

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

3.

OA 28/2019

Lt Col SK Jha
Versus
Union of India & Ors.

... Applicant

... Respondents

For Applicant : Mr. S S Pandey, Advocate
For Respondents : Dr. Vijendra Singh Mahndiyan, Advocate

CORAM :

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

ORDER
17.10.2023

Vide our orders of even date, we have dismissed the OA. Faced with the situation, learned counsel for the applicant makes an oral prayer for grant of leave to appeal under Section 31 of the Armed Forces Tribunal Act, 2007, to the Hon'ble Supreme Court. We find no question of law much less any question of law of general public importance involved in the matter to grant leave to appeal. Hence, the prayer for grant of leave to appeal is declined.

[RAJENDRA MENON]
CHAIRPERSON

[P. M. HARIZ]
MEMBER (A)

Neha

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ORDER

1. The present application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a serving Lt Col in the Army who is aggrieved by his non-empanelment by the Selection Board to the rank of Colonel and rejection of his statutory complaint vide impugned order dated 20.11.2018. The applicant has made the following prayers:

- (a) Call for the records based on which the impugned CR of the applicant has been retained and taken into consideration for all purpose including promotion and based on which Statutory Complaint of the applicant has been rejected vide order dated 20.11.2018 and thereafter quash the same.

- (b) Quash/ set aside the ACR covering period from 31.03.2014 to 06.02.2015 in its entirety.
- (c) Direct the respondents to consider the case of the applicant afresh for promotion to the rank of Col by ignoring the ACR covering period from 31.03.2014 to 06.02.2015.
- (d) Direct the respondents to promote the applicant to the rank of Col with effect from when the officers of 2001 batch have been promoted along with the consequential benefits such as seniority, arrears of salary and further promotions etc.
- (e) Pass any other order/orders as deemed appropriate by this Hon'ble Tribunal in the facts and circumstances of the present case.

Brief facts of the Case

2. The applicant was commissioned into Corps of Engineers on 03.11.2001. The applicant was conferred GOC-in-C, HQ Andaman and Nicobar Command Commendation Card in 2014.
3. The applicant submitted a statutory complaint dated 18.01.2018 impugning ICR for the period 31.03.2014 to 06.02.2015 on the ground the ICR for the relevant period was technically invalid and objective and thus prayed that the same be set aside. In the meantime, applicant

approached the this Tribunal against the non-disposal of his statutory complaint dated 18.01.2018. The Hon'ble Tribunal vide order dated 19.04.2018 allowed the applicant to withdraw the said OA with liberty to file afresh at appropriate stage, if required. The applicant was considered as a fresh case by No 3 SB held in **April 2018** for empanelment to the rank of Col and was not empanelled. The competent authority duly examined the statutory complaint dated 18.01.2018 and found that the impugned CRs were fair, objective, well corroborated, performance based, consistent and technically valid. Accordingly, the competent authority vide order dated 20.12.2018 rejected the statutory complaint. Hence, this OA.

Arguments by the Counsel for the Applicant

4. The counsel briefly recapitulated the service profile of the applicant and stated that in spite of his professional record, the applicant had not been empanelled to the rank of Col. The counsel submitted that soon after joining 801 Engineer Regiment R&P (TA), the applicant informed Respondent No 4 regarding certain aberration in administration and other issues in the unit. The counsel then elaborated various incidents highlighting applicant's differences with Respondent No 4 which included deliberate design to keep the applicant away from the Unit, harassment and abusive conduct, filing of false and unethical

AFMS-10 against the applicant. The counsel for the applicant also questioned the technical validity of the verbal/written counselling letters issued to the applicant by Respondent No 4.

