

**COURT NO. 1, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

O.A. No. 54 of 2010

IN THE MATTER OF:

Havildar Jai Chand

.....Petitioner

Versus

Union of India and Others

.....Respondents

For petitioner : Mr. K. Ramesh, Advocate

For respondents : Mr. Mohan Kumar, Advocate

CORAM:

HON'BLE MR JUSTICE A.K. MATHUR, CHAIRPERSON

HON'BLE LT GEN M.L. NAIDU, MEMBER

JUDGMENT

25-03-2011

1. The petitioner vide this application filed in the Armed Forces Tribunal on 25-01-2010 has prayed for quashing and setting aside the impugned order of GOC in C South Western Command dated 25-09-2009. He has also prayed for setting aside the impugned ACR of 2006-2007 on the grounds of being technically invalid and contrary to the principles enunciated in the relevant order for initiation writing of ACR.

2. The brief facts of the case are that the petitioner was enrolled in the Indian Army on 15-01-1988. He was assigned to the Intelligence Corps. In due course he was promoted as a Havildar on 14-03-1998.

The ACR covering the period from 01-10-2006 to 30-09-2007 was initiated on 30-09-2007. The petitioner received no counselling/warning during the relevant period. However, in March, 2008 he received a counselling letter. He preferred a non statutory complaint on 24-06-2008 which was rejected by GOC in C.

3. The petitioner is assailing the ACR being biased and subjective and contrary to the Army Order on the subject. Since the counselling letter was received by the petitioner only on 02-05-2008, he did not have an opportunity to rectify his shortcomings. Therefore, he should not have been penalized in the impugned ACR of 2006-2007.

4. Learned counsel for the petitioner argued that the petitioner had applied for loan for house construction from his AFPP Fund in September, 2007. No action was taken upon by his unit till December, 2007. In December, 2007 the petitioner was sent to Military Intelligence Training School and Depot (MITSD) on temporary attachment. He preferred a second application directly to the Commandant MITSD and obtained the sanction for the said loan. Apparently this action by the petitioner was not favourably viewed by his Commanding Officer (CO) and a show cause notice was issued by his unit on 18-12-2007. The show cause notice dated 18-12-2007 reads as under :

“1. Ref SAO 16/S/76

2. On 31 Oct 07 when you had submitted the application requesting for final withdrawal from AFPP Fund for Rs.2,50,000/- on the pretext of construction of house, you were instructed to resubmit the application along with the registration copy of the land and the lay-out of the proposed house approved by the Municipal/Panchayat committee.

3. But it was noticed that you failed to submit the same and instead of resubmitting the application with reqd docu you had adopted improper means by manipulating your contacts through MITSD School Pune to get the fund withdrawn w/o obtaining the permission of OC No 3 Det and Sanction of CO HQ SWCCIU, while being sent to Pune as witness for Recording of Summary of Evidence on 03 Nov 07.

4. You are reqd to show cause as to why suitable disciplinary/adm action should not be initiated against you for failing to abide by the rules and regulations laid down in SAO 16/S/76.

3. Your reply on the above should be fwd to the undersigned by 20 Dec 07 failing which it will be assumed that you have nothing to state in your defense and ex-parte decision to initiate disciplinary/adm proceeding against you."

6. The petitioner submitted a reply to the show cause notice on 20-12-2007 which was disposed of by the Respondents on 20-12-2007. The disposal letter dated 20-12-2007 reads as under;

"1. Ref your show cause notice reply dt 20 Dec 07.

2. *Your reply for the show cause notice issued to you was not satisfactory and thus you are directed to submit fresh reply to the show cause notice issued to you as per SAO 16/S/76. However your lve is sanctioned from 21 Dec 07 to 31 Dec 07 as asked by you.*

3. *Your reply on the above should be fwd to the undersigned by 04 Jan 08 failing which it will be assumed that you have nothing to state in your defense and ex-parte decision to initiate disciplinary/adm proceeding against you.”*

6. The petitioner further responded in terms of the reply to the show cause notice on 04-01-2009 which reads as under;

“1. Ref your letter No 7619/3/CIU/A dated 20 Dec 2007 and my reply to SCN dated 20 Dec 2007.

2. I had applied for final withdrawal showing reasons for addition/alteration of existing house with an aim to early process as well as early release of amount for making payment to the contractor with whom I reached an agreement for construction of my house. In that case of addition alteration as per SAO, no bldg document is required to attached. However, as you had asked documents as mentioned in my previous reply to SCN through Sr JCO, being an obedient soldier I had produced it upto my satisfaction but still showing reason of ‘not approved plan’ my application was withheld in spite of knowing that these documents are not required in this case and also knowing

that I am in very much need of the money. Due to no processing of application even after prolong delay of three months I had no other alternate but to approach Head Clk at MINTSD, Pune where I was att, to get my application for final withdrawal sanctioned as my construction job was stopped by the contractor due to non payment of agreed amount. Therefore, I feel I have done no mistake as necessity knows no bound.

