

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

OA 2770/2021

Col Upmanyu Singh Rathore ... Applicant
Versus
Union of India & Ors. ... Respondents

For Applicant : Mr. Dhruv Gautam, Advocate
For Respondents : Gp Capt Karan Singh Bhati, Sr. CGSC

CORAM :

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

ORDER

Invoking the jurisdiction of this tribunal under Section 14 of Armed Forces Tribunal Act, 2007, the applicant has filed the OA with following prayers:-

(a) *Expunge the ACR for period 11.02.2011 to 31.08.2011 as the impugned ACR is subjective and inconsistent with the overall profile of the Applicant.*

(b) *Expunge the ICR for the period of 01.09.2014 to 14.02.2015 for being subjective, biased and inconsistent with the overall profile of the Applicant.*

(c) *As a consequential relief, direct the re-consideration of the Applicant for promotion to the rank of Brigadier on the basis of relief granted in prayer (a) and /or (b) in the present Application for three SB No. 2, in which the Applicant was earlier considered for promotion.*

(d) *Declare the table given in paragraph 19 of the AV Singh Committee Report to be unconstitutional for being violative of Article 14 of the Constitution of India, to the extent that it provides for different and lesser command tenure for Infantry Officers viz-a-viz Mech Infantry and Armoured Corps Officers and consequently, the command tenure in para 19 of the AVSC be amended to 2.5 years for the Corps of Mechanised Infantry and Armoured Corps and fresh allocation of Select rank*

vacancies be done to these two Corps under the mathematical model promulgated vide the Policy Letter dated 21.01.2009.

(e) As a consequential relief to prayer (d), the Applicant thereafter be considered as per the fresh allocation of vacancies to his Corps (Mechanised Infantry).

(f) Pass any other order as this Hon'ble Tribunal considers fit and appropriate in the facts and circumstances of the present case.

Facts of the Case

2. The applicant was commissioned in the Indian Army in the Mechanised Infantry on 10.12.1994 and has been in service for more than 31 years, at the time of filing this OA. The applicant had been promoted to the rank of Colonel in January 2011. He was considered by No 2 Selection Board (No 2 SB) for promotion to the rank of Brigadier in December 2019 as a Fresh case wherein he was declared as NOT Empanelled.

3. Thereafter he was again considered by the No.2 SB in December 2020 as First Review Case and he was held as 'Not Empanelled' for promotion by the No.2 SB. The Applicant was considered as a 'Final Review' Case in July 2021 but was once again held 'Not Empanelled' by the promotion board.

Submissions on behalf of the Applicant

4. It is submitted by the learned counsel for the applicant that the applicant's assessment in the Impugned ACR is not objective and unbiased as claimed in the Impugned Order.

The applicant could not have been fairly assessed on his capacities as a Commanding Officer when two out of three mechanised companies were deployed for the UN Mission and therefore he was handicapped due to lack of manpower. He emphasises that as soon as the two mechanised companies returned back to the Battalion from UN mission, not only was the applicant personally awarded the Army Commander's commendation, but the 5th Mechanised Infantry Battalion also received recognition in the form of Army Commander's citation in 2014.

5. It is further submitted that the Impugned Order has been passed mechanically and without going into the different facts and circumstances under which the Impugned ACR and the ICR were written. The Impugned Order for rejection of the ACR and ICR is common and the non-application of mind in rejecting challenge to both reports is mechanical; making the entire system an infructuous and futile exercise as is evident in the Impugned Order. The Impugned Order gives no reasoning for rejection of the stat complaint.

6. The learned counsel for the applicant further submits that the applicant has not been objectively assessed by the IO in the Impugned ACR as the IO's assessment was biased in

view of the fact that the other two battalions in the formation had full strength of their sub-units available to their respective Commanding Officers while in the applicant's battalion owing to UN deployments 2/3 sub-units were not available for undertaking formation duties. As per him, instead of evaluating the applicant's performance as Commanding Officer of the battalion and objectively evaluating his performance with whatever resources were at his disposal at the relevant time, the IO was influenced by the fact that other two Battalions in the formation had full strength of Battalion available to discharge the requirements of the Formation.

