

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

2.

OA 964/2021 WITH MA 2098/2021

Col Abhijit Rudra		Applicant
Versus		
Union of India & Ors.		Respondents

For Applicant	:	Mr. S S Pandey, Advocate
For Respondents	:	Mr. Harish V Shankar, Advocate

CORAM

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

ORDER
22.03.2024

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.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

[LT GEN P.M. HARIZ]
MEMBER (A)

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ORDER

MA 2098/2021

This is an application filed by the respondents under rule 12(5) of the AFT (Procedure) Rules, 2008 seeking condonation of delay of **10** days in filing the counter affidavit. In view of the verdicts of the Hon'ble Supreme Court and the reasons explained in the MA and in the interest of justice, MA 2098/2021 is allowed and the short delay of **10** days in filing the counter affidavit MA 2098/2021 is thus condoned. The MA is disposed of accordingly.

OA 964/2021

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 non-empanelment for promotion to the rank of Brigadier. He has made the following prayers:-

- (a) Call for the relevant records based on which the respondents have retained the CRs for the year 2012 and 2014 which ought to have been removed from the reckonable profile of the applicant and based on which the applicant has been overlooked for promotion to the rank of Brigadier by No.2 SB in all his considerations including his Review consideration vide impugned order dated 09.03.2021 as well as records based on which the Respondent No. 1 has rejected the statutory complaints including the impugned order dated 09.11.2020 vide which the applicant was only granted partial relief and thereafter, quash the same including orders dated 09.11.2020 to the extent relief was denied along with the orders of his non empanelment including order dated 09.03.2021.
- (b) Call for the records of all the officers who were considered by No.2 SB in Feb 2018, Nov 2018 and May 2020 and in the Review Selection Board held in 22.01.2021 and examine the inter-se merit of the officers so considered and promoted including the value judgement given by the members of the Board and compare the same viz-a-viz the applicant.

(c) Direct the respondents to scrutinize the complete impugned CRs of the applicant for the impugned periods and if any unintended aberrations inadvertently forming in his profile with special emphasis or if existing, due to subjectivity, undue influence of extraneous factor, asymmetry and in congruency in CR ratings and aberrations in assessment by any endorsing officers with his overall profile on technical invalidity then, such CRs be set aside and the same be reviewed again.

(d) Direct the respondents to consider the applicant for promotion to the rank of Brigadier by the first available appropriate Selection Board by treating him a special review (fresh) after removing the impugned ratings in the CRs of 2012 and 2014 and all other necessary modification in the reckonable profile of the applicant and in the event he is found fit, he may be promoted to the rank of Brigadier with all consequential benefits of back wages, seniority and continuity of service etc. w.e.f the date of release of the result dated 10.05.2018 of the PB No.2 held on 28.02.2018.

(e) Issue such other order/direction as may be deemed appropriate in the facts and circumstances of the case.

(f) Interim:

Direct the respondents to keep one vacancy of Brigadier in AMC vacant subject to the final outcome of the OA.

Brief Facts of the Case

2. The applicant was commissioned into Army Medical Corps (AMC) on 26.12.1989, and is a MD (Forensic Medicine). Following his commission, he achieved time-bound promotions, reaching the rank of Lieutenant Colonel. He was, considered by PB (AFMS) No.3 for promotion to the rank of Colonel and was empanelled for promotion and promoted on 27.05.2011. Subsequently he was considered by PB (AFMS) No.2 for promotion to the rank Brig in Feb 2011 and he was not empanelled. He was then considered in 2019 in his second chance and in 2020 in his third chance. However he remained non empanelled.

3. Aggrieved by his non empanelment to the rank of Brig, the applicant filed a statutory complaint dated 21.05.2018 wherein he prayed that his CR's considered by the Promotion Board may be examined for inconsistencies/aberrations, if any, and that they be set aside. That he be then considered afresh by PB (AFMS) No.2 for promotion to the rank of Brig without any loss of seniority. However,

vide letter dated 21.05.2009; the competent authority dismissed the statutory complaint on the grounds that it lacked merit.

