

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

OA 246/2024

Brig Anirudh Singh Kanwar ... Applicant
Versus
Union of India & Ors. ... Respondents

For Applicant : Mr. S.S Pandey, Advocate
For Respondents : Mr. Neeraj, Sr CGSC

CORAM :
HON'BLE MR. JUSTICE RAJENDER MENON, CHAIRPERSON
HON'BLE LT GEN C.P MOHANTY, MEMBER (A)

ORDER

The instant OA has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, with following prayers:-

(a) Calling for entire records, including Policies contrary to the mandate of Law as also the directions of the Competent Authority as also implementing the same in the most unfair, arbitrary and discriminatory manner in terms of Policy dated 17.08.2017 vide which the Respondent No. 3 exceeding the Jurisdiction by adopting a format for the RO2 not approved by the Respondent No. 1 in terms of Letter dated 17.08.2017 with further provision of communication in a manner to avoid a scrutiny of such assessment by the SRO which is a normal norm in the assessment system of the Army followed for many years resulting in a situation, Records including Policy dated 06.04.2021 vide which categorisation of identification of near perfect Nine Reports in the same kind of CR only on the basis of its initiation by a Civilian Officer has been made and adopting a definition of such concept differently if the same has been initiated by a Service Officer and on that basis expunging the assessment of the Applicant of both the CRs so far as assessment of IO is concerned as per intimation dated 09.05.2023 received in July 2023 and dated 27.10.2023 received in December 2023 which were otherwise totally consistent with the Profile

of the Applicant based strictly on his performance as observed by the IO and thereafter carrying out the considerations for NDC result of which was approved illegally without presenting the same to the Ministry of Defence which resulted in denial of nomination to the Applicant for NDC and thereafter quash the same including the policies as well as such impugned Orders along with the entire result of NDC issued vide Order dated 19.10.2023 against which the Applicant has filed the present OA.

(b) Direct the Respondents to restore the assessment of the Applicant of IO in both his CRs covering the period from 01.10.2021 to 30.06.2022 and from 01.07.2022- 30.03.2023. as also any other upward assessment of any higher Reporting Officer if expunged without any intimation to the Applicant as also expunged the assessment of RO2 in both the CRs in its entirety being illegal.

(c) Issue further directions to reconvene the Board of nomination for NDC afresh after carrying out necessary modifications and after such nominations are approved by the Respondent No. 1 in which the Applicant is found fit on merit, directions may be issued for sending him for the NDC Course.

Submission by the Applicants

2. Explaining the factual background, it is submitted by the applicant that he was commissioned on 10.06.1995 into the Corps of Engineers, with ante-date seniority of 2 years, thereby, becoming an officer of 1993 Batch. He cleared the Defence Services Staff College (DSSC) Examination with just five years of commissioned service and was nominated for the Higher Defence Management Course in the rank of Colonel. He was also promoted from time to time including his promotion to the rank of Colonel and Brigadier by selection in his first consideration. He was awarded Chief of Army Staff

Commendation in 2007 & 2014 in addition to the Commendation by the GOC-in-C in the year 2005.

3. Emphasizing his achievements, it is submitted by the applicant that in his career he has tenanted coveted appointments and courses including commanding three prestigious units i.e. Indep Fd Coy, Indep Armd Engr Sqn and a Road Construction Company (RCC) in Bhutan. He further commanded an Engr Regt under Engr Bde, along LC in OP Rakshak and Counter Insurgency Environment and as Brig, commanded Project Arunank with operationally & strategically significant tangible outcomes in OP Snow Leopard. He has further performed in Operational Staff Appts - Brigade Major (BM) of Inf Bde in OP PARAKRAM, Col Q of Inf Div and AQMG of NDA Khadakwasla. The Applicant has performed well in all military courses which he has attended and not only has vast operational experience but also has excelled on the academic front.

4. Elaborating on the Policy Letter dated 14.05.2009, it is submitted by the applicant that the MS Branch (Respondent No.3) vide their Letter dated 14.05.2009 under which it was prescribed that the Quantified System for Selection criteria for the NDC selection should be same as that for selection of

Selection Board No 1 (SB-1) (Brigadier to Major General), and that in such a scenario the Selection Board should be approved by the Central Government and not by COAS himself. Currently even though the NDC Selection Board is the same as SSB the approval is given by COAS. Further thereto, the NDC criteria being adopted is different from the SB-1 criteria with respect to Course Marks and that courses like Staff College etc. are also being given weightage for NDC which shouldn't happen.

5. Arguing on the promulgation of Army Order 02/2016/MS, it is submitted by the applicant that said Army Order brought comprehensive changes in the entire process of rendition of ACRs by promulgating it as Army Order 02/2016/MS which replaced the Army Order of 2001 vintage which also contained a Para 148 which prescribed the method of processing the ACRs held to be deflationary or inflationary which in normal course supposed to be a performance based assessment method during the reporting period and therefore, will have upward and downward assessment in each year depending upon the performance of the officer that year as perceived by the Reporting Officers.

6. Pointing out the reporting channel for initiation of ACR, it is submitted by the applicant that the MS Branch (Respondent No. 3) proposed a channel of reporting for the purpose of rendition of ACR in view of creation of an appointment of Additional Director General Border Road Organization which was approved by the Respondent No. 1 through "Border Road Development Board" vide Letter dated 10.08.2017 as per which the existing channel of reporting included the GOC-in-C as Reviewing Officer 2 in the Part-II of the CR Performa IAFI-1123-A-2 (For Brigadiers) after the existing Column for the RO in the Channel of Reporting in respect of the Army Officers posted as Chief Engineer in BRO Projects which only required an additional column after the RO of RO2 with the assessment in 11 attributes called as Personal and Demonstrated Performance without approving any other form of ACR which clearly implied that the same CR after the assessment of the IO and RO will go to RO2 for his assessment for PQs & DPVs before the ACR goes to the SRO who is Defence Secretary for the Chief Engineers posted on the rank of Brigadier for different projects of BRO.

