman efforts in the capacity of being head of

the department of Nuclear Medicine at Army Hospital, the department was recognised as one of the most advanced centres of Nuclear Medicine in the world. Even the General Officer Commanding in Chief, Western Command, during his first visit to the department, appreciated it by giving an award. In spite of such administrative performance, the DGMS (A) endorsed that the applicant's character roll (CR) by downgrading him to Benchmark 8, which was concurred by DGAFMS without visiting the department. The unfortunate part was that in the year 2008, the DGMS (A) and DGAFMS did not endorse the CR in violation of Para 32 of SAO 8/S/91, which would prove their bias against the applicant to his disadvantage in the comparative merit vis a vis similarly situated officers. The statutory complaints made by the applicant were rejected on 24.8.2009 and 30.7.2010 respectively by non speaking orders.

8. To the contrary, from the side of the respondents, much thrust was laid that the reporting system in AFMS is modern in outlook and scientific in concept. The domain of personal qualities and variables of demonstrated performances in respect of ratee officers on the confidential reports have been selected after considerable research over

a period of time to encompass various attributes considered essential for job content of an AFMS Officer. The multi-tier reporting system, which is presently in vogue, has the inherent advantage of the RO/STO being 'moderator' and SRO/HTO being 'balancer' while rendering a confidential report. That means, the SRO/HTO should balance or rationalise the report of an officer wherein the assessments of the subordinate reporting officers are either in marked variance to each other or it is apparent that the subordinate reporting officers have rendered too liberal a report in respect of a ratee. The STO/HTO/DGMS (A) as head of the Service and the DGAFMS as head of the Organisation and cadre controlling authorities are required to give overall figurative assessment of the officer in the box provided for this purpose known as 'box grading' in whole numbers only. This assessment is not a mere numerical average of the assessment made in other parts of the report, but it contains an overall assessment, which includes potentials of officers as well. While giving box grading, the STO/HTO/Head of Service/Organisation takes into consideration (i) its conformity to the assessment made by the reporting officers as regards to personal qualities and demonstrated performances of the ratee; and (ii) its conformity to the potential of the ratee officer.

The relevant Special Army Order, viz. S.A.O No. 8/S/91, relating to Instructions for rendering CRs on AMC and AD Corps Officers, is extracted hereunder:

SPECIAL ARMY ORDER
ADJUTANT GENERAL BRANCH

**SAO 8/S/91 INSTRUCTIONS FOR RENDERING
CONFIDENTIAL REPORTS ON AMC AND AD CORPS OFFICERS**

General

1. xx xx xx xx
2. This Army Order is applicable to AMC and AD Corps
Officers only.
3. xx xx xx xx
4. xx xx xx xx

Aim of Confidential Reports

5. The aim of Confidential Report broadly is to have an objective assessment of an officer's professional and personal qualities, his comprehension, employability and his potential as observed during the period covered by the report. All reporting officers must, therefore, be fair, impartial and objective in their assessment.

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Endorsement by Addl DGDS/DGMS/DGAfMS

32. The Addl DGDS will endorse the reports of AD Corps officer of the rank of Major and above as higher technical officer. The DGMS will report on Lt Col and above. The DGAFMS will also endorse the report of Brig and above. The endorsement of DGMS and DGAFMS will be obtained under arrangement of DGMS and DGAFMS office respectively.

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PART VII—OBJECTIVITY IN REPORTING AND COMMUNICATION OF CONTENTS (WHEN APPLICABLE TO RATEE)

Objectivity in report

71. In accordance with the aim as defined at para 5 above the assessment contained in a CR will be restricted strictly to the performance and events during the period covered by the report.

Consistency in report

72. On receipt in Dte General Medical Services (DGMS-1A) a CR will be scrutinised for consistency in reporting.

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Responsibilities of the Senior Reporting Officers

74. It will be incumbent upon the senior reporting officers i.e. RO/SRO/NSRO and HTO/DGMS/DGAFMS to endorse specific remarks on assessment by junior reporting officer for following in pen picture:--

- (a) Whether the assessment by junior reporting officer is "liberal", "justified" or "strict".

(b) Recommendations for expunction of assessment which is considered to be subjective. These recommendations should be supported by reasons.

75. In addition, it will also be obligatory for the senior reporting officers to ensure the CR has been rendered in accordance with the provisions contained in SAO and that the conditions for consistency in reporting have been complied with.