4. The applicant aggrieved by his non empanelment in his second consideration held in Nov 2018, promulgated vide letter of 09.01.2019, preferred another statutory complaint dated 26.07.2019, wherein he prayed for the same reliefs as in his first statutory complaint. The competent authority vide order dated 27.10.2020 granted partial redressal to the applicant by way of expunction of the entire assessment of SRO in ACR 2017 on the grounds of inconsistency

5. The applicant was, thereafter considered in his third chance by PB (AFMS) No.2 held on 05.05.2020 wherein he was again not empanelled, and the same was promulgated vide letter dated 27.10.2020.

6. Furthermore, the Review Promotion Board No.2 held on 22.01.2021 again did not empanel the applicant for promotion to the rank of Brigadier and the same was declared vide result dated 09.03.2021.

7. Aggrieved by his non empanelment in all his considerations, the applicant filed the present OA.

Arguments by the Counsel for the Applicant

8. The counsel, recapitulated the service profile of the applicant, and highlighted his professional achievements. The counsel further added that while the applicant was posted as CO, 408 Field Hospital (408 Fd Hosp), the unit was adjudged as "Demo Field Hospital" and in 2012 he was also conferred GOC-in-C ARTRAC Commendation Card.

9. The counsel further contended that during the tenure of the applicant as CO, 408 Fd Hosp, the then IO/FTO of the applicant for the period from 01.01.2012 to 31.12.2012, did not assess the applicant objectively as the IO deliberately omitted mentioning the applicant's achievements in the pen picture and also did not consider them while endorsing his figurative assessment in the impugned ACR. The counsel emphasised that this CR be expunged completely since these were deliberately done out of subjective considerations, motivated by personal professional differences and thus lacked objectivity. The counsel further added that, since the report was not shown to the applicant he had no occasion to question the same.

10. The counsel further submitted that the ACR for the period from 01.01.2014 to 31.12.2014, was initiated during a transition phase in

the Department of Forensic Medicine and Toxicology (FMT) at AFMC and it was intentionally delayed by the IO until after handing over the department to the applicant, and the IO's move was approved. He further asserted that, the in-service seniority gap between the applicant and the IO, which was four years until 2007, had narrowed to less than a year by 2014 as the IO had missed two Promotion Boards for Col and two Promotion Boards for Brig, whereas the applicant was promoted to Col in his first chance. Considering that the appointment of Professor and HOD had been upgraded to Brigadier and the IO's promotion board for Brigadier was scheduled towards the end of 2015, it is plausible that these factors influenced the IO in assessing the applicant subjectively. The counsel emphasised that these deliberate subjective inconsistencies were aimed at denying the applicant's promotion; the IO and the applicant were likely to be the only eligible candidates for the appointment of Prof & HOD at AFMC, Pune, on promotion to Brigadier.

11. The counsel emphasised that the CRs for the years 2012 to 2016, considered by the PB (AFMS) No.2 in Feb 2018 were biased, subjective and inconsistent with the applicants demonstrated profile and this had resulted in his non empanelment. The counsel then

elaborated on the applicant's statutory complaint dated 21.05.2018 and its rejection by the competent authority vide order dated 21.05.2019.

12. The counsel then elaborated on the second consideration; non-empanelment and the second statutory complaint dated 26.07.2019. He added that the competent authority vide its order dated 27.10.2020 had granted partial redressal in CR of 2017, in that the complete assessment of the SRO was expunged on grounds of inconsistency. Despite this redressal, the applicant was not empanelled in his Review Boards granted against his second and third consideration. The counsel further explained that the Review Boards instead of being conducted on separate days was held on the same day.

