

**COURT No.1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH: NEW DELHI**

OA 1871/2020

Col Paramvir Singh **Applicant**
Versus
Union of India and Ors. **Respondents**

For Applicant : Mr. Rajiv Manglik, Advocate
For Respondents : Gp Capt Karan Singh Bhati,
Sr. CGSC

CORAM

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

ORDER

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 and rejection of his statutory and non-statutory complaints. He has made the following prayers:-

- (i) To-call for the records of all the No 2 selection board held for consideration of the applicant for the rank of Brig and declare the action of the respondents as unjust, arbitrary and illegal; and

(ii) To quash and set aside order dated 23 Apr 2020 and 17 Jul 2018; and.

(iii) To quash and set aside the result of the No 2 selection board qua the applicant considering the applicant for the rank of Brig; and

(iv) To quash and set aside the impugned ACR for the period 09/14-06/15; and

(v) To direct the respondents to consider the applicant by the No 2 SB with the changed profile and if found fit to promote the applicant to the rank of Brig and grant all consequential benefits of the rank of Brig including pay and allowances and seniority; and

(vi) To award exemplary costs in favor of the applicant.

(vii) To pass such other and further orders which their lordships may deem fit and proper in the existing facts and circumstances of the case.

Brief Facts of the Case

2. That the applicant was commissioned in the Army Ordnance Corps (AOC) on 08.06.1991. The applicant was considered for promotion to the rank of Brigadier as a fresh case by No 2 Selection Board (SB) held in Feb 2018. However, the applicant was not empanelled. Aggrieved by his non empanelment, the applicant had submitted a non-statutory complaint dated 13.04.2018. The competent authority vide order dated 11.07.2018 rejected the non-statutory complaint and communicated the same vide letter No 36501/17343/AOC/2018/ MS-19 dated 17.07.2018. Thereafter, the applicant submitted a statutory complaint dated 12.04.2019 against CR 09/14-06/15. The competent authority vide order dated 23.04.2020 rejected the statutory complaint of the applicant. In the meantime, the applicant was again considered for promotion by No 2 SB held in Jun 2019 and Jul 2020 as First and Final Review Case respectively, but was not empanelled. Hence the OA.

Arguments by the Counsel for the Applicant

3. The counsel for the applicant briefly recapitulated the service profile of the applicant and highlighted the applicant's excellent

performance on various courses of instructions. The counsel further stated that the applicant had participated in various operational sectors and had been awarded the Force Commander's Commendation Card while on the UN Mission as part of an Infantry Battalion Group in Ethiopia and Eritrea.

4. The counsel further contended that the applicant was amongst the first four officers of his batch nominated for the Senior Command Course and that he was promoted to the rank of Col in his first consideration. The counsel for the respondents further stated that during his command, the applicant earned ACRs from four different IOs and three different ROs, all of whom had graded him as 'Outstanding'. He further added that post the command tenure, the applicant was posted to a staff appointment at IHQ of MoD (Army) MGO's Branch as Director OS Ammunition from Apr 2012 to Jun 2015, and was responsible for management of ammunition for the entire Indian Army.

5. The counsel elaborated on the benchmark set up by the applicant for provisioning and addressing ammunition deficiencies in the Indian Army. He further added that the CAG audit during his

tenure had endorsed the flawless performance of OS-Amn under his leadership. The counsel then stated that the applicant had earned three CRs in this appointment under the same IO, wherein the IO had assessed the applicant as 'Outstanding' in the first two CRs, while he gave a lukewarm report in the third CR covering the period Sep 14 to Jan 15. The counsel further added that based on his performance, the applicant was nominated as the first reserve for the HDMC course, which was indicative of his position amongst the top of his course.