7. It is the contention on behalf of the applicant that the Impugned ICR also does not reflect an objective assessment of the applicant's true and actual performance during the period of grading. The applicant's IO did not have sufficient time to evaluate and judge the Applicant's performance. The IO has himself given verbal instructions that by an internal arrangement, the Applicant's appointment would be changed to Director (NAG) as the applicant was suitable course qualified for the said appointment. However, the MS Branch did not issue the posting orders to that effect and the Applicant was graded by the DDG (Trg & Pers) as his

Initiating Officer (IO). The sole reason for not awarding an "Outstanding" grading to the applicant was that the IO had to issue an advance intimation of 90 days, which was practically impossible since the IO was posted out 59 days after declaration of his posting.

8. It is reiterated by the applicant that he had given a detailed representation in the non-stat complaint as well as stat complaint and yet the Impugned Order has not discussed nor given any reason for rejection of the grounds raised by the applicant in the strat complaint.

9. The learned counsel for the applicant asserts that the differential command tenure for units of Mechanised Infantry viz-a-viz Infantry has the effect on the number of vacancies in the Select ranks of Colonel and above. Due to lesser command tenure, the churning rate of Infantry Colonels moving from command tenure to staff tenure increases. The Colonels of Mechanised Infantry and Armoured Corps undertake a longer command tenure. Due to this principle, the number of vacancies available for Mechanised Infantry and Armoured Corps in the General Cadre are greatly reduced. The command ranks in various RR & AR units have been customised for the Colonels of Infantry in such a way that it is virtually not possible for the officers of these two

corps of Arms to tenant the RR/AR commands without prejudice to their CRs and careers.

10. Stressing on the issue of Command tenure, it is the Applicant's contention that if the command tenure of units of Mechanised Infantry Corps are also calculated at 2.5 years and fresh vacancies are notified in terms of the judgement passed by the Hon'ble Supreme Court in UOI Vs. Lt. Col. PK Chaudhary, the Applicant would get a fair chance of being considered for promotion to the rank of Brigadier. Since the officers of Corps of Mechanised Infantry and Armoured Corps were not a party to the said litigation, the issue of differential command tenures within the "Combat Arms" were never raised and decided.

11. As per the learned counsel for the applicant, the system of promotions in the Indian Army has traditionally and in national interest been such that till the junior-most select rank of Colonel, vacancies between the Corps were allocated on a pro rata basis. At the same time, the vacancies in General Cadre (which gave the pool for selection of highest ranks of the Army, including the Chief of the Army Staff (COAS) were solely based on merit. However, the latter day policies reversed this in such a way that the junior-most select rank of Colonel is allocated on the command exit model and the

higher ranks of the General Cadre have become subject to the quota system.

Submissions on behalf of Respondents

12. Per contra, the learned counsel for the respondents submitted that the applicant submitted a Statutory Complaint dated 01.02.2019 against CRs for the period 02/11-08/11 and 09/14-02/15. The said complaint of the applicant was duly examined in the light of his overall profile and other relevant documents and after consideration of all aspects of the complaint and viewing it against the redress sought, it emerged that the impugned CRs 02/11-08/11 and 09/14-02/15 are well corroborated, performance based and technically valid. There being no sign of any bias or subjectivity, the impugned CRs did not merit any interference. Accordingly, the Central Government after due application of mind rejected the Statutory Complaint dated 01.02.2019 submitted by the Applicant vide order dated 07.08.2020.

13. The learned counsel for the respondents further submits that the applicant also submitted a Non Statutory Complaint dated 08.08.2019 against CRs for the period 10/17-08/18. The said complaint of the Applicant was duly examined in the light of his overall profile and other

relevant documents. The IO's assessment in CR for the period 10/17-08/18 was expunged on directions of COAS on grounds of assessment invalidity in accordance with the provisions of Para 148 of AO 2/2016/MS. After consideration of all aspects of the complaint and viewing it against the redress sought, there being no requirement of any interference, the competent authority rejected the Non Statutory Complaint dated 08.08.2019 submitted by the Applicant vide their order dated 10.12.2020.