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Thus in the aforesaid S.A.O. No. 8/S/91, procedure for recording of ACRs has been elaborately provided for. There are different officers involved in the process. The object of writing confidential reports and making entries in them is to give an opportunity to a public servant to improve excellence thereby augmenting efficiency of administration. Moreover, it gives an opportunity to the public servant to improve his performance (see **State of U.P v. Yamuna Shanker Misra and another** (1997(4) SCC 7). As stated earlier, from the above scheme (SOA 8/S/91), it is clear that while giving box grading, the STO/HTO/Head of Service (DGMS(A)/Head of Organisation (DGAFMS), takes the following factors into consideration: (i) conforming to the assessment made by the ROs as regards the personal qualities and demonstrated performance of the

ratee; and (ii) conforming to the potential of the ratee officer. From the material on record, it appears that the officer was evaluated in his ACR of 2007 by the then DGMS, who was a specialist in Radiation Therapy and had an opportunity to observe the work of the candidate closely. He appears to have exercised his discretion to modulate his SSR as DGMS (A) which was concurred by the then DGAFMS by adequately justified pen picture. The bench mark in ACR was given on the basis of his demonstrated performance and further no vice on the part of the DGMS (A) and DGAFMS has been contended.

9. The question is whether the action of the DGMS (A) and DGAFMS in giving box grading '8' to the applicant can be held to be arbitrary. The learned counsel appearing for the Respondents has placed before us the procedure followed for recording ACR and for giving overall grading. Having regard to the said procedure which is followed by the appropriate authority, we are unable to hold the box grading of the applicant to be arbitrary. No ground is, therefore, made out for interference. It is settled legal position that courts normally do not sit in court of appeal to assess the ACR Guidelines contained in SA 08/S/91. The authority, after taking into consideration factors like service record,

making its own assessment of the work of applicant kept the box grading confined to '8'. It is apparent that they have not evaluated the confidential report of the individual in isolation.

10. In so far as the question of malice or bias is concerned, no such case is made out in the petition though some vague allegations are scattered in the petition saying that both DGMS and DGAFMS did not visit the centre and refrained themselves from giving or writing any report. Such non visit to the centre cannot be construed to be a bias. Whatever assessment was made by the authorities for the reporting year 2007, we do not find any unreasonableness. In the absence of any allegation of bias, we do not find it to have been actuated by arbitrariness. Reliance may be placed on the decision in **International Airports Authority of India v. K.D Bali and another** (1988(2) SCC 360), wherein it was held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions or whimsical, capricious and unreasonable plea should not be made standard to regulate normal conduct.

11. It is further submitted by learned counsel for the applicant that box grading of 8 was arbitrary when the applicant was well appreciated for his achievement as Head of the Department, Nuclear Medicine and Radiology, Army Hospital (Research and Referral). No judicial review of such grading can be made unless there is error apparent in making real assessment of the merit of the applicant. Undisputedly there exists a distinction between decision making process adopted by the statutory authority and the merit of the decision, whereas in the former, the Court/Tribunal would apply the standard of judicial review and in the latter, it may enter into merit of the matter. Whatever process regarding CR was adopted, we do not find any impropriety in it. So was the situation for assigning benchmark for the performance of the applicant also. His performance was also found to be not upto the mark and he was also superseded in selection to the post of Brigadier. The material on record clearly reveals that the procedure for recording of the ACR of 2007 was strictly adhered to.

12. It has next been argued by learned counsel for the applicant that the Promotion Board in AMC is guided by promotion policies issued by DGAFMS from time to time. The Promotion Board is to conform to the

directives issued through promotional policy letters, as applicable at the time of holding of the Promotion Board. The Board is required to draw a merit list based on average of numerical grading by IO, FTO, RO, STO, SRO, DGMS (A) and DGAFMS and allot additional mark as apportioned for qualifications, individual awards, etc. which was in vogue for the consideration of the names by the Promotion Board in 2008 promulgated by Government of India, Ministry of Defence Letter No. 10(1)/2004/D (MED) dated 17.5.2006, the relevant portion of which is quoted below:

“Subject: Procedure for selection and promotion of Armed Forces Medical Services (AFMS) Officers viz. Army Medical Corps (AMC), Army Dental Corps (ADC), Army Medical Corps (Non Tech)(AMC(NT), and Military Nursing Services (MNS) – amendment regarding

Sir,

I am directed to refer to this Ministry's Letter No.10(1)/2004/D(Med), dated 14.1.2004, on the subject mentioned above and to say that the following amendments are hereby made in the said letter:-