5. The counsel further submitted that impugned CR was unilaterally initiated by Respondent No 4 and the grading of 6/7 (few 8s) and the false adverse remarks by Respondent No 4 as IO, were inconsistent with the overall profile of the applicant. Moreover, the applicant was promoted to the rank of Lt Col on 03.11.2014 and had not completed 90 days in the rank of Lt Col and therefore the impugned CR was initiated contrary to Para 89 of AO 45/MS/2001. To substantiate his claim, the applicant has relied on AFT, RB, Chandigarh Order dated 30.07.2013 in OA 1168/2011 titled as Lt Col Vinay Lakhera Vs UoI. The counsel emphasised that the CR was biased, subjective and inconsistent with the profile of the officer and ought to have been set aside during internal assessment itself.

6. The counsel then concluded that due to these reasons, the applicant had not been empanelled and prayed that the issues raised against the impugned CR be reconsidered, and necessary relief be granted.

Arguments by the Counsel for the Respondents

7. The counsel briefly recapitulated the methodology of outstanding CRs; how 'Outstanding' reports were exceptions which were required to be justified in the pen picture and the details of consideration by No 3 SB.

8. The counsel reiterated that during the relevant period, the applicant was posted in 802 Engineer Regiment R&P (TA). Respondent No 4 was the CO of the applicant and had observed certain inadequacies for which he administered written counselling. The counsel further added that vide separate letter dated 27.01.2015, Respondent No 4 instructed the applicant to submit the CR form, 10 days before being struck off strength (SOS). The counsel pointed out that the applicant was SOS with effect from 06.02.2015 but had failed to submit the CR form duly completed as mandated under Para 93 of the Army Order 45/2001, nor did he submit the medical examination report as directed. Therefore, Respondent No 4 was compelled to initiate the impugned CR under Para 96 of the Army Order. The counsel further added that the extracts of the impugned CR were communicated to the applicant vide letter dated 10.04.2015 and the extracts duly signed by the applicant was returned vide his letter dated 11.04.2015.

9. The counsel stated that the statutory complaint dated 18.01.2018 against the impugned CR was nothing more than an afterthought on

part of the applicant. Moreover, the statutory complaint was duly examined by the competent authority who concluded that the assessments were well corroborated, objective, fair, performance based consistent and technically valid. Therefore, the competent authority vide order dated 20.11.2018 rejected the statutory complaint filed by the applicant.

10. The counsel further stated that the contention of the applicant that the impugned CR was initiated contrary to Para 89 of AO 45/MS/2001 was wrong. Admittedly, the applicant was promoted to the rank of Lt Col on 03.11.2014 and the impugned CR fell due on 06.02.2015. Counting both these days, the applicant had held the rank of Lt. Col for 95 days as against the minimum requirement of 90 days in Para 89 of AO 45/MS/2001. He further added that these details can be verified from the Records.

11. On the issue of non-empanelment of the applicant to the rank of Col by No 3 SB, the counsel strenuously argued that the applicant till date has not availed the mandatory statutory remedy under Section 27 of the Army Act, therefore, the applicant was not entitled for such relief. However, the counsel submitted that the applicant was not empanelled due to his overall profile and merit amongst those considered.

Consideration of the Case:

12. Having heard both the parties at length, the issue that requires consideration is whether the respondents have fairly disposed of the complaint and whether the impugned CR merits interference. We have examined the CR Dossier, examination of complaint and the Board proceeding of the No 3 SB submitted by the respondents.

Complaint:

13. The statutory complaint dated 19.01.2018 has been filed against the CR covering the period 03/14 – 02/15. The applicant has stated that after joining 801 Engr Regt he had brought certain aberrations in the administration to the notice of the CO. That the CO then gave him a cold shoulder and started harassing the applicant including attempts to keep the applicant away from the unit, initiating AFMS-10 against the applicant and issuing counselling letters. That the CO initiated the impugned CR under Para 96 of AO 45/2001/MS and that the report was vitiated by bias and subjectivity. The applicant was apprehensive that the RO & SRO may have been influenced by the IO's report. The applicant, therefore, prayed that the CR be examined for technical validity, objectivity and consistency and that the complete CR be set aside.

14. The examination reviewed the impugned CR. This CR was initiated by the IO under the provisions of Para 96 of AO/45/2001/MS on 23.03.2015 as the applicant was posted out on 07.02.2015 and had failed to submit his CR despite repeated reminders. The assessment is a clear above average report which is well corroborated amongst the reporting officers, duly supported by pen pictures and negative recommendations. The competent authority thus concluded that the CR was well corroborated, performance based and technically valid and therefore, did not merit any interference. Accordingly, the complaint was rejected vide order date 20.11.2018.

CRs

15. There are 11 CRs in the reckonable period which include six CRs in the rank of Major and five in the rank of Lt Col. The impugned CR covers the period 03/14-02/15 during which the applicant was the Coy Cdr in 801 Engr Regt (R&P) (TA). The applicant has been rated outstanding in 31% of the box grading with the balance 69% being above average. In the technical reports he has been rated 55% outstanding with balance 45% as above average. Cumulative, the applicant has 41% outstanding box grading with balance 59% being above average.

16. The impugned CR (03/14-02/15) is boxed 7/7/7 by IO/RO.SRO with a good sprinkling of 7s and a few '6'. All the reporting officers have

made negative recommendations for promotion, foreign assignments and career courses. The RO has held the IO's report as justified and the SRO has held the report of the IO and RO as justified. The IO has given weak/adverse remarks in the pen picture. The pen picture is reproduced below:

"The officer did not submit his IC in spite of repeated verbal and written instructions. The officer is obese and has failed to clear his mandatory physical tests during the current tr year. The offr did not submit his previous annual medical report in spite of repeated verbal and written instructions. During the reporting period, the officer took very less interest in the regimental activities and training. The offr needs to improve his physical attributes, discipline and behaviour.

The offr has been adequately warned verbally and in writing and copies such warnings letters were simultaneously endorsed to his RO, SO and MS-4. The officer is highly manipulative by nature. The offr should not be entrusted with any independent or sensitive appointments"

17. The RO's and SRO's pen pictures are also reproduced below:

RO's pen picture *"...takes keen interest in the task assigned to him and produces satisfactory results. Offr remained away on Ive for*

most of the time during the period of report. Overall performance of the offr was satisfactory'."

SROs pen picture: "*Performed his duties satisfactorily. The offr had been counselled by his IO and RO a No of times, since there were functional problems between CO and the offr and the off remained away on Ive for a long time"*

18. It is also seen that the IO has given two verbal and three written counselling to the applicant which have been endorsed at Para 12(c) of the CR. The first verbal counselling was given on 06.12.2015. Written counselling letters were given on 04.12.2014 and two letters on 27.01.2015. It is also seen from the details attached with the CR that the applicant had physically served under the IO for 131 days. The repeated instructions to the applicant to submit the CR are also held on record. Since the applicant did not submit his CR, it was initiated under Para 96 of AO 45/2001/MS. One of the counselling letters dated 27.01.2015 pertains to the fact that the applicant had not passed the BPET & PPT (physical tests) during the training year. And the second written counselling letter dated 27.01.2015 was regarding non-submission of the last Annual Medical Examination Report and absence from office and parades.

No. 3 SB

19. The applicant has been given fair consideration by No 3 SB thrice. The applicant has not been empanelled due to his overall comparative merit amongst those considered. The details are as under:

Ser	No 3 SB	Consideration	Batch Year	Results
(a)	Apr2018 Engr 2001 Batch	Fresh	2001	NE Merit – 87.070 Last offr – 91.599
(b)	Mar 2019 Engr 2002 Batch	First Review	2002	NE Merit- 87.864 Last offr- 90.703
(c)	Feb 2020 Engr 2003 Batch	Final Review	2034	03NE Merit- 88.181 Last offr – 91.568

20. With the above consideration, we conclude that the competent authority was justified in rejecting the statutory complaint dated 18.01.2018. CR covering the period 3/14-02/15 does not merit any interference. The applicant has been non empanelled due to his overall merit.

21. Accordingly, the OA is dismissed.

Pronounced in the open Court on this day of¹⁷ October, 2023. ¹⁴

(RAJENDRA MENON)
CHAIRPERSON

(P M HARIZ)
MEMBER(A)

/ashok/