6. The counsel then stated that the IO of the applicant had desired the applicant to abide by certain orders which, according to the applicant, were not as per rules and would result in a loss to the exchequer. The counsel added that during the period of the third ACR, the IO gave several such commands and directed the applicant to amend certain demands to the Ordnance Factory Board (OFB) which included instructions to place indents on OFB for certain class of ammunition which was already surplus, and indent certain ammunition which did not meet laid down technical specification, all of which the applicant refused to do. The counsel vehemently

asserted that in another incident involving gross irregularity and mismanagement, the applicant had refused to accept certain ammunition which had already completed 50% of its shelf life, which the IO insisted that it be accepted. The counsel then stated that shortly thereafter, the Hon'ble Raksha Mantri had handed over a corruption case involving the IO to the CBI for investigation and it can thus be presumed that the IO issued these illegal commands to the applicant for potential gratification.

7. The counsel contended that the applicant had applied for study leave, which was sanctioned and consequently, the ACR for the period 09/14-06/15 was written early as the applicant was proceeding on study leave from 01.07.2015. However, since the applicant's reliever was not posted, he handed over charge to the Joint Director. The counsel vehemently asserted that the IO wrote the ACR in the first week of Sep 2015 and gave the applicant a lukewarm ACR with a box grading of '8', and sent the extracts by post instead of calling the applicant to sign the CR, as the applicant was on study leave in the same station. Upon receiving the ACR

extract, the applicant approached the IO, who stated that OS-Amn Section had not performed efficiently.

8. The counsel then stated that the applicant was considered by the No 2 SB in Feb 2018 and was not empanelled, while three other officers, who were either not nominated for HDMC or were reserves were empanelled, clearly indicating they were lower in merit as compared to the applicant and therefore it was evident that the applicant was not empanelled only due to the ACR for the period 09/14-06/15, as all prior ACRs were outstanding, and the applicant had been on the reserve list for HDMC. The counsel then emphasized that since no other ACR except the impugned ACR was earned between 2014 and the consideration by No. 2 SB, the applicant had not been empanelled due to this biased and inconsistent CR.

9. The counsel vehemently asserted that the respondents had considered the applicant's non-statutory complaint in a casual manner, deeming the box grading of '8' in the ACR for the period 09/14-06/15 as being objective and fair. The counsel contended that an '8' grading was adverse if it hindered promotional prospects, as

defined by the Hon'ble Apex Court, and therefore should be regarded as being inconsistent and was required to be set aside as the applicant had always been graded 'outstanding'. He further emphasized that any ACR affecting promotional prospects must be considered as being inconsistent and was therefore required to be quashed. The counsel vehemently asserted that the ACR for the period 09/14-06/15 was written beyond the permitted time frame and included events that occurred after the applicant had left the position, which was against the policy and was also indicative of malice in law. The counsel contended that the applicant was graded 'Outstanding' by the same IO for the past two years, and a sudden drop in performance was improbable indicating that the CR was non-objective, considering the animosity between the applicant & the IO on the issue mentioned earlier. The counsel further argued that an above-average ACR does not inherently indicate objectivity or performance-based evaluation and emphasized that if a single ACR adversely affected an officer's promotion, it should be considered adverse, and the benefit of the doubt regarding objectivity should be granted to the ratee.

10. The counsel further asserted that according to AO-45/2001, the time period for initiation and receipt of the ACR by the MS Branch, duly initiated by the IO, RO, and SRO, was 75 days. However, despite being in the same HQ an station, the IO took more than three months to initiate the ACR, making it flawed due to malice in law, as held by this Hon'ble Tribunal in OA No. 74/2015, **Maj Gen KK Sinha, SM, VSM Vs. UOI**, decided on 29 Apr 2015. The counsel also contended that the applicant followed due process of exhausting departmental remedies by filing a non-statutory complaint, an then a statutory complaint, and that he had approached the AFT only after these were rejected.

Arguments by the Counsel for the Respondents

11. The counsel for the respondents argued that the Army has a pyramidal rank structure with limited vacancies in higher ranks and consequently, only those officers whose records of service within a particular batch are superior were selected to fill these vacancies. The counsel vehemently asserted that all officers of a particular batch were considered together based on common parameters and criteria, and that based on individual profile and comparative batch merit,

officers were empanelled. The counsel further elaborated that seniority alone was not a consideration before the SB for empanelment and further added that if an officer obtained relief through a complaint in a CR after the SB has convened, he was entitled to special consideration by the SB with his updated profile. And that if the officer was then empanelled, his original seniority was protected. The counsel contended that each officer was entitled to only three considerations for promotion to select ranks: Fresh Consideration, First Review, and Final Review. He further elaborated that if an officer was not empanelled as a Fresh case but was later empanelled in First/ Final Review, he lost seniority accordingly. After three considerations, if an officer was not empanelled, he was deemed to be finally superseded.