7. It is submitted by the applicant that as learnt by the Applicant much later, the MS Branch (Respondent No. 3)

issued in terms of Letter dated 17.08.2017 a Format by attaching a separate sheet for the RO-2 which was to be forwarded to MS Branch directly thereby violating the normal channel in which the SRO has the authority to comment about the assessment by the IO and RO. RO-2 (instead of assessing the 11 qualities at Part-11 of the CR with an additional column after RO on the same page) was asked to assess altogether a different CR Part II with a box pen picture and recommendations. Also while doing so he was blind to IO's assessment and RO-2's assessment was not sent to SRO. This RO-2 did not review IO's assessment nor was RO-2's assessment balanced by SRO. The assessment of GOC-in-C for all Chief Engineers of respective Commands in Part II of the CR's whereas a separate assessment was going directly to the MS Branch (Respondent No. 3) which was a complete departure from the normal channel.

8. With respect to policy letter dated 24.01.2018, it is submitted by the applicant that the policy dated 24.01.2018 for nomination for the NDC which was aligned with the policy for consideration for the Maj Gen by adopting the same criteria as also the composition, and that the Respondent No. 3 without any further directions from the

Respondent No. 1 prescribed the assessment of RO-2 in CR Part-II instead of having an additional column in Part-II of the CR for Brigs which means clearly that the directions of Respondent No.1 have been violated by MS Branch (Respondent No. 3) on the pretext that different formats of Part II Reports are being promulgated and for uniformity vide letter dated 11.05.2018 prescribed the assessment in four parts for RO2 which included the basic details and pen picture, figurative assessment, Box Grading, Recommendation for promotion and recommendation for employment which was clearly a case of excessive delegation without the sanction of Respondent No. 1 and therefore, is legally unsustainable.

9. With respect to Policy Letter dated 06.04.2021 in which the initiation of CR as per AO 02/2016/MS was further elucidated to identify the Perfect Nine, Part Perfect Nine (PPN) and Near Perfect Nine (NPN) assessment which also contained a most discriminatory, unfair and illegal clause in the policy provided a different yardstick for declaring a report Near Perfect Nine Assessment for necessary expunction if the same is initiated by the Civilian Initiating

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Officer; contrary to even the mandate of Para 148 of the AO 02/2016/MS.

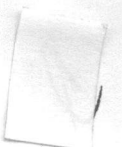
10. Bringing out his posting profile with respect to his ACRs, it is submitted by the applicant that upon his promotion to the Rank of Brig in his very first consideration as part of his Batch of 1993, he was selected to hold the appointment of Chief Engineer (Project) Arunank at the Line of Control (LOC). The Applicant was twice assessed in the Rank of Brigadier for the CR for a period of 01.10.2021 to 30.06.2022 and 01.07.2022 to 30.03.2023 which were initiated by a Civilian Officer who was the ADGBR and who assessed the Applicant strictly as per his performance which was totally consistent with his past profile and the Applicant as late as till July 2023 did not receive any communication within which both the CRs were initiated but interestingly the format on which the ACR was initiated was same what was used for the same Criteria appointment of his Batch Officers holding the same appointment of the Chief Engineer where the Initiating Officer may be a Defence Service Officer. He was also asked to submit the separate sheet for the assessment of the RO-2 as per the policy mentioned above which was a clear departure from the sanction granted by the Respondent

No.1 but the Applicant had no occasion to raise any observations in this regard as he was unaware of all such internal correspondences which came to his possession now showing the illegality in the manner in which such assessment was made by the RO-2.

11. With respect to his ACRs during his posting as Brigadier, it is submitted by the applicant that the efforts of the Applicant was duly reflected in the ACRs wherein the Initiating Officer in the CRs rated the performance of the Applicant as '9' (outstanding) in ten out of eleven PQDPVs as a result of his exceptional demonstrated performance with specific achievements as well as professional and personal conduct of the highest order which were also mentioned in the pen picture (Para 130 of AO 02/2016/MS).

12. It is further submitted by the applicant that the Applicant after completion of this tenure of Chief Engineer which was a criteria appointment during which he earned Two CRs as mentioned above and while he was posted at Kolkata at HQ Eastern Command in the Rank of Brig on Staff as ACE (ES) On 27.06.2023, he received a letter dated 09.05.2023 by MS Branch (Respondent No. 3) wherein he was informed that the assessment of IO of his CR for the

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period of 01.10.2021 to 30.06.2022 was expunged on the directions of the COAS as per the Provision of Para 148 of AO 02/2016/MS. The Applicant was not informed if any such assessments of any higher reporting officer was also expunged on the same ground as the same is not required to be communicated to the affected officer which itself is totally a violation of the principles of natural justice.

13. Drawing our attention to Para 148 of AO 02/2016/MS, it is submitted by the applicant that the provision of Para 148 of AO 02/2016/MS states that the CR is checked for objectivity in consonance to past profile and if it is found inconsistent, it is expunged by the COAS. The same was done after the IO initiated the second report as well in which he assessed the Applicant as per his performance on ground and had he been aware that his assessment will be expunged at least he would have acted in time to ensure that the otherwise exemplary performance of the Applicant is not made nonexistent especially the first level of reporting of the IO who is constantly in touch with the Applicant and who had minutely observed his day to day performance.

14. It is further submitted that the CR of the Applicant for the period of 01.10.2021 to 30.06.2022 was expunged

having a Near Perfect Nine only on being assessed by Civilian Reporting Officer vide letter dated 06.04.2021. By expunging the CR of the Applicant for tenure 01.10.2021 to 30.06.2022, the Respondent No. 3 has made the entire hard work of the Applicant go waste on the strength of the said policy which was inherently illegal, arbitrary and discriminatory even when the assessment of the Applicant was totally consistent and objective matching with his past assessments by the IO, RO and SRO. The policy is discriminatory in nature since it imposes an upper limit on reporting only by civilian officers. This puts the Applicant at a distinct disadvantage as his competitors can get nine or more '9's in PQs & DPVs whereas MS Branch expects the same to remain at a maximum of (a policy imposed) only eight '9's in PQ and DPVs.