13. The counsel then elaborated that the CR of 2017 had been considered during PB (AFMS) No.2 held in Feb 2018 and Nov 2018. Since then CR had now been found to be inconsistent and had been partially expunged, it had caused prejudice in his earlier Boards. Moreover, since none of his CRs for the period 2012-2016 have been expunged, he was not empanelled in the Review Boards. Moreover, the DG AFMS (SRO)'s remarks on the earlier

complaint would have influenced the consideration of the complaint, resulting in it being rejected.

14. The counsel emphasized that the CR of 2012 was not objective as the then SRO had told the IO/FTO in the presence of the applicant that the applicant's achievements be not reflected. This therefore, was likely to have caused grave prejudice to the applicant.

15. The learned counsel emphatically asserted that the respondent's claim that the applicant was not promoted based on lower comparative merit and limited vacancies was inconsistent with the demonstrated performance of the applicant.

16. The learned counsel placed reliance on the judgement of the Hon'ble Supreme Court in **Dev Dutt v Union of India & Ors.** and judgement of the Hon'ble Delhi High court in **Narendra Prakash Kohli v Union of India & Ors.** [WP (C) No. 2968 of 2014].

Arguments by the Counsel for the Respondents

17. Per contra the learned counsel for the respondents argued that a well-established legal principle dictates that long-settled seniority cannot be disrupted based on the applicant's belated grievance. The

counsel further asserted that the applicant, after a lapse of nearly 2 ½ years, was now seeking a review in the PB (AFMS) No.2: AMC, following the rejection of his statutory complaint dated 21.05.2018 through a disposal order on 21.05.2019. The counsel further submitted that the present OA, filed with an unexplained delay in addressing the applicant's grievance against non-selection to the rank of Brigadier was a feeble attempt to disturb the seniority position of officers already empanelled in the PB (AFMS) No.2: AMC after a gap of 2½ years and that the applicant should therefore be debarred from challenging his non-empanelment in his 1st chance because of delay and laches. In this regard, the counsel placed reliance on the judgement of the Hon'ble Supreme Court in **Shiba Shankar Mohapatra v State of Odisha** (2010) 12 SCC 471.

18. Further, the counsel stated that the current OA was not only time-barred as per Section 22 of the Armed Forces Tribunal Act, 2007, the applicant had not availed himself of the departmental remedy in relation to his Review Promotion Board held on 22.01.2021. The counsel also asserted that the present OA was marred by a critical error of non-joinder of parties, as the applicant has made serious imputations regarding personal bias against the IOs in 2012 and 2014 without impleading them as parties to the suit.

Consequently, the uncorroborated allegations against them lack legal merit and cannot be sustained. Furthermore, no infringement of Rules or Regulations, nor violation of legal or vested rights of the applicant, had been demonstrated and as such, the OA was susceptible to be dismissed in-limine.

19. The counsel further submitted that PB (AFMS) No.2 held in Nov 2018 included CRs from 2013 to 2017 and that in the PB held on May 2020 (3rd chance), the reckonable profile included CRs from 2014 to 2018. Thus on being granted partial redressal in the CR of 2017, in his second statutory complaint, the applicant was given Review consideration for his second and third chance as the CR of 2017 had been considered and in these PBs and was not part of the reckonable profile during his first consideration in 2018. The counsel further elaborated that the applicant was not empanelled in the Review consideration since his merit was still lower than the last officer empanelled in the original considerations.

20. The counsel has placed reliance on the following judgements:

(a) Hon'ble Supreme Court judgement in **Dalpat Abasaheb Solanki v B S Mahajan** [1990 (1) SLR 849];

(b) Hon'ble Supreme Court judgement in **Air Vice Marshal S.L. Chhabra, VSM v Union of India and Anr** [1993 SCR (3) 669];

(c) Hon'ble Delhi High Court judgement in **Mr. P.K.S. Shrivastava v Union of India and Anr** [2016 SCC Online Del 6149];

(d) Hon'ble Delhi High Court judgement in **Union of India v Colonel Naresh Kumar** [LPA No. 379 of 1999] decided on 24.04.2000.