14. It was brought to our attention by the Learned Counsel for the Respondents that the applicant also submitted a Statutory Complaint dated 22.06.2021 against the CRs for the period 10/2017 to 08/2018. The said complaint of the applicant was duly examined in the light of his overall profile and other relevant documents. After consideration of all aspects of the complaint and viewing it against the redress sought, it emerged that the impugned CR 10/17-08/18 was already expunged on grounds of assessment invalidity in accordance with the provisions of Para 148 of AO 02/2016/MS and hence it did not merit further interference. Accordingly, the Central Government vide Order dated 27.07.2022 rejected the Statutory Complaint dated 22.06.2021 submitted by the applicant.

15. It is stressed on behalf of the respondents that the Army has a pyramidal rank structure. Thus, the number of vacancies in higher ranks is limited. From the broad base of the pyramid, only those officers whose record of service within a particular batch is better are selected to fill up the vacancies available in the higher ranks.

16. It is the case of the respondents that the assessment of officers in Annual Confidential Report (ACR) was regulated by Army Order 45/2001/MS (which has now been 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.

17. It is further contended that while considering an officer for promotion to a selection rank, the Selection Board takes into consideration a number of factors such as war/operational reports, Course Reports, Annual Confidential Report (ACR) performance in command and

staff appointments, honours and awards, disciplinary background etc and not just the Annual Confidential Reports (ACRs) or one/few Annual Confidential, Reports (ACRs). Empanelment/Non Empanelment is based upon the overall profile of an officer and comparative merit within the Batch as evaluated by the Selection Board.

18. The learned counsel for the respondents asserts that it is up to the Selection Board to assess the suitability of the Applicant for promotion. The assessment of the Selection Board is recommendatory in nature and not binding until approved by the competent authority; viz, Chief of the Army Staff (COAS) or the Central Government as the case may be. The Hon'ble Supreme Court has held that the courts should not substitute the findings of the Selection Boards by its own judgments.

Consideration

19. We have heard the submissions of learned counsels on behalf of parties and perused the documents produced before us by the respondents including the CR dossiers, complaint processing files qua the applicant by MS Branch Complaint Advisory Board of COAS secretariat and MoD as well as the selection board results of No 1 SB held for the applicant for promotion to rank of Brigadier. The applicant

has raised multiple questions, firstly with respect to the creation of vacancies, command exist model and reduction of age of Commanding Officers (COs) post the AVSC Committee Report after Kargil War. The applicant has also expressed grievance with respect to processing of his complaint by the respondent and his consideration by successive promotion boards No 2 SB in Dec 2019, Dec 2020 and Jul 2021 wherein he has been non-empanelled for promotion to the rank of Brigadier.

20. With a view to answer the question of grievances related to the AVSC Committee report leading to formulation of policy and its implementation from 2004 onwards, it is our observation that a policy which has been in place for nearly two decade cannot be challenged at such a belated stage merely because it affects the promotional prospects of the applicant who avers that one of the reasons for his non empanelment was the lack of vacancies for Mechanised Infantry due to command exit model wherein tenures of the COs were laid down for different durations for combat arms, combat support arms and the services. This question has been descriptively and lucidly discussed in the judgment of the Hon'ble Supreme Court in the case of UoI Vs. Lt Col PK Choudhary & Others in Civil Appeal No 3208 of

2015(2016)4 Supreme Court cases 236 thereby bringing this controversy of distribution of vacancies and command tenures to rest. Even if the officers of Armoured Corps and Mechanised Infantry were not party to this litigation as averred by the applicant, the principles laid down by the Hon'ble Apex Court will be still be held relevant to the adjudication of the case under consideration.

21. Without once again delving into the merit and demerit of AVSC policy de novo at this very belated stage it would be adequate to answer the prayer of the applicant with reference to the command exit model and distribution of vacancies by reproducing the orders of Hon'ble Supreme Court dated 22.04.2015 which read to the effect :