12. The counsel drew our attention to AO 45/2001/MS (now replaced by Army Order 02/2016/MS) and elaborated on various provisions relating to grading and assessment. He further emphasized that, the entire assessment entailed evaluation by three different Reporting Officers: IO, RO and SRO. The counsel vehemently asserted that an 'Outstanding' grade (9) was reserved for

exceptional achievements beyond the performance of an officer with 'Above Average' performance and no officer has a right to claim an 'Outstanding' assessment in CRs. The reporting officers, who have observed the officer during the period, were competent to assess the ratee's performance objectively. He further emphasized that therefore such assessments were outside the scope of judicial review unless the CR was technically invalid due to contravention of laid down policy or if the applicant established bias or mala fide against the reporting officers with supporting evidence, and had included them as parties to be case.

13. The counsel for the respondents contended that while considering an officer for promotion to a select rank, the Selection Board took into account several factors, including war/operational reports, course reports, ACR performance in command and staff appointments, honors and awards, and disciplinary background, and that the empanelment was based on the officer's overall profile and comparative merit within the batch under consideration. The counsel further elaborated that it was the prerogative of the SB to assess the applicant's suitability for promotion and that the SB's assessment

was recommendatory and was required to be approved by the competent authority.

14. Referring to the two complaints filed by the applicant, the counsel stated that the applicant's complaints were duly examined by the competent authority. Considering his overall profile and other relevant documents and after thorough consideration, it was determined that all the CRs in the reckonable profile, including the impugned CR for the period 09/14-06/15, were fair, objective, well corroborated, performance-based, and technically valid. Since there was no evidence of bias or subjectivity in any of the CRs, none of the CR's merited interference. The examination of the complaints had concluded that the applicant was not empanelled for promotion due to his overall profile, relative merit, and comparative evaluation by the No.2 SB. Consequently, the competent authority, in a detailed speaking order dated 11.07.2018, rejected the Non-Statutory Complaint and later vide order dated 17.07.2018 had rejected the statutory complaint.

15. The counsel then stated that in the meantime, the applicant had been considered by No-2 SB in June 2019 and July 2020 as a

First and Final Review Case, respectively. However, he could not be empanelled on both occasions due to his overall profile and comparative merit.

16. The counsel further asserted that the applicant had leveled serious allegations of corruption against his IO, which could only be replied to by the IO. Therefore, the IO was a necessary party to the case. However, since the applicant had not impleaded the IO, it rendered OA bad in law for non-joinder of necessary parties. Referring to the delay in initiation of the impugned CR, the counsel contended that the CR was initiated by his IO on 07.09.2015. The extracts of the open portion were communicated to the applicant by the IO and were duly authenticated by the applicant on 30.09.2015. The counsel emphasized that the remaining averments were the applicant's unsubstantiated assumptions.

17. The counsel further placed reliance on the following: -

- (a) **Union of India Vs Lt Gen RS Kadyan**, (2000) 6 SCC 698.
- (b) **Maj Gen IPS Dewan Vs UOI and Others**, (1995) 3 SCC 383.
- (c) **AVMSL Chhabra, VSM Vs UOI**, 1993 Supp (4) SCC 441.

(d) **Dalpat Abasaheb Solunke Vs BS Mahajan**, (1990) 1 SCC 305.

(e) **Lt Col Amrik Singh Vs UOI**, (2001) 10 SCC 424.

(f) **Major Surinder Shukla Vs Union of India and Others**, (2008) 2 SCC 649.

Consideration

18. Having heard both parties at length, the only issue to be considered is whether the impugned CR merits interference. The Respondents have submitted the CR dossier of the applicant along with the Board Proceedings of the consideration for HDMC and consideration by No-2 SB. We have examined these.