(e) The Tribunal's judgement in **Maj Gen Basavaraj G Gilganchi v Union of India and other** [O.A. No. 1256/2018] decided on 13.12.2018.

21. The counsel asserted that the IO/FTO in CR of 2012 and CR of 2014 had assessed the applicant as 'above outstanding' veering towards exceptionally outstanding, with matching pen picture and recommendations and were unbiased. He added that the applicant had consciously not impleaded both these officers. The counsel also submitted that the applicant had himself submitted the impugned CR of 2014 to his IO on 19.01.2015 and the IO had initiated the same on 07.02.2015 and that a delay of mere 02 weeks or so cannot be said

to have been done purposefully to the applicant's detriment, since this IO/FTO was IO for many other officers.

22. The counsel vehemently asserted that the applicant was not empanelled to the rank of Brigadier in his stipulated three considerations due to his overall comparative merit and limited vacancy and then explained the applicant's merit positions in his three considerations.

Ser	Chance	No of anticipated vacancies	No. of Officers considered	Merit position of last Officer empanelled	Merit position of the applicant
(a)	1 st	32	116	32	53
(b)	2 nd	41	137	41	78
(c)	3 rd	35	133	35	66

Consideration of the Case

Complaints

23. From the records it is seen that the applicant has filed one non statutory complaint and two statutory complaints. The applicant filed a non-statutory complaint dated 23.07.2010 in which he impugned the CR of 2009 and sought that the adverse/advisory remarks of the IO and the figurative assessment be set aside. The applicant was granted partial redressal by the COAS vide note

dated 21.04.2011 and intimated vide DGAFMS letter dated 07.06.2011.

24. Statutory Complaint No.1. The applicant then filed statutory complaint dated 21.05.2018 against his non-empanelment to the rank of Brig by PB (AFMS) No.2 held on 28.02.2018, in which the applicant was given his first consideration. The applicant had prayed that all CRs in the reckonable period be reviewed for inconsistencies/aberrations, if any and be set aside. That he be then considered afresh by PB (AFMS) No.2 without any loss of seniority. The complaint was examined by the DGMS (Army), DGAMFS, AG's Branch, COAS, and MoD. The examination reviewed all the CRs in the reckonable period and the competent authority finally concluded that the applicant's case had been dealt with as per policy which is applied uniformly to all similarly placed officers and no injustice has been done to him. Accordingly, the complaint was rejected vide order dated 21.05.2019.

25. Statutory Complaint No.2. The applicant filed a second statutory complaint dated 26.07.2019 against his non-empanelment for promotion to the rank of Brig in PB (AFMS) No.2 held in Nov 2018 wherein the applicant was given his second consideration. The applicant prayed that all his CRs in the

reckonable period be reviewed including the pen pictures and inconsistencies/aberrations if any, be set aside. And that the applicant be considered again by PB (AFMS) No.2 without any loss of seniority. He also stated that his first statutory complaint had been disposed of pre-functionally and therefore, this complaint be examined suitably considering all issues that have been raised. The examination held that all CRs in the reckonable period of the first consideration which included CRs upto 2016 had been already examined and no CR merited any interference. Since then, in his second consideration CR 2017 has been included afresh and then this was reviewed in detail. After detailed examination by the DGMS(Army), AG AFMS, AG, COAs and the MoD, the competent authority granted partial redressal in that the entire assessment of the SRO in CR of 2017 was expunged on grounds of inconsistency vide order dated 09.11.2020. This was intimated to the applicant vide DGMS (Army) letter dated 14.12.2020.