15. It is brought out by the applicant that in his view that in spite of impressive credentials in the assessment of the Applicant in the period of the impugned ACRs, the Respondent No. 3 have blatantly expunged his CR ignoring the consistent performance with Outstanding ratings from all Reporting Officers throughout service in the past earned by the Applicant and therefore to expunge an entire period CR

only because it was evaluated by Civilian Officer is completely discriminatory and untenable.

16. Inter alia, it is argued by the applicant that the other flaw in the said illegal order was that the Respondents failed to take corrective steps to suitably intimate the IO about the decision by acting belatedly while vide letter dated 09.05.2023 they sent intimation that Assessment of IO in the impugned CR (01 Oct 2021 to 30 Jun 2022) has been expunged vide Para 148 of AO 02/2016/MS. However, by then the next CR of the Applicant was also initiated. Had the IO known about the Policy dated 06.04.2021 or been timely informed about the required upper limit of assessment, the IO would have probably rated the Applicant in the next CR covering the period from 01.07.2022 to 30.03.2023 in which he would assessed in a way to save the ACR from getting expunged which did not happen.

17. It is the case of the applicant that under these circumstances, the Respondents issued letter dated 14.07.2023 vide which the provisional Agenda was issued for the consideration of the eligible officers for the nomination for NDC/APPPA Course which included name of the Applicant from the Corps of Engineers from 1993 Batch

against 3 vacancies which is very crucial for the Officers for further career progression beyond Brig. He further submits that unknown to the Applicant, the Respondents issued letter dated 27.10.2023 vide which the assessment of the IO Portion of the second ACR was removed completely where the same IO had assessed the applicant in same manner thereby the timing of expunction just before consideration for NDC and it's late intimation only shows that the Respondents have acted unfairly not to even give any time to the Applicant to seek any redress against the said decision. It is the contention of the Applicant that at this stage only the Respondents may have expunged the First CR which was purportedly done in May 2023 because the Applicant was intimated about the same only in Jul 2023 and all such exercise to tweak his merit was done on the eve of his consideration for NDC by acting on such unfair and discriminatory policy.

18. Arguing on his consideration for the NDC, it is submitted by the applicant that under these circumstances, the Respondents issued the final agenda for the NDC where Applicant was considered along with other eligible Officers by the Selection Boards comprising of COAS as the Presiding Officer and all the GOC-in-C of the Commands as the

members which was declassified on the same date on 19.10.2023 without any approval of the Defence Secretary (Respondent No. 1) against the basic policy as also the principles of natural Justice as the Respondent No. 2 who himself was the Presiding Officer of the Board which considered the Officers for nomination for NDC and he only approved the said Board when having adopted same method and procedure for consideration of Officers for NDC what is applicable to the selection for Maj Gens, such result could not have been implemented without its approval by the next Authority which in the present case would have been Ministry of Defence. As anticipated due to such infirmities as pointed out above, the Applicant was not nominated for the NDC.

19. With respect to the statutory complaint, it is submitted by the applicant that being aggrieved by such expunction of his first ACR, he filed a statutory complaint in Nov 2023 and after doing so, he received Letter dated 27.10.2023 intimating him about expunction of his second Report as well in the month of Dec 2023. The Applicant has also raised the issue of wrongly implementing the inclusion of RO2 which actually exceeded the jurisdiction. However, after filing of the

complaint the Applicant has got to know that the Respondent do not entertain statutory complaint against nomination for NDC being a policy matter and the issue related to policy, with the additional fact, that the NDC Course will be starting from 08.01.2024, thereby leaving no option to the Applicant but to approach this Hon'ble Tribunal seeking urgent directions by assailing the said impugned ACRs on the grounds raised herein in the succeeding paras amongst others.

Submissions on behalf of the Respondents

20. Per Contra, it is submitted by the Respondents that the NDC (National Defence College) and APPPA (Advance Professional Programme in Public Administration) are prestigious career courses to train service officers to hold important Command and Staff appointments. Aim of NDC is to prepare the next generation of policy makers from the Defence Forces and the Civil Services for increased responsibility through a programme of studies in National Security and Strategy. The course covers socio- political, economic, technological, diplomatic and military dimensions of national security. The objective of the course is to promote forward thinking about the shifting patterns of international,

political, economic and military relationship and implications of such relationship on National Security. Similarly APPPA course is aimed to prepare the participants to make greater contribution for better governance, develop attitudes that focus on citizen services and to strengthen leadership qualities. It provides an opportunity to the participants to analyze major contemporary issues in governance, learn about recent developments in the social sciences and their application in administration, analyze environmental and other factors, apply relevant concepts, skills and techniques relating to policy, behavioral and administrative sciences. Thus, it is apparent that the officers of Indian Army are nominated on said course after undergoing a thorough screening by a screening committee and only deserving officers are nominated who have excelled in their earlier career. As per Policy dated 24 Jan 2018, mandatory QRs for NDC and APPPA courses are given in Paras 10 to 11 therein.

21. It is submitted by the respondents that in accordance with the Policy, officers of various batches across different Arms and Services are considered for the screening for the nomination for the NDC/APPFA course. All officers of Brig rank are eligible for a maximum of two looks (two

consideration) for nomination in two consecutive years provided they fulfill all mandatory QRs as evident from Para 13 of the Policy. For any Selection Board for select rank, all officers of a particular batch are considered together with same cut off Annual Confidential Reports (ACRs) and inputs and on the basis of individual profile of the officer and the comparative batch merit, they are either empanelled/not empanelled. Seniority in itself is no consideration before the Selection Board for empanelment or non empanelment. In case, any officer gets any relief through complaint etc in any Confidential Report (CR), after the Selection Board has been held, he is entitled to a special corresponding consideration by Selection Board with his changed profile, and in case, he is empanelled by such special consideration, his original seniority remain protected. However, in the case of NDC Consideration batch concept is not followed. It is the list of Brigs who fulfills the mandatory QR is drawn separately for Arms /Services known as Agenda as given in Para 12 of NDC Policy.