Complaints

19. The applicant has submitted two complaints, a non-statutory complaint dated 13.04.2018 and a statutory complaint dated 12.04.2019. The non-statutory was against his non-empanelment in by No-2 SB held in Feb 2018 when the applicant was considered as a fresh case. The applicant had highlighted his service profile and professional achievements; that he had been assessed 'Outstanding' in his AE reports as a Maj/Lt Col; and that as a Col he had been

assessed as 'Outstanding' in all his AE reports as Dir OS (Amn) except for the CR 09/14-06/15; and that based on his profile he had been nominated in the reserve list for HDMC. The applicant had impugned the CR 9/14-6/15 and had stated that it had not been initiated in the stipulated time and that the IO was biased due to certain professional differences and that the integrity of the IO itself was questionable since a CBI inquiry had been initiated against him. He had therefore prayed that his reckonable performance from 2003 to 2015 be examined for any inconsistency, specially CR 9/2014-06/2015, that this CR be set aside if biased and that he be considered afresh by No 2 SB.

20. The statutory complaint dated 12.04.2019 was specifically against CR 09/14-06/2015. The applicant once again highlighted his service profile and the fact that all his assessments had been 'Outstanding' except for the impugned CR. He had once again highlighted that his IO was biased since the applicant had declined certain tasks which were against professional ethics, that the CR was not initiated within the prescribed time and that the IO himself was under a CBI enquiry. He had thus prayed that the impugned CR be

reviewed and that the entire CR be set aside. The reckonable profile including the impugned CR had been examined and the examination had concluded that all the CRs in the reckonable period including the impugned CR 9/14-6/15 were well balanced, performance based devoid of any inconsistencies and that the applicant had not been empanelled due to his overall comparative merit.

Examination of CRs

21. It is seen that in the reckonable period, the applicant has earned a total of 18 CRs; five in the rank of Maj, which includes two criteria reports; five in the rank of Lt Col including four criteria reports; and eight in the rank of Col which includes five criteria reports. All the 18 reports are 'Above Average'/'Outstanding' with No 7s or weak remarks. His overall profile consists of 66% 'Outstanding' grading while the remaining 34% are 'Above Average'.

22. The impugned CR 9/14-6/15 is a non-criteria CR earned by the applicant as a Col in the appointment of Dir OS (Amn). The CR is boxed 8,8,- by the IO/RO. The IO had graded the applicant a clear 'Above average' with positive recommendations for foreign

assignments and career courses along with a positive pen picture. The RO has endorsed the assessment as 'Justified' and has rated the applicant as 'Above Average' with positive recommendations and pen pictures. The SRO has not endorsed the CR. The same IO had assessed the applicant as outstanding in the two preceding CRs covering 9/12-8/13 and 9/3-8/14. Thus this downwards moderation of the IO's assessment needs to be seen as being performance based which has been duly corroborated by the RO. A ratee cannot seek an assessment based on his past assessment. Thus this CR is consistent with the overall profile and does not merit any further interference.

23. In the case of **Brig Rohit Mehta** Vs. **UoI & Ors** in W.P. (C) No.15167/2023 where in the petitioner had sought expunction of a CR only because it was not an 'Outstanding' in comparison with his previous CRs, the Hon'ble Delhi High Court held that merely because a ratee had been graded/ assessed as "Outstanding" in his previous CRs, it does not necessarily mean that he ought to be graded/ assessed as such in a subsequent CR, and that grading/ assessing by the IO or the RO or even the SRO, is not a matter of right, and accordingly

dismissed the case. Relevant portions of this judgement are reproduced below:-

20. *The grading/ assessing of CR-5 of the petitioner herein is a result of a policy decision taken by the respondents after they have devised specific procedure/ mechanism after due deliberation. The CR-5 involved the due application of mind by not one, but as many as three officials being first the IO, then the RO and finally the SRO and that too at three different stages. Thus, there is no scope of overlap or connection inter se them. Needless to mention, each of the IO, the RO and the SRO are neither inclined to meddle nor dwell upon the correctness of the CR-5 of the petitioner. Even otherwise, as per settled law, this Court ought not to generally interfere where such factors are involved. This Court is fortified by Jacob Puliyel v. Union of India and Ors., 2022 SCC OnLine SC 533 wherein the Hon'ble Supreme Court has held as under:*

"21. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary."