CRs

26. During his first consideration in Feb 2018, five CRs from 2012 to 2016 were considered. This included an ICR in the year 2013. During his second consideration in Nov 2018, CRs from 2013 to 2017 were considered as part of the reckonable profile. We have

examined all CRs from 2012 to 2017. In the first consideration all the 24 box gradings are 'Outstanding' to 'Exceptionally outstanding'. The final average is between 8.81 and 8.92. Thus in the PB, the overall CR average was 8.86. All CRs are well corroborated, performance based and technically valid and hence do not merit any interference. At the time of his second consideration in Nov 2018, CRs during the period 2013 to 2017 were considered. All the CRs in the reckonable profile are clear 'Outstanding' to 'Exceptionally outstanding' CRs. The final average varies between 8.68 to 8.92. All the CRs are well corroborated by suitable pen picture and positive recommendations. Based on the statutory complaint dated 26.07.2019, partial redressal has been granted vide order dated 9.11.2020. Thus no CR merits any further interference at this juncture.

PB (AFMS) No 2

27. PB (AFMS) No.2 (Feb 2018). The PB was held on 28.02.2018 to consider eligible Cols for promotion to the rank of Brig for the vacancies arising in 2018. The PB considered 116 officers for promotion against 32 vacancies. The 116 officers included 26 officers being considered for their third chance, 26 officers being considered for the second chance and 64 officers including the

applicant being considered for their first chance. The applicant was 53rd in the order of merit with total marks of 91.00. In comparison, the last officer empanelled had a total of 91.80 marks. Thus the applicant was not empanelled due to his comparative merit amongst those considered.

28. PB (AFMS) No.2 (Nov 2018). The applicant was considered for his second chance by PB (AFMS) No.2 held on 26.11.2018. The PB considered a total of 137 eligible officers for 41 vacancies arising in 2019. The 137 officers consisted of 25 officers being considered in their third chance and 29 officers (including the applicant) being considered in their second chance. The applicant was at Ser 78 in the merit list with a total of 90.75 marks. The last empanelled officer had a total of 91.70 marks.

29. PB (AFMS) No.2 (May 2020). The applicant was considered for his third chance by PB (AFMS) No.2 held on 05.05.2020. The PB considered a total of 133 officers for 35 vacancies. Out of the 133 officers, 24 officers including the applicant were being considered for their third chance and 39 officers were being considered for their second chance. The applicant was at Ser 66 in the merit list with 90.85 marks whilst the marks of the last empanelled officer were 91.60.

30. Review PB (AFMS) No.2. As per Promotion Policy dated 05.02.2016, in case a complaint is accepted or relief granted, the cases of such officers will be reviewed by the appropriate PB on the basis of the modified records, and if found fit as per the parameters of the Board where they were previously not selected, these officers will be then placed on the select list of that Board and their seniority will be protected accordingly.

31. In the case of the applicant here, he was granted partial redressal in his CR of 2017 where in the complete assessment of the SRO had been expunged on the ground of inconsistency. The CR 2017 was first considered in the applicant's second consideration in Nov 2018 and subsequently in the PB (AFMS) No.2 held in May 2020. Thus, the Review PB (AFMS) No.2 held on 22.01.2021 now considered the applicant. However, the applicant was not empanelled due to his overall merit. The summary of the merit position is as under:

Ser	Promotion Board	Final merit		Cut-off	Remarks
		Before Relief	After Relief		
(a)	26.11.2018	90.75	91.05	91.70	Non Empanelled
(b)	05.05.2020	90.85	91.15	91.60	Non Empanelled

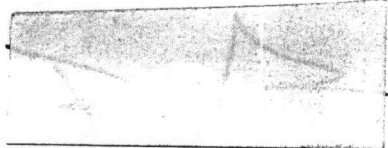
32. In view of the above considerations we conclude that none of the CRs merit any further interference. The complaints have been dealt with and disposed of, based on the merits of each complaint. The applicant has been considered thrice by PB (AFMS) No.2 and has also been granted the requisite Review consideration based on the partial redressal granted in the second statutory complaint. The applicant has remained non empanelled due to his overall comparative merit amongst those considered.

33. The OA is therefore dismissed.

34. No order as to costs.

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

Pronounced in open Court on this ^{22nd}.....day of March, 2024.



(JUSTICE RAJENDRA MENON)
CHAIRPERSON



(LT GEN P.M. HARIZ)
MEMBER (A)

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