I. **For the existing Para 3(d):**

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II. **For the existing para 11**

READ:

11. PG Qualifications: Officers in possession of any one of the following academic achievements will be awarded mark as mentioned against each:-

Ser No	Qualification	Marks
(a)	Doctor of Medicine (MD)/Master of Surgery (MS)/Masters in Hospital Administration (MHA) recognised by Medical Council of India/Diplomate National Board (DNB)	1
(b)	XX XX XX XX	
	XX XX XX XX	
(k)	XX XX XX XX	

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III. For the existing para 12**READ**

12. Officers in possession of any one of the following academic achievements will be awarded one (1) mark :-

- (a) Master of Chirugury (M Ch) **recognised by MCI**
- (b) Doctorate of Medicine (DM) **recognised by MCI**
- (c) Doctor of Philosophy (Ph D) **recognised by MCI**
- (d) Diplomate of National Board (DNB) (super-speciality subject)

NOTE: - If an officer is having more than one of the above-mentioned qualifications, mark for only one qualification will be credited.

IV. For the existing para 13:**READ**

13. **Basic parameter for grant of weightage for qualifications :** Marks for qualifications under paragraphs 11 and 12 will be awarded in each promotion board an officer is exposed to.

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2. These amendments will be implemented for the Promotion Board to be held for the vacancies arising in the year 2007 and thereafter."

The aforesaid policy reveals that selection or promotion is based on the quantitative assessment of CRs as has already been canvassed in MOD Office Letter No.17267/DGAFMS/DGIX CRD/Policy/Prom Bd. Dated 08 Jun 2009 Para 2 of the policy reads as under:

"2. AFMS follows a Quantified Sys for selection for all Promotion Boards. In order to draw the quantified merit of the officers in the zone of consideration and to attend to the related secretariat work at DG-IX, there is a reqmt to freeze inputs relating to CRs, Qualification, courses, honours & awards and spl achievements pertaining to ofrs under consideration."

Further Selection Board after reviewing the performance of all the officers who were in the zone of consideration for promotion to the rank of Major General made assessment as per the guidelines. The recommendations of the Selection Board cannot be challenged except on the ground of *mala fides* or serious violation of statutory rules. The Courts/Tribunals cannot sit as an appellate authority to examine the

recommendations of the Selection Board, like the court of appeal. One has to give credit to the Selection Board for making assessment, taking over all views of the ACRs of the officer. One may excel in merit in comparison to the applicant it is not subject to appeal. If this type of interference is permitted than it would virtually amount that Tribunals start sitting as appellate authority over selection. It is not the domain of the Tribunal. In this regard, it shall be useful to quote the decision given by the apex Court in the case of **R.S. Dass v. Union of India and Others** (1986 (Supp) SCC 617), wherein, at paragraph 28, it was held:

“28. It is true that where merit is the sole basis of promotion, the power of selection becomes wide and liable to be abused with less difficulty. But that does not justify presumption regarding arbitrary exercise of power. The machinery designed for preparation of Select List under the regulations for promotion to All India Service, ensures objective and impartial selection. The Selection Committee is constituted by high ranking responsible officers presided over by Chairman or a Member of the Union Public Service Commission. There is no reason to hold that they would not act in fair and impartial manner in making selection. The recommendations of the Selection Committee are scrutinised by the State Government and if it finds any discrimination in the selection it has power to refer the matter to the Commission with its recommendations. The Commission is under a legal obligation to consider the views expressed by the State Government along with the records

of officers, before approving the Select List. The Selection Committee and the Commission both include persons having requisite knowledge, experience and expertise to assess the service records and ability to adjudge the suitability of officers. In this view we find no good reasons to hold that in the absence of reasons the selection would be made arbitrarily. Where power is vested in high authority there is a presumption that the same would be exercised in a reasonable manner and if the selection is made on extraneous considerations, in arbitrary manner the courts have ample power to strike down the same and that is an adequate safeguard against the arbitrary exercise of power."

This was also reiterated by the Apex Court in the case of **Dalpat Abasaheb Solunke and others v. Dr. B.S. Mahajan and Others** (1990(1) SCC 305), wherein it was observed that:

"It is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinise the relevant merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. In the present case the University had constituted the Committee in due compliance with the relevant statutes.

13. In view of aforesaid discussions, we do not find any merit in the petition. In the result it is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER