

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

**OA 1661/2022
with
MA 2219/2022**

**Col J S Rathore
VERSUS**

Union of India and Ors.

... **Applicant**

... **Respondent**

**For Applicant
For Respondents**

: Mr. S.S. Pandey, Advocate
: Mr. Anil Gautam, Sr. CGSC

CORAM

**HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT. GEN P M HARIZ, MEMBER(A)**

ORDER

MA 2219/2022

Keeping in view the averments made in this application and finding the same to be bona fide, in the light of the decision in **Union of India and Others** Vs. **Tarsem Singh** [(2008) 8 SCC 648], the instant application is allowed condoning the delay in filing the OA.

2. MA stands disposed of.

OA 1661/2022

3. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007, by the applicant who is a serving Col in the Army and is aggrieved by his loss of original seniority and

rejection of his statutory complaint. He has made the following prayers:

- (a) Issue directions to summon all service records of the applicant and ascertain the malafide alleged, in terms of mismatch between the numeric grading and pen picture of the officer.
- (b) Issue directions to restore the original Seniority of the applicant with the seniority of 1995 Batch.
- (c) Issue directions to set aside the alleged CRs i.e. June 2004 to November 2004; January 2005 to January 2006; June 2008 to May, 2009 and June 2010 to May 2011.
- (d) Issue directions to set aside any moderation carried out by the respondent without intimation to the applicant.
- (e) Issue to directions to conduct Special Board No.2 for the rank of Brigadier before June - July, 2023 in light of equity with his batch mates so that the applicant be timely promoted before his age of superannuation on 31.12.2023.
- (f) Pass directions to allow the applicant the same number of chances for his Brigadier's board as his original Batch in light of his specific facts and circumstances, and his extraordinary contribution to the Nation's armed forces.

(g) Pass any other order in the interests of justice, equity and good conscience.

Brief Facts of the Case

4. The applicant was commissioned into SIKH Regiment on 20.08.1994. He participated in Kargil war as part of his bn and was Mentioned in Despatches for his valour. He was seriously wounded in this operation and due to his medical condition, he was later transferred to Army Ordnance Corps (AOC). During his service career, he served in various sectors and held prestigious appointments. Based on his professional competence, he was promoted to the rank of Col in 2013 and commanded 9 Field Ordnance Depot (9 FOD). He was posted as the Logistic Officer of an Inf Bde Gp in a UN Mission Congo, where he was awarded the Force Commander's Commendation in 2005. Later he was awarded GOC-in-C Western Command's Commendation Card in 2017.

5. The applicant was considered as a fresh case by No 3 SB held in June 2012 for empanelment to the rank of Col, however, he was not empanelled. Thereafter, the applicant was considered as a First Review case by No 3 SB held in Dec 2013 and was found fit for empanelment to the rank of Col. Subsequently, the applicant filed OA 1281/2017 before this Hon'ble Tribunal challenging his non

consideration for the HC/HDMC course for the year 2018 which was later dismissed as withdrawn vide order dated 30.11.2023. In the meantime, applicant preferred a statutory complaint on 14.06.2020 against CR (06/04-11/04), which was later amended on 06.10.2020 as a complaint against his non empanelment. The competent authority examined the statutory complaint of the applicant in the light of the applicant's overall profile and relevant documents and found that all CRs in the reckonable profile of the applicant, including the impugned CR (06/04-11/04) in the reckonable profile were fair, objective, well corroborated, performance based and technically valid. There being no evidence of any bias or subjectivity, none of the CRs merited any interference and accordingly, the competent authority vide order dated 29.09.2021 rejected the statutory complaint dated 06.10.2020.

6. Thereafter, the applicant submitted a second statutory complaint dated 26.09.2022, in which he impugned four CRs; (06/04-11/04), (01/05-01/06), (06/08-05/09) and (06/10-05/11). The applicant also prayed for retrospective merit computation for HCC/HDMC course. In addition, the applicant prayed that he be considered by the No 2 SB due in Dec 2022 with his original BYOS i.e 1995. The competent authority duly examined

the second statutory complaint dated 26.09.2022 and granted partial redressal to the applicant and expunged the assessments of IO and RO at Paras 24 (a) to (e) in CR (01/05-01/06) on grounds of inconsistency and subjectivity vide order dated 06.03.2023.

7. As the applicant was already empanelled by No 3 SB in Dec, 2013 in his First Review consideration, the applicant with his changed profile, was considered by No 3 SB in Mar 2023 for restoration of seniority; however, the BYOS was not restored. Hence, this OA.

Arguments by the Counsel for the Applicant

8. The counsel briefly explained the exemplary service profile of the applicant, his battle report, achievements and appreciation earned for contribution in various professional work and other activities. The counsel then recapitulated applicant's consideration as a fresh case by No 3 SB in June 2012; his non-empanelment; and his subsequent empanelment in Dec 2013 and how this had resulted in loss of seniority and placed him at a major disadvantage for his future promotion to the rank of Brig. The Counsel also explained briefly the details of the statutory complaints filed on 06.10.2020 and 26.09.2022; non-statutory complaint filed on 01.05.2023 and the outcome from these complaints.

9. The counsel submitted that the undermentioned impugned CRs earned by the applicant, resulted in him not being empanelled to the rank of Col in his fresh consideration by No 3 SB in June 2012. Though he was subsequently empanelled in Dec 2013, the change in seniority and these impugned CRs had come in the way of the applicant's nomination for the prestigious Higher Command Course (HCC)/ Higher Defence Management Course (HDMC), as well as his promotion to the rank of Brig.

| Ser | CR | Period | Rank | Appointment |
|-----|------|-------------|--------|---|
| (a) | CR 1 | 06/04-11/04 | Maj | Provision Officer 6 FOD |
| (b) | CR 2 | 01/05-01/06 | Maj | Logistic Officer HQ 301 Inf Bde Gp (UN Msn) |
| (c) | CR 3 | 06/08-05/09 | Lt Col | Adm Officer, COD Jabalpur |
| (d) | CR 4 | 06/10-05/11 | Lt Col | Adm Officer, 14 FAD |

10. Referring to CR-1, the counsel stated that this was amongst the initial CRs earned after his transfer to AOC, when he was in transition into a new environment, and recovering from his war injuries and medical condition. He further added that this was the time when the quantified selection system was yet to be introduced and thus the CRs were initiated as part of a qualitative system of selection in vogue then. Referring to CR-2, the counsel elaborated

that the applicant had performed well on the UN Msn, and had been awarded the Force Cdr's Commendation in recognition of his work. However, he had been intimated by his IO that, CRs earned in UN do not form part of the reckonable profile and moreover that it was not expedient to grade all officers as 'Outstanding'. Thus, despite the applicant's performance, he was assessed as 'Above average'. The counsel further added that based on the applicant's statutory complaint dated 26.09.2022, partial redressal had been granted in which the assessment of both the IO and RO in Paras 24 (a) to (e) had been expunged on grounds of inconsistency. The counsel then emphatically stated that since a major portion of the assessment had been found to be inconsistent, the complete CR was required to be set aside.

11. Once again referring to the partial redressal granted in statutory complaint dated 26.09.2022, the counsel elaborated that with this relief, the applicant's seniority ought to have been automatically restored. However, the relief granted had been overlooked when the applicant was considered for restoration of seniority, and was denied his legitimate right for restoration of seniority.

12. Referring to CR-3 and CR-4, the counsel submitted that while the IOs and FTOs had assessed the applicant as 'Outstanding' the applicant was apprehensive that due to lack of interaction with the ROs and SROs, the applicant was not rated objectively. Therefore, the counsel prayed that any inconsistency/aberration in these CRs be expunged.

13. The counsel relied on the judgment of the Hon'ble Supreme Court in the case of **A.K Kraipak & Ors.** Vs. **Union of India & Ors.** [AIR 1970 SC 150], wherein, the Supreme Court held that-
"Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. There must be a reasonable likelihood of bias. In deciding the question of bias, we have to take into consideration human probabilities and ordinary course of human conduct".

14. The counsel further submitted that although promotion was not a matter of right, but, under Article 14 and 21 of the Constitution of India, the applicant was entitled to a fair and reasonable consideration for promotion. The counsel contended that by unfairly

losing his BYOS, the applicant fundamental rights were violated. He concluded by vehemently asserting that these CRs merit interference and his BYOS be restored in order to ensure natural justice. The counsel relied on the following cases:

- (a) **Council of Scientific and Industrial Research & Anr** Vs. **K.G.S Bhatt & Anr**, [(1989) 4 SCC 635].
- (b) **S L Kapoor** Vs. **Jagmohan & Ors.**, [(1981) 4 SCC 136].
- (c) **State of U.P** Vs. **Yamuna Shankar Mishra & Anr**, [(1997) 4 SCC 7].
- (d) **Swadesh Cotton Mills** Vs. **Union of India & Ors**, [AIR 1981 SC 851].
- (e) **Maenka Gandhi** Vs. **Union of India & Ors** [AIR 1978 SC 597]

Arguments by the Counsel for the Respondents

15. The counsel briefly recapitulated the methodology of rendering CRs and elaborated how 'Outstanding' reports were exceptions which were required to be justified in the pen picture. He then elaborated the details of the applicant's consideration by No 3 SB. The counsel further added that the case had many delay and latches and that it suffered from non-joinder of parties. The counsel further stated that although the applicant had averred to many imputations

of personal bias against his IO in CR-1 and CR-2, he did not make them a party to this case. Thus, not having done so, all allegations against the said IO are unsustainable in law.

16. Admitting that the applicant was a meritorious officer, the counsel submitted that the applicant had not been empanelled to the rank of Col in his fresh consideration by the No 3 SB held in June 2012 due to his overall comparative merit and added that the applicant had been subsequently empanelled in Dec 2013, with the same profile. The counsel emphasised that the current OA was an afterthought to bring out a case for applicant's non nomination for HCC/HDMC Course and restoration of seniority.

17. The Counsel further stated that the applicant had failed to show as to how any of his legal or vested rights had been abridged by the respondents. The Counsel added that by virtue of being empanelled to the rank of Col as a First Review Case in Dec 2013, the applicant's batch seniority was changed from 1995 to 1996 as per policy in vogue. The applicant emphasised that the applicant had not raise the issue of non empanelment as a fresh case in Jun 2012 by No 3 SB, nor did he file a complaint against it then. That it was only in 2020, i.e, eight years later, that the applicant preferred a statutory complaint against his non empanelment and

the CR for the period (06/04-11/04). That this was the first time when the applicant prayed for restoration of his batch year of seniority as per his original batch (1995). The counsel reiterated that the competent authority after due examination, had rejected this complaint vide order dated 29.09.2021.

18. Further referring to the second statutory complaint dated 26.09.2022, the counsel stated that this complaint had been filed against the four impugned CRs referred to by the counsel for the applicant.; retrospective merit computation for HCC/HDMC course and restoration of original BYOS i.e 1995. He added that the competent authority had granted partial redressal to the applicant and expunged certain figurative assessments by the IO and RO in CR (01/05-01/06) on grounds of inconsistency and subjectivity vide order dated 06.03.2023. Consequent to this, the applicant had been considered by No 3 SB in Mar 2023 for restoration of seniority, and that based on his merit, he had not qualified to have his seniority restored. The Counsel thus emphasised that, fair consideration had been granted to the applicant for his promotion and restoration of seniority and thus this OA deserved to be dismissed.

Consideration

19. Having heard both the parties at length, the issues that requires consideration are:

(a) Whether the respondents have fairly disposed of the complaints and whether any CR merits interference.

(b) Whether the applicant is entitled to restoration of original BYOS i.e 1995.

20. We have examined the CR Dossier, examination of complaints and the Board proceedings of the No 3 SB submitted by the respondents.

Complaints

21. The applicant has made two statutory complaints and one non-statutory complaint. Statutory complaint dated 06.10.2020 was against non-empanelment by No 3 SB held in June 2012 wherein the applicant was considered as a fresh case and has impugned one CR. The second statutory complaint dated 26.09.2022 was against four CRs. The non-statutory complaint dated 01.05.2023 was against the rejection of restoration of seniority by No 3 SB held on 11.04.2023.

22. Statutory Complaint No.1 Filed against non-empanelment by No 3 SB, the applicant highlighted his service profile

including his performance as part of an Inf Bn in OP VIJAY wherein he was severely wounded; declared as a Battle Casualty and was Mentioned-in-Despatches. The applicant had impugned CR (06/04-11/04) on the grounds that this was the first AOC unit he served in after transferring to AOC; though he had done well on the JC Course, he was not granted leave for preparing for DSSC Exam; there was a difference of opinion between the IO and RO which may have impacted his assessment and that while proceeding on UN Mission, he had submitted his CR for initiation having signed a blank CR. The applicant had prayed that this CR be set aside and his seniority be restored to his original seniority of 1995. The examination recorded that this was the second CR earned in the same environment under the same reporting officers. That the CR was performance based, well corroborated and technically valid and without any evidence of bias. The examination concluded that the officer was not empanelled for promotion due to his overall comparative merit. Thus the complaint was rejected vide order dated 29.09.2021.

23. Statutory Complaint No.2 The applicant was empanelled by No 3 SB in Dec 2013 as a first review case. This complaint was filed against four CRs; (06/04-11/04), (01/05-01/06), (06/08-05/09) and

(06/10-05/11). The applicant highlighted his service profile and achievements and was aggrieved by his revised batch seniority and his non consideration for HC/HDMC due to age. The grounds for CR (06/04-11/04) were the same as given in statutory complaint No.1. With regard to CR (01/05-01/06) earned whilst on a UN Mission, it was the applicant's case that despite his excellent performance, the IO had informed him that UN reports will not be included in the reckonable profile and that since all officers cannot be assessed as outstanding, he was assessed as 'above average'. With regard to CRs (06/08-05-09) and (06/10-05/11), it was the applicant's case that though the IO/FTO assessed him 'Outstanding', it is the apprehension of the applicant that the other reporting officers may not have assessed him correctly due to lack of interaction. The examination concluded that certain assessments by both IO and RO in CR (01/05-01/06) were inconsistent and these were accordingly expunged. All other CRs were evaluated as being well corroborated, performance based and technically valid, thus did not merit any further interference. Accordingly vide order dated 06.03.2023, partial redressal was granted in that IO & RO's assessment in Para 24(a) to (e) in CR (01/05-01/06) were expunged on grounds of inconsistency.

24. Non Statutory Complaint Consequent to the partial redressal granted in statutory complaint vide order dated 06.03.2023 and the fact that the applicant had already been empanelled by No 3 SB in Dec 2013 as a First Review Case, he was again considered by No 3 SB in Mar 2023 for restoration of seniority and did not qualify to have his seniority restored. This complaint was against the restoration of seniority. It was the plea of the applicant that non-restoration of seniority after having been granted partial redressal was inconsistent and unjustified. That the Board may have overlooked his battle performance reports and injury sustained. That the non-restoration of seniority would deny him a fair chance to be considered by No 2 SB. Thus the applicant prayed that his batch/year of seniority be restored and the No 2 SB for AOC 1995 batch be conducted well before his superannuation. The examination concluded that none of the CRs merited any further interference and that even with the redressal, since his merit in No 3 SB of Mar 2023 was still less than that of the empanelled officer of No 3 SB of 1995 Batch held in June 2012, he did not qualify to have his seniority restored. Accordingly, the non-statutory complaint was rejected vide order dated 04.08.2023.

CRs

25. In the reckonable profile at the time of No 3 SB in Jun 2013, the applicant had earned seven CRs which included four in the rank of Maj and three in the rank of Lt Col. Of these seven, there were a total of five criteria reports. Overall, excluding the technical reports, the applicant had 61% assessment as 'outstanding' with the balance assessment of 39% being 'above average'. The overall technical reports had 100% 'outstanding' assessment. In the criteria reports excluding technical reports, the applicant had 79% 'outstanding' assessment and the 21% being 'above average'.

26. CR – 1 (06/04-11/04) This was the third CR that the applicant had earned after his transfer from Infantry to AOC. This non-criteria report has been earned in the appointment of Provision Officer/6 FOD and is boxed 8/8/-/8/8 by the IO/RO/SRO/FTO/HTO. All reporting officers have given positive pen pictures with positive recommendation for promotion, foreign assignments and career courses. There were no 7s/weak points and it is in sync with the profile of the applicant. This is the second CR earned by the applicant in the same environment under the same reporting officers. Thus, the CR is performance based, well corroborated and

consistent with the profile of the applicant and thus does not merit any further interference.

27. CR – 2 (01/05-01/06) This report was earned by the applicant in the rank of Maj as the Logistic Officer of HQ 301/Inf Bde Gp deployed in a UN Mission. This CR is boxed 8/8/- by IO/RO/SRO with complimentary pen picture and positive recommendations for promotion and foreign assignments. There are no 7s/weak remarks in the CR. The IO & RO's assessment at Para 24(a) to (e) have already been expunged vide order dated 06.03.2023 based on the statutory complaint dated 26.09.2022. The CR does not merit any further interference.

28. CR – 3 (06/08-05/09) and CR – 4 (06/10-05/11) CR-3 (06/08-05/09) is a criteria report in the rank of Lt Col earned as the Adm Officer of COD Jabalpur. The CR is boxed 9/8/8 by the IO/RO/SRO with positive pen pictures and recommendations for promotion. There are no 7s/ weak remarks. CR-4 (06/11-05/11) is also a criteria report in the rank of Lt Col earned as the Admn Officer/14 FAD and is boxed 9/9/8/9/9 by the IO/RO/SRO/FTO/HTO with positive recommendations for promotion and pen pictures. Again there are no 7s/ weak remarks. Both reports have been initiated by different set of reporting officers and are entirely performance based and well

corroborated. They are both technically valid and there is no evidence of any bias or subjectivity. Hence these too do not merit any interference.

No 3 SB

29. The applicant had been granted his entitled consideration by No 3 SB and had been empanelled as a First Review Case by No 3 SB held in Dec 2013, and thus this batch year of seniority was set as 1996. Consequent to the partial redressal granted in Statutory Complaint dated 26.09.2022, he was considered for restoration of seniority by No 3 SB (Review – Restoration of Seniority) in Mar 2023. However, based on his overall profile and merit, he did not qualify for restoration of seniority. The details of consideration are given below:

| Ser | No 3 SB | Consideration | Batch Year | Results |
|-----|--|---|------------|---|
| (a) | June 2012 AOC 1995 Batch | Fresh | 1995 | NE OOM- 90.502 Last offr – 90.976 |
| (b) | Dec 2013 AOC 1996 Batch | First Review | 1996 | Empanelled |
| (c) | Partial redressal granted vide order dated 06.03.2023, wherein, assessments of IO and RO at Paras 24 (a) to (e) in CR 01/05-01/06 were expunged. | | | |
| (d) | Mar 2023 | Special Review Restoration of seniority | - | Not restored Merit - 90.593 Last offr of 1995 Batch - 90.976 |

30. No order as to costs.

31. The OA stands dismissed.

32. Pending miscellaneous application(s), if any, stands closed.

Pronounced in open Court on this 22nd day of December, 2023.

(RAJENDRA MENON)
CHAIRPERSON

(P.M. HARIZ)
MEMBER (A)

Neha