22. With respect to screening, it is submitted by the respondents that as per the applicable policy for NDC, each officer is entitled to only two looks i.e. Fresh/First Look and

Final Look viz Look-I and Look-II. In case an officer is not nominated in First/Fresh Look, then he is given Second Look provided he fulfills mandatory QR. After two looks, if an officer is not nominated then he is deemed to be exhausted. In case Officer is given either Relief in CR or there is change in profile as given in Para 14 of Policy, then he is entitled for Review Look provided he fulfills the other mandatory QRs. As per policy, the vacancies are limited for this career course. Further, the nomination procedure through a Screening Committee is elaborated in the policy.

23. With respect to initiation of ACRs, it is submitted by the Respondents that the assessment of officers in Annual Confidential Report (ACR) was earlier regulated by Army Order 45/2001/MS which was replaced by Army Order 02/2016/MS and other relevant policies at any given time. The gradings are numerical from 1 to 9 (Overall as well as in Personal Qualities and Performance Variables in different qualities) and in the form of pen picture also. The entire assessment of an officer in any Annual Confidential Report (ACR) consists of assessment by three different Reporting Officers i.e. Initiating Officer (IO), Reviewing Officer (RO) and Senior Reviewing Officer (SRO) whose assessments are

independent of each other. Further, at times aspects of dual control and user/functional requirement necessitate the assessment in Part II reporting also.

24. Arguing on the ACRs of the applicant, it is submitted by the respondents that the Applicant has earned two CRs for the period from 01 Oct 2021 to 30 June 2022 and 01 Jul 2022 to 30 Mar 2023 which were examined in terms of applicable policy and Army Order in vogue. The subject CRs were inflationary in nature and violative of existing policy and the same were expunged by the Competent Authority in accordance with the provision of Para 148 of AO 02/2016/MS. It is also stated that the expunction of the said CR was also communicated to the Applicant and his IO.

25. With respect to the inclusion of GOC-in-C as RO2 in the reporting channel, it is submitted by the respondents that in order to facilitate user perspective on infrastructure preparedness and facilitation of functional aspects, keeping mainline channel of reporting issued by the MoD intact, a proposal to include GOC-in-C in Part II reporting for CE (Projects) BRO by respective GOsC-in-C was forwarded for concurrence of MoD. The proposal was concurred by the MoD vide letter No BRDB/04/2367/2014-15/GE-1 dt 10

Aug 2017. Accordingly, GOsC- in-C Command have been included in Part II reporting vide MS Branch Letter No A/18531/DGBR/MS 4D (Channel) dated 17 Aug 2017. It is further submitted that the aspect of Part II report is not uncommon and may be followed whenever the aspect of dual control and user/functional requirement necessitates the same.

26. Addressing the issue of approval of the results of consideration of the Selection Board, it is submitted by the respondents that as per MoD ID No 34(3)/2001/D (O&M) dated 03 Aug 2001 on Delegation of Administrative Powers to Service HQs (as amended), utilization of all posts within overall authorized cadre in respect of officers up to the rank of Brigadier has been delegated to Service HQ. The COAS is responsible to the President (Supreme Commander of Indian Armed Forces) through the Central Government for the Command, Recruitment, Training, Organizational, Administration and preparation for war of the Army. Thus, COAS having the authority to control the Indian Army, is the competent authority to approve recommendations of NDC Screening Committee and the same is not required to be approved by MoD as nomination for courses cannot be

equated with Selection Boards for promotion to next higher rank which needs approval by higher authorities as provided in Para 108 of Regulations for the Army (Revised Edition-1987).

27. It is further submitted that an officer of the Indian Army is required to undergo various courses in his military career. The courses are divided into two main categories viz mandatory courses e.g. YOs, JC etc and competitive courses eg. PSC, TSOC etc. Apart from these, for higher select ranks i.e. Colonel and above, there are certain career courses. Nomination in r/o these are done with an approval by the COAS and resultant vacancies are filled up suitably from respective Arms/ Services. Such courses are HC, HDMC, NHCC and HACC. Further, for the rank of Brig, APPPA and NDC courses are there. Such career courses require mandatory qualitative requirements as per applicable policies and officers are also required to be in acceptable medical category as per relevant Army Order. As regards NDC policy dated 24 Jan 2018, the same elaborately deals with the nomination procedure required to be followed for NDC nomination. Para 16 of this policy prescribes the composition of the Screening Committee for NDC/APPPA courses which is

the same as that of SSB of which the COAS is the Chairman. In Para 19 of said policy, it is mentioned that the Screening Committee is required to submit its recommendation to COAS for approval and post approval of COAS, the list of nominated officers is declassified. Therefore, the contentions of the Applicant are highly misconceived.

Consideration

28. Having heard learned counsels on behalf of parties and on a perusal of the documents placed before us, we have come to conclusion that besides seeking a relief for restoration of the impugned Confidential Reports (CRs) in his service profile, the applicant has raised several issues on grounds of legal tenability and arbitrariness. Therefore, we consider it essential to place them as separate issues and if the same warrants, analyze the questionable contents of the policy letters placed before us for judicial scrutiny.

Issue 1 : Whether GOC-in-C Command can be Appointed as RO2 or Not ?:

29. With respect to the aforesaid issue, we find that a letter issued by the MoD, Border Roads Development Board vide MoD ID No BRDB/04/2367/2014-15/GE.I dated 10th

August 2017 has been issued with approval of Hon'ble Raksha Mantri which reads as under :

"2. The matter has been considered. This Ministry concurs with the proposal for incorporation of an additional Column for reporting by GOC-in-C as RO2 in the Part II of the CR proforma IAFI-1123-A-2 (for Brigadiers) after the existing Column for RO. Details of the RO2 may also be provided at appropriate places in Part I of the CR proforma."

30. It has been submitted that the GOC-in-C's endorsements as RO2 in Part II of CR proforma is after the existing column for RO as per new format. Through the written arguments, learned counsel for the applicant has placed before us a purportedly revised CR form which has an additional column for RO2 i.e GOC-in-C at Para 3 of the CR i.e "Personal and Demonstrated Performance". The new form requires the RO2 also to record his gradings in 11 columns in addition to Initiating Officer (IO) and Review Officer (RO). It is also the grievance of the applicant that RO2 is required to fill in his part of the CR without perusing the gradings of IO and/or the RO. It is his submission that RO2 is technically another IO and hence, the same is required to be shown to the ratee and the signature to be obtained as in the open portion of the CR. On a perusal of the CR record of the applicant and in particular the impugned CR, we cannot but record our observation that this is nothing but illusory presumption of the applicant as the RO2 is only required to

grade the ratee in a Box grading & pen picture and his recommendations for promotion and tenantry higher ranks.