21. *This is more so since there can be no straight jacket formula or fix benchmark or some yardsticks or specific prescribed guidelines for grading/ assessing by the IO, the RO or even the SRO as it all depends upon their respective discretion as also on the surrounding, intrinsic and extraneous circumstances involved in every case separately. As such, merely because the petitioner had previously been graded/ assessed as „Outstanding“ in CR-1, CR-2, CR-3, does not necessarily mean that he ought to be graded/ assessed as such even at the time of his CR-5. In any event, grading/ assessing by the IO or the RO or even the SRO, is not a matter of right. Thus, holding such would render any fresh CR, in this case the CR-5 of the petitioner, otiose. Therefore, since there can be no comparison of CRs, the petitioner cannot avail any benefit of any of his previous CRs be it CR-1, CR-2, CR-3 or for that matter CR-4.*

No 2 SB

24. The applicant was given his three considerations by No 2 SB in Feb 2018, Jan 2019 and Jul 2020. The applicant has not been

empanelled in all his considerations due to his overall profile and comparative merit amongst those considered The details of the applicant's merit and cut off are summarized below:

Ser	No 2SB	Consideration	BYOS	Remarks
(a)	Feb 2018 AOC 1991	Fresh	1991	NE OOM – 91.729 Last offr 92.235
(b)	Jan 2019 AOC 1992	First Review	1992	NE OOM 91.755 Last offr 92.057
(c)	Jul 2020 AOC 1993	Final Review	1993	NE OOM 92.157 Last offr 92.622

25. It was argued that the applicant was nominated as the first reserve for HDMC and that between this nomination and consideration by No-2 SB, the only other CR earned by the applicant was the impugned CR. It was also argued that those approved included some who were below the applicant in the consideration for HC/HDMC Course. We have therefore examined the records pertaining to the consideration of HC/HDMC and those who were subsequently approved by No 2 SB..

26. The applicant's batch of 1991 was entitled for two considerations for nomination to HC/HDMC, and were accordingly

considered in 2013 and 2014. Each year, AOC has 06 vacancies on HC/HDMC. In 2013, there were 63 officers considered and the last officer nominated was Ser 9 in the order of merit who was Reserve-1. This happened as two officers were not recommended and one was nominated to HCC on receipt of an additional vacancy. The applicant was 11th in the order of merit. In 2014 there were 07 vacancies, 65 officers were considered and the last officer nominated was Ser 8 (Reserve-1) as one nominated officer was unwilling to attend the course. The applicant was at Ser 9 in the order of merit as Res-2, thus became Res-1. On examining the results of No-2 SB held in 2018, where the applicant was considered as a fresh case, 54 officers were considered for a total of 08 vacancies. Of the 54, 24 officers including the applicant were considered as fresh case. Of the eight approved to be empanelled to the rank of Brig, four officers had been nominated for HC/HDMC in 2013 and 03 had been nominated for HC/HDMC in 2014. Clearly all these officers were above the applicant, both in the consideration for HC/HDMC and in No 2 SB. Of the remaining two officers who were empanelled, one was a special review case and the other though not nominated for HDMC was

above the applicant in the order of merit on the HC/HDMC course of 2013 and in 2014 was just below the applicant in order of merit.

Conclusion

27. In view of the above consideration, we conclude that the impugned CR does not merit any interference at this stage and that the applicant has not been empanelled to the rank of Brig due to his overall profile and comparative merit amongst those considered.

28. Accordingly, the OA is dismissed.

29. All MAs stand disposed of.

Pronounced in the open court on this day of 12 July, 2024.

(RAJENDRA MENON)
CHAIRPERSON

(P M HARIZ)
MEMBER(A)

/ashok/