3. *In view of your repeated letters of SCN, I am mentally disturbed and can not even concentrate towards needs of my ailing parents for which I had taken a posting on medical grounds in this station. Therefore, I again request you to arrange an interview of BGS (Int) sahib, HQ SWC at the earliest to whom I want to explain my grievances to get rid of this repeated harassment which has almost paralyzed my peaceful family life."*

7. The petitioner was further given an adverse performance counselling by the adjutant on behalf of CO on 07-01-2008.

8. Learned counsel for the petitioner further argued that it was because of lack of response from the unit qua the loan application that he was forced to seek the loan directly through MITSD. He had engaged a civilian contractor for construction of his house in his home town. The construction work had commenced and the contractor was threatening to stop construction if the amount contracted for was not paid for as per the terms and conditions. Therefore, sensing urgency,

while temporarily attached at Pune with MITSD, he applied for the loan for the second time thus bypassing the unit.

9. Learned counsel for the petitioner made a further averment that the CO was so biased against the petitioner that he forced the IO to change his ACR even after the ACR was written by the IO, so that the RO could downgrade the ACR without difficulty. He avers that he was given an "Above Average" grade earlier and which brought down on the intervention of the CO. The IO was forced to make amendments to the ACR which the IO had already written.

10. Learned counsel for the respondents stated that the impugned ACR covers the period from 01-10-2006 to 30-09-2007. The assessment of both the IO and RO pertains to the performance of the petitioner during the period of assessment. It appears that the petitioner is trying to quote the show cause notice issued on 18-12-2007 and again on 20-12-2007 to be the basis for writing the impugned ACR. While it is submitted that the impugned ACR contains the assessment of IO and RO as observed by them during the period covered by the ACR. Therefore, the ACR is technically correct.

11. The ACR was examined by the appropriate authority for inconsistency and technical validity when the petitioner preferred a representation on 06-03-2007. Since there was no technical infirmity and there was no inconsistency compared to his past performance, the

representation was rejected on 25-09-2009. Therefore, the show cause notices issued in December, 2007 and reply by the petitioner are not material in the present case.

12. Having heard both the parties at length we called for and examined the original documents. The impugned ACR bore several cuttings by the IO rather in each such correction he had downgraded the assessment from "Above Average/High Average" to that of "High Average/Average". So much so, in the pen-picture, he has cut down "***the NCO is Above Average***" by having scored out the word "***Above***" has written "***High***". All these corrections have been authenticated by the IO himself.

13. The RO while endorsing the remarks, has stated that the "***NCO is Average and even after giving sufficient opportunities and regular guidance, he has failed to deliver result and tends to manipulate reports***". This extract was conveyed to the petitioner on 12-05-2008.

14. It is clear from the foregoing that the issue of obtaining house loan by the petitioner from MITSD by bypassing the chain of command, surfaced after the period covered by the ACR. Therefore, the remarks of the RO have been based on the performance of the NCO during the said period. However the cuttings in all boxes of figurative assessment and pen-picture by the IO create a doubt in our

minds to surmise that it has been done in an unfair manner. While the petitioner has specifically made the averment of IO “changing” the endorsement, the respondents have failed to justify the “cuttings”. Thus the IO’s endorsement/cuttings do not withstand probity. It is obvious that the IO changed his mind for whatsoever reason, to down grade the NCO from “Above Average” to “High Average”. Apparently, this was done after the IO had already written the report and communicated to the petitioner. The downgrading has not been justified by the IO in his pen-picture either. All the same, the amendments made are in all columns of the ACR by the IO and in spite of being authenticated by the IO himself gives appearance of having been unfair to the petitioner. Therefore, the IO’s remarks in the impugned ACR covering the period 01-10-2006 to 30-09-2007 need to be expunged in entirety.

15. The same cannot be held for the remarks of the RO. The RO is abundantly clear in his assessment both in the figurative box grading as also the pen-picture. In both these, he has emphatically stated that the NCO is average, besides giving reasons for such assessment. In addition, the RO has conveyed his assessment including the pen-picture to the petitioner.

16. In view of the foregoing, we partially uphold the petition expunging only the remarks of the IO in the impugned ACR covering the period 01-10-2006 to 30-09-2007. The petitioner will be entitled to consequential benefits. No orders as to costs.

**A.K. MATHUR
(Chairperson)**

**M.L. NAIDU
(Member)**

**New Delhi
March 25, 2011**