31. Noting that the policy has been brought out with an objective, without any element of biasness or illegality, we in fact endorse the spirit of Policy letter dated 17 August 2017 wherein it is stated that the policy has been promulgated with a view to remove the variance between Channels of Reporting wherein Para 2 & 3 read to the effect :-

2. In order to remove the variance between channels of reporting promulgated vide ibid letters and to avoid resultant anomaly the Confidential Reports (CRs) for CE (Proj) Army (less Project (DANTAK) will be initiated by respective ADG BR with DG BR as Reviewing Officer and Def Secy/Addl Secy as the Senior Reviewing Officer as promulgated vide MoD letter under reference at Para 1(c).

3. The CRs will be endorsed by GOC-in-C of respective Commands in Part II of the CRs (format attached as Appendix A). Copy of MoD letters under reference at Para 1(c) & (d) are attached as Appendix B & C respectively.

32. On a further perusal of the aforesaid letter, we find that in Appendix A of this letter, the modifications affected to the CR form only caters for a box grading and pen picture by GOC-in-C and therefore, we are unable to comprehend the very purpose of this line of argument. Moreover, considering the operational necessity of the GOC-in-C of Regional Commands to be accountable for the constructions by BRO Projects in their geographic domains of responsibilities, as submitted by the respondents, we do not find any illegality in

introduction of this policy. Therefore, we are of the opinion that the ground for challenging the letter & the modified CR form is unfounded, without any legal basis.

33. We find it essential to take note of MS Branch letter No A/18571/Part II Form/MS4D(Channels) dated 11.05.2018 which has been squarely promulgated to standardize the ACR forms wherein endorsement of Revised Part II Report Form for CE (Proj) BRO is required to be endorsed in the CR as RO2 as per the MoD letter dated 10th August 2017 discussed earlier. We observe that Part II report is to be initiated separately as and when Part I is due and both parts are to be merged at MS Branch. Considering the argument preferred by the applicant that since the RO2 is initiating the report, it is essential for the report to be shown to the ratee. Although there is a limited logic in this line of submission, in the instant case, we do not find any bias or subjectivity which is detrimental to the applicant alone and the policy being common to all officers under BRO, we do not see any merit in this averment as well. However, with the possibility of adverse opinion, not to be ruled out in future in any case, it is incumbent for the respondents to remove the anomaly and

ambiguity, if any, by issuing detailed instructions with the approval of competent authority.

Issue 2 : Whether the MS Branch Letter A/17151/4/MS4CR Policy dated 06.04.2021 is Discriminatory as Against a Civilian Reporting Officer or not ?

34. With respect to aforesaid issue, we find that the applicant has challenged MS Branch Letter No A/17151/4/MS4CR Policy dated 06.04.2021 as being discriminatory against the civilian reporting officer. It is pertinent to refer to the relevant Para of the letter as reproduced below :

"2. It is observed that in spite of repeated advisories, in some cases there continue to be violations in reporting norms. This 'inflationary trend in reporting has led to difficulties in merit discernibility during various selection boards/panels especially in higher ranks and has necessitated the re-iteration of fwg critical aspects of reporting norms enunciated vide letter under ref at Para 1 above:-

(a) Perfect Nine (PN) Assessment. An assessment with only '9' in Personal Qualities and Demonstrated Performance (PQDPVs) and Qualities to Assess Potential (QsAP) along with Box Grading '9' by a reporting officer is defined as a Perfect Nine Assessment.

(b) Part Perfect Nine (Part PN) Assessment. An assessment with all figuratives as '9' in PQDPVs or QsAP by a reporting officer is defined as a Part Perfect Nine Assessment.

(c) Near Perfect Nine (NPN) Assessment.

(i) Brigadiers. An assessment with thirteen or more '9's out of sixteen figuratives along with Box grading '9' is defined as NPN assessment. In case of civilian reporting officer, an assessment with nine or more '9's out of eleven figuratives in PQDPVs of the CR Form along with Box grading '9' is a NPN assessment.

(ii) Major Generals. An assessment with ten or more '9's out of twelve figuratives along with Box grading '9' is defined as NPN assessment. In case of civilian

reporting officer, an assessment with six '9's out of seven figuratives in PQDPVs of the CR Form along with Box grading '9' is a NPN assessment."

35. We find that the Learned Counsel for the applicant places before us an illustrative example of the calculations to demonstrate to us that the policy of recording a CR as 'Near Perfect Nine' (NPN) is discriminatory to the disadvantage of the officers serving under Civilian Officers. We consider it essential to place the Box for our analysis which is reproduced as under:

<u>SR NO</u>	<u>PARAMETERS</u>	<u>ARMY REPORTING OFFICER</u>	<u>CIVILIAN REPORTING OFFICER</u>
(a)	<i>Number of qualities</i>	16	11
(b)	<i>Highest Permissible Grading below NPN</i>	12 Nines 4 Eights	8 Nines 3 Eights
(c)	<i>Highest Permissible average below NPN</i>	$(12 \times 9) + (4 \times 8)$ ----- 16 = 8.75	$(8 \times 9) + (3 \times 8)$ ----- -- 11 = 8.72
		<i>Clear Discrimination of 0.03 can make or break careers since 47% weightage to being AE Report</i>	

36. On a cursory look at the illustrative example, we observe that a simple arithmetic exercise brings us to a conclusion that there is a marginal disadvantage of 0.03 marks (8.75 – 8.72) for the officers serving under civilian reporting officers. However, it is also essential for us to observe that if this anomaly is to be corrected and civilian reporting officers be allowed to grade 9x9 and 2x8 to remain

within the parameters of NPN, on the contrary the officers serving under Army Reporting Officers will be placed at a greater disadvantage by 0.07 i.e 8.82 in favour of civilian reporting officers and 8.75 in favour of Army Reporting Officers. Therefore, either way, there is an inequality amongst officers albeit marginal between the officers graded by Army and Civilian Officers.