"31. The allocation of 734 vacancies, comprising the second tranche, when made on stand-alone basis, (without any adjustment of the excess allocated in the first tranche) is the only right method for allocation in our opinion. The excess allocated in the first tranche, against which officers who may not have otherwise picked up the higher rank were promoted, cannot possibly deny the rightful due to those who would be entitled to claim promotion against the vacancies in the second tranche. The respondents are, therefore, right in arguing that the second tranche should be allocated on a stand-alone basis. This exercise has been done by the appellant and the result thereof filed by Mr Maninder Singh is in the form of a statement to which we shall presently advert. But before we do so, we may as well deal with the second aspect of the matter, namely, whether the stipulation of a command tenure of four years for Arms Support officers can be said to be so arbitrary as to call for interference by a court or tribunal in exercise of their power of judicial review. We must, at the outset, say that command tenure is a policy matter on which the scope of judicial review is extremely limited. What should be the tenure

of a commanding officer for Arms of Arms Support is for defence experts or for the government to determine on expert advice having regards to variety or factors. It is neither necessary nor proper for any court or tribunals to sit in judgment over any such decision leave alone, substitute the same by its own decision. If the Government has upon consideration of the nature of duties and the need for battle preparedness of the force has taken a decision to prescribe a tenure of up to four years for officers serving in Arms Support, it will be difficult to fault the same in the absence of any patent perversity in any such decision especially when no breach of any fundamental or other right of any one complaining against the prescription of such a tenure is demonstrated. No such infirmity has been pointed out to us in the case at hand. Having said that, we must add to the credit of the appellant and their counsel that the question of a shorter tenure was considered by them favourably at our suggestion only to avoid any frustration or disgruntlement among officers serving in Arms Support.

58. That apart, legitimate expectation as an argument cannot prevail over a policy introduced by the Government which does not suffer from any perversity, unfairness or unreasonableness or which does not violate any fundamental or other enforceable rights vested in the respondents. In the case in hand, the Government has, as a matter of policy, decided to lower the age profile of officers serving in Combat Arms and Combat Arms Support pursuant to the recommendations made by the Expert Committees. We have in the earlier part of the judgment dealt with the recommendations made by the Committees and the objectives sought to be achieved by the policy decisions of the Government. There is nothing perverse, unreasonable or unfair about the policy that the age of officers serving in Combat Arms and Combat Arms Support will be lowered by creating additional vacancies to be allotted on Command Exit Model. In the absence of any perversity, unreasonableness or unfairness in the policy so introduced, we see no reason to allow the argument based on legitimate expectation to unsettle or undo the policy which is otherwise laudable and intended to render the Indian Army more efficient and better equipped for combat situations. It also is not a case where no reasonable person could have taken the decision which the Government have taken as regards the need for e lowering the age profile of the Commanding Officers or their exit after 2 ½ to 3 years to occupy positions which the Government have created for the

officers to occupy till they are considered for promotion to the next higher rank”

22. We are also fortified by the judgment of Hon’ble Supreme Court in the case of Union of India and Ors. Vs. Air Commodore N.K. Sharma in Civil Appeal No. 14524/2015 decided by Hon’ble Supreme Court on 14th December, 2023 has much relevance and therefore, relevant paras of the same is extracted as under:-

49. Making policy, as is well recognized, is not in the domain of the judiciary. The Tribunal is also a quasi-judicial body, functioning within the parameters set out in the governing legislation. Although, it cannot be questioned that disputes in respect of promotions and/or filling up of vacancies is within the jurisdiction of the Tribunal, it cannot direct those responsible for making policy, to make a policy in a particular manner.

50. It has been observed time and again that a court cannot direct for a legislation or a policy to be made. Reference may be made to a recent judgment of this Court in Union of India v. K. Pushpavanam where while adjudicating a challenge to an order passed by a High Court directing the State to decided the status of the Law Commission as a Statutory or Constitutional body and also to consider the introduction of a bill in respect of torts and State liability, observed as under:-

“..As far as the law of torts and liability thereunder of the State is concerned, the law regarding the liability of the State and individuals has been gradually evolved by Courts. Some aspects of it find place in statutes already in force. It is a debatable issue whether the law of torts and espically liabiites under the law of torts should be codified by a legislation. A writ court cannot direct the Government to consider introducing a particular bill before the House of Legislature within a time frame. Therefore, the first direction issued under the impugned judgment was unwarranted.”

(Emphasis Supplied)

51. We may further refer to *Union of India v. Ilmo Devi* wherein the Court, while considering with the case concerning regularization/absorption of part-time sweepers at a post office in Chandigarh observed:-

"The High Court cannot, in exercise of the power under Article 226, issue a Mandamus to direct the Department to sanction and 17 create the posts. The High Court, in exercise of the powers under Article 226 of the Constitution, also cannot direct the Government and/or the Department to formulate a particular regularization policy. Framing of any scheme is no function of the Court and is the sole prerogative of the Government. Even the creation and/or sanction of the posts is also the sole prerogative of the Government and the High Court, in exercise of the power under Article 226 of the Constitution, cannot issue Mandamus and/or direct to create and sanction the posts.