37. On an examination of the necessity of devising different CR norms for civilian and military reporting officers, it is considered essential and important to observe that since all the officers are considered by a common board for career courses and promotion based on their CR profiles, it is unlawful and discriminatory to have different parameters, even if as little as 0.03. While adjudicating several cases, we have observed that the difference in quantified marks of competing candidates of batches is as negligible as third decimal place.

38. While noting so, there is no denial of the fact that gradings in the category of Qualities to Assess Potential (QsAP) are exclusively within the domain expertise of the service officers as they are required to assess their

subordinates for their suitability for holding higher assignments in senior ranks i.e. under the heads of :-

- (a) Professional Competence.
- (b) Vision and conceptual ability.
- (c) Selflessness & setting of personal examples.
- (d) Integrity and moral courage (e) Tolerance of ambiguity.

39. Although the above qualities are graded by at least one of the higher reporting officers being Armed forces officers in the channel, the benefit of a closer observation of ratee by an Army reporting officer in the capacity of IO is denied to officers serving in environments under the civilian reporting officers. It cannot be denied that the closest observation of a ratee is by an IO as the RO is merely vested with the responsibility to review the report of the IO who has the freedom of closer observation of the work or performance of the ratee.

40. Thus, we are of the view that given the competitive nature of the boards for selection of officers for professional courses and promotion wherein the candidates marks are differentiated down to third decimal place, even a small difference of 0.03 marks cannot be ignored as there is a

distinct disadvantage to such officers. Concluding the issue, we are of the view that the calculation under this policy clearly demonstrates the discrimination in nature and appropriately, direct the respondents to resolve this anomaly and devise a solution, requiring a mathematical calculation. Needless to say, till the appropriate mathematical model is devised is brought in to correct the difference, the aforesaid computation with respect to calculation of marks shall be withheld from immediate effect.

Issue 3 : Whether an Examination of the Legal Ramifications of DO letter from Additional Director General, Border Roads, East dated 28 May 2024 is Required or Not ?

41. We have perused the contents of the subject DO letter addressed to Additional MS (X), IHQ of MoD (Army), MS Branch. At the very outset, we cannot help but notice the uncanny resemblance of contents of the DO letter placed before us with the contents of the Statutory Complaint of the applicant placed at Annexure A-5 of the OA.

42. However, on an examination of the aforesaid DO letter, we have taken note of the laudatory performance of the ratee during his assignment as CE (P) Anunank which led the ADG BR (East) Mr PKH Singh, VSM to rate him 'Outstanding' in

both the CRs from 01.10.2021 to 30.06.2022 and 01.07.2022 to 30.03.2023. The IO has recorded at length the achievements of the project under command of the applicant in 'OP SNOW LEOPARD' which was recognised by Hon'ble President of India, Hon'ble Prime Minister, GOC-in-C Eastern Command and IG ITBP amongst many such dignitaries. The applicant was awarded the Chief of Defence Staff (CDS) Commendation Card for his achievement.

43. We note that the above accolades and awards are in themselves the rewards earned for the work done by the applicant during his assignment as Chief Engineer (Project) Arunank. However, in our considered opinion these awards cannot be a license for the IO to violate the laid down principles and guidelines of the writing of the CRs. A reward cannot be a basis of another reward or award which is required to take into consideration the contributions and performance of an individual and not how many awards have been earned by him during the course of performance of the duty. We find that the CR initiated by IO has been clearly in violation of the guidelines and therefore, as per the established regulations, respondents acted within policy framework in expunction of the entire CR.

44. While going through the contents of the DO letter, we find the very fact that the ADG, BR (East) has questioned the validity and legality of the MS Branch policy letter, which shows that he has a clear knowledge of the existence of such a letter. At this moment, we are of the view that the justification of raising the second CR by the IO with similar violation cannot be camouflaged just because he purportedly received the intimation of expunction of his portion of the first CR i.e -01.10.2021 to 30.06.2022 at a belated date vide MS Branch letter dated 09 May 2023 (impugned letter) which was despatched even later i.e on 27 June 2023.

45. We find it pertinent to observe that it is settled law that ignorance of law is not an excuse, and as an IO, he was expected to be aware of the policy framework existing before initiating the CRs, which could have been sought from the MS Branch if not existing with the IO. Even if the impugned letter was in receipt at a belated stage, the established fact remains that the initiation of CRs by IO were not in consonance with the existing policy framework, and thus, we are of the opinion that writing DO Letter cannot cure the defects created by him earlier. This issue is thus, answered herein as above.

Issue 4 : Whether the Expunction of CRs by MS Branch in the Instant case is Illegal or Not ?

46. Before considering this issue, we find it appropriate to take note of AO 02/2016/MS which enunciates the policy of Confidential Reports on Officers wherein on the aspect of Inflationary Reporting, the instructions at Para 145 are relevant and read as under:

“146. Internal Assessment. All CRs on receipt will be subjected to scrutiny during Internal Assessment at MS Branch for correct entitlement, channels of reporting, completion of CR forms in all respect and objectivity in reporting. In case endorsement of CRs is in violation of one or more provisions of this AO (e.g. channel of reporting, entitlement of a reporting officer to endorse CR etc) by any reporting officer, the endorsement of complete assessment by any reporting officer(s) in the CR may be set aside on technical grounds by MS Branch.”

47. We find that further, the Army Order also enunciates the policy of scrutiny of CRs at MS branch wherein relevant Paras 146,148 to 149 are reproduced below :-

“148. Assessment Check. The CR when checked for objectivity in reporting will also be analysed for consistency of the performance of the ratee and corroboration of the report within the reporting officers and with ratee's past profile. Depending upon variation from past profile of the ratee against parameters like performance in past CRs, environment of current and past CRs, Adverse Remarks/ special achievements in the past, course profile, rating tendency of reporting officers, recommendations of higher reporting officers on the assessment of lower reporting officers etc, the CR may be accepted as it is or with enfacement for Inflated/ Deflated report, to be reflected on Master Data Sheet for Selection Boards/Panels. However, CR identified as grossly inconsistent or with inflationary/ deflationary/ subjective reporting, after due examination at appropriate level, may be expunged by the COAS.

149. Setting aside of CR on technical grounds (other than non-completion of 90 days physical service) or expunction of entire assessment of first level reporting officer would not prejudice the

validity of assessment of higher reporting officers provided provisions as applicable to their endorsement have been met.”

48. A bare perusal of the relevant paras of the above quoted Army Order brings us to observe that there exists a provision at the level of MS Branch to carry out any internal assessment for an audit of correct channels of reporting and also the objectivity in assessment by reporting officers in the channel. The reports are subject to scrutiny to observe variations, if any, compared to the past CR profile of the officers and infirmities, if any, are indicated by appropriate encagements and filed as such with exceptions of grossly inconsistent ratings with inflationary/deflationary /subjective ratings with the approval of COAS, being the competent authority. However, it is pertinent to note that the reporting officers have no access to the previous reports of the ratee.

49. Therefore, they are expected to initiate or review the CRs as the case may without any past reference; as per their judgment of ratee's performance independently while remaining within the parameters of the policy with respect to "Near Perfect Nine" or "Perfect Nine" ratings of the officers earning a CR. Therefore, it is essential that the policy provisions in this regard contained in Para 2(c) (i) of MS Branch letter No A/17151/4/MS 4CR policy dated

06.04.2021 which has been promulgated to all Command HQs as also inter alia to Director General of Border Roads cannot be lost sight of either by the IO or the ratee.

50. This responsibility is more pronounced on the ratee himself being a senior army officer in the rank of Brigadier and also, the affected party wherein he is shown the CR by the IO after having graded him in the open portion of the CR. It does not in any way dilute the onus of responsibility on the IO who is required to be conversant with relevant policy letters with respect to initiation of CR of Army Officer serving under him. We cannot help but notice that the applicant was well aware that his IO, a senior civilian officer, while initiating CRs was in violation the provisions of the relevant instructions and inadvertently or otherwise while initiating his CR and yet he did not caution him to amend the gradings and silently signed the CR as perused.

51. Therefore, we don't have any hesitation in holding both the officers accountable for violating the laid down policy guidelines for initiating the CR, while observing that there are unambiguous guidelines stated in the MS Branch letter dated 06.04.2021 with respect to the Perfect Nine (PN) and Near

Perfect Nine (NPN) assessment which we have discussed earlier.

52. At this point, we consider it essential to refer to Para 4 & 5 of the aforesaid letter as reproduced below:

“4. Award of Outstanding Grading. Reporting Offrs need to ex requisite discretion while awarding "Outstanding" grading to ratees, to ensure that benefit of exceptional performance is given to deserving offrs. The offr should have exhibited exceptional demonstrated performance with specific achievements as well as professional & personal conduct of the highest order, to be considered for such an assessment. Timely adv Intimation justifying the proposed "Outstanding" assessment in r/o such an offr must be given to the higher tier reporting offrs in accordance with provns enunciated in MS Br Letter No A/ 17151/ 10/ MS 4 CR Policy dt 27 Nov 2015. Further, specific aspects of exceptional demonstrated performance meriting award of "Outstanding" grading must clearly be mentioned in detail in the pen picture.

5. Internal Assessment at MS Br. It is emphasized that all CRs are diligently scrutinized during internal assessment process at the MS Branch to Include comparison with the offrs' past profile derived from a computer generated "Dynamic Asymmetric Variation" Table & those found outside the norms (as enunciated in Para 2 above) are processed for corrective action. Thus, the reporting offrs are requested to ex great discretion/ diligence while endorsing CRs to ensure that the assessment is truly reflective of the performance of the ratee & the laid down norms are not exceeded, lest they inadvertently disadvantage the offr(s).”

53. While considering the issue under question, we observe that the respondents have acted according to law laid down in constitutional principle of right to equality wherein there cannot be an unfair advantage to an employee by deliberate violations of policy by one while others on same position continue to abide by the same policy and therefore, suffer a disadvantage vis-à-vis the applicant.

54. However, we find it essential to refer to the impugned CRs of the applicant wherein the respondents by virtue of their internal assessment have expunged the IO's portion of both the CRs from 01.10.2021 to 30.06.2022 and from 01.07.2022 to 30.03.2023 while retaining the numerative gradings of RO, RO2 and SRO. We observe that the internal notings of the MS Branch have indicated to the effect that the portions of the CRs were subjected to scrutiny in accordance with the provisions of the relevant Army Orders and Army Instructions during Internal Assessment.

55. We find that the CRs in question were compared to the past profile from the computer generated "Dynamic Asymmetric Variation" table and since the assessment of IO were found to be spilling beyond the brackets of parametric limits, they were found liable to be technically expunged as per the provisions of relevant policy letter dated 06.04.2021.

56. While we are conscious of the fact that the reason for this expunction in accordance with Para 148 of AO was to prevent undue benefit to the applicant which is required to uniformly apply to all employees, however, we have to simultaneously endorse the fact the intimation of the expunction of the CR should have been conveyed to the IO

and the ratee at the earliest and ideally before initiation of the next CR, but the same was done at a rather belated stage; thereby inadvertently subjecting the next CR also to be initiated as an inflated CR and once again being expunged due to similar reasons.

57. We have taken note of a counselling letter vide MS Branch letter dated 21.06.2023 to IO, ADG PKH Singh, VSM, ADGBR (East) in terms of Para 145 of AO 02/2016 for indulging in unjustifiably inflationary reporting. In this context it is important to take note of Para 2 to 4 of MS Branch letter dated 22.05.2018 which is as under :

“2. The 'inflationary trend in reporting' has led to predicament of merit discernibility in various Selection Boards/Panels. A number of steps have been initiated by MS Branch in past to address the challenge. The concept of 'Moderator & Balancer' in rendition of CRs needs to be implemented in letter and spirit to arrest this unabated trend. The essence of a 'three tier reporting' lies in RO to function as a 'Moderator' and SRO as an overall 'Balancer' for rendition of an objective and balanced assessment, besides commenting upon the objectivity of assessment by lower tier Reporting Officers.