(Emphasis Supplied)

52. The above being the settled position of law, it only stands to reason that a Tribunal functioning within the strict boundaries of the governing legislation, would not have the power to direct the formation of a policy. After all, a court in Writ jurisdiction is often faced with situations that allegedly fly in the face of fundamental rights, and yet, has not been entrusted with the power to direct such formation of policy.

23. While dealing with the submission of applicant with respect of his grievance on low rating in his ACR & ICR it is pertinent to rely upon principles laid down by Hon'ble Apex Court in *Air Vice Marshal S.L. Chhabra, VSM Vs. UoI*, 1993 Supp (4) SCC 441: the relevant extract of which are reproduced herein :

"According to us, neither the High Court nor this Court can moderate the appraisal and the grading of the appellant for a particular year. While exercising the power of judicial review, a court shall not venture to assess and appraise the merit or the grading of an officer."

24. Similarly, the relevant paras of the judgment of Hon'ble Delhi High Court dated 13.03.2024 in WP (C) 15167/2023 in the case of Brig Rohit Mehta vs UOI & Ors is extracted a under :-

"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.

27. In any event, it is to be borne in mind that the petitioner by way of the present petition, cannot ask this Court to call upon the IO or the RO or the SRO to conduct a de novo grading/ assessment of the CRs of the petitioner, more particularly, as the same are bereft of any material particulars and/or cogent evidence and merely because there is another interpretation possible from that what has been arrived at by the learned AFT."

24. On the aspect of the ACRs and ICRs that have been challenged by the applicant, co-diligent reading of the file notings of complaint assessing section of MS Branch, IHQ of MOD and the Complaint Advisory Board of COAS Secretariat shows that adequate application of mind has been done into the detailed analysis of the complaints of the applicant. His entire CR profile has been viewed which have nothing adverse in the figurative ratings or the pen picture. His CR

for the period 10/2017 – 08/2018 has been expunged by the competent authority. The applicants profile is a overall healthy mix of outstanding and higher bracket of above average with award of outstanding gradings in Box in most of the CRs with only a few of the CRs where he has been graded overall 'Above Average' in the Box grading. It is our view that no employee can claim perversity or bias or arbitrariness, if he is graded above average in any of the reports, since the CRs are reflection of his performance for the period of reporting and it is the prerogative of the superior officers in the reporting channel to grade an employee as per his performance irrespective of his past reports which are neither in the knowledge of the reporting officers nor guarantee award of outstanding report merely because he has been graded Outstanding in past or by previous reporting officers. If that claim is to be accepted by us and every officer knocks the doors of the Courts for not being awarded an outstanding grading and resultantly, the courts were expected to replace the above average grading by outstanding grading based on the justification of previous report being Outstanding, the entire system of CR gradings and consequently, the Quantified Selection System of Promotion Boards will be rendered ineffective. At this

moment, we find pertinent to refer to relevant Paras of our order dated 27.09.2023 in the case of OA No 1256/2022 of

Brig Vishal Mohanlal Murada Vs. UoI:

“16. On examination of the Statutory Complaint of 07.03.2020 against the non-empanelment in No 1 SB held in October 2019, we find that the impugned Confidential report for the period has been analysed in detail by the competent authority with the pen pictures having no adverse remarks and they are over all laudatory, while the gradings including the box gradings of all reporting officers are a mix of High Above Average (8) and Outstanding (9).

17. We find that all the recommendations are positive in nature and there is no technical invalidity that has been observed. It is our considered opinion that the Court are not an expert to assess the competence of the employee and override the assessment of the reporting officers to upgrade Above Average (8) to Outstanding (9) in absence of any malafide on record.”

25. We do not find any subjectivity or lack of application of mind in the process of analysing the Non-Statutory and Statutory Complaint and passing appropriate orders by the competent authority and therefore there is no reason for further judicial interference to expunge the impugned CRs from 02/2011 – 08/2011 & 09/2014 – 02/2015 and accordingly dismiss this prayer