3. In order to ensure objectivity in reporting and inviting a true reflection of ratee's performance from first tier as well, 'Box Grading' of IO/FTO has been shifted to hidden portion in Revised CR Forms (Version 2018). It is imperative that reporting officers especially the RO & SRO take into consideration the true capability of the ratee in comparison to his peer group and the potential of the ratee to tenant senior appointments in the Army and thus be judicious while endorsing an 'outstanding' assessment.

4. Apropos, in keeping with the aim to address the inflationary trend in reporting, MS Branch will analyse the rating tendencies and periodically bring cases of Liberal Reporting to the notice of the reporting officers and their superiors. Requisite counselling would be resorted to in extreme cases. If excessively liberal trend is noticed in a particular formation/establishment/environment, MS Branch shall

initiate corrective actions as deemed appropriate during the Internal Assessment process.”

58. We find it pertinent to refer to Para 42 of AO/2016/MS which is extracted as under:

42. In case the CR is endorsed by Reporting Officers other than Army, the following provisions will apply:-

(a) Reporting Pattern. All figuratives are required to be filled up by reporting officers from Navy, Air Force, Central Police Organisations (CPOs) and Para Military Forces (PMF). A civilian reporting officer, other than those mentioned in Paragraph 42 (b) below, will be required to fill up only PQs/DPVs (as per instructions contained in CR forms promulgated by MS Branch from time to time), box grade, pen picture and Technical Performance Variables (TPVs) (where applicable).

(b) Civilian Reporting Officers. It is mandatory for civilian reporting officers in MES, Border Roads Organisations, Military Farms, College of Military Engineering, Military College of Telecommunication Engineering and Military College of Electrical and Mechanical Engineering and any other organisation promulgated from time to time to fill up all portions of CR form

(c) Officers, who take up employment after retirement and form part of channel of reporting, will be entitled to endorsement akin to civilian reporting officers i.e. they will endorse only PQs/DPVs (as per instructions contained in CR forms promulgated by MS Branch from time to time), box grade, pen picture and TPVs (where applicable).

59. On an analysis of aforesaid AO/2016/MS and the MS Branch letter dated 22.05.2018, we observe that the respondents have acted in accordance with the aforesaid Army Order and subsequent policy letters issued from time to time, however, we are of the well-considered view that the process of denying the entire benefit of reporting by IO to the applicant especially, wherein there was an option available

with the RO to moderate the ratings, but not done, is violative of basic principles of justice. It is observed that the RO who is an Army Officer and is required to review the marking by IO has not even moderated the CR. RO is a moderator of the remarks of the IO and therefore, his opinion is reflective of the gradings awarded by IO who has the singular responsibility of observing the performance of a ratee from close quarters.

60. We are of the view that due to his frequent interaction with ratee and the accountability of an employee directly to his immediate superior, who is the IO, expunction of the important input by IO in terms of rating is an extreme step. In the instant case, we find that as not disputed by the respondents, the RO has not performed his role of being a moderator and despite having observed the inflationary reporting by the IO, he has failed in his duty to counsel the IO or atleast advise him not to indulge in violation of policy.

61. Ongoing through the records, we find that the reports initiated by the IO have been beyond the laid down parameters of "Dynamic Asymetric Variation" and therefore, the CRs provided an unfair advantage to the applicant beyond parameters of tolerance in his consideration for NDC and

subsequent career progression mechanisms. However, there has been a systematic failure in imposing timely caution on the erring IO, both by RO and MS Branch as against the principles of natural justice, which has even led to unfair disadvantage to the applicant whose work during two consecutive periods have gone unreported by his immediate superior as his IO.

62. We cannot shy from observing that even if the ratee and IO were at fault in the non-initiation of CRs in consonance with the relevant policy framework, the role of RO even if due to inadvertent oversight and MS Branch due to delay cannot be accepted to be justified to the loss of the applicant, thereby denying him a fair chance for the course and the promotion, specifically when the MS Branch and RO had course correction options available at their end.

63. We are of the opinion that the MS Branch, IHQ of MoD (Army) is required to review the Policy Letter no. A/17151/4/MS-4 CR Policy dated 06.04.2021 with respect to the practice of affecting expunctions instead of moderating the inflated/deflated CRs which in our considered view will be fair to all the affected officers and also, within the

permissible limits of laid down parameters without granting unfair advantage/disadvantage to any officer.

Conclusion

64. In view of the aforesaid analysis, we consider it appropriate to grant a fair chance to the applicant, with a moderation of the IO's ratings in the CRs, so that he is not adversely affected for his considerations for NDC and the promotion boards, and thus, we set aside the impugned letter dated 09.05.2023 and direct that the IO's figurative ratings, the pen pictures and recommendations for the period from 01.10.2021 to 30.06.2022 and 01.07.2022 to 30.03.2023 shall be restored to the CR profile of the applicant by the respondents.

65. We direct that said restoration shall be affected after conducting due moderation of the CRs to normalize them within the laid down parameters of tolerance as specified by the policy. Consequently, the applicant shall be considered afresh for the NDC course with moderated and restored CRs. The aforesaid directions shall be given effect to within a period of 30 days from the date of pronouncement of this judgment.

66. Furthermore, we direct that the appropriate mathematical calculation shall be brought in within 30 days to correct the difference between the assessment of the aforesaid computation with respect to calculation of marks in reporting by Army Reporting Officer and Civilian Reporting Officer as enshrined in MS Branch Letter no. A/17151/4/MS-4 CR Policy dated 06.04.2021 being discriminatory in nature shall be withheld from immediate effect, to be not applied for further reporting.

67. Concluding, we find it pertinent to record that aforesaid directions have been issued noting the peculiar circumstances encountered in this case, and shall not be treated as a precedent.


68. The aforesaid OA 246/2024 is disposed off in view of the aforesaid directions.

69. No order as to costs

Pronounced in the open Court on 4 day of October 2024.




**(JUSTICE RAJENDRA MENON)
CHAIRPERSON**


**(LT GEN C.P. MOHANTY)
MEMBER (A)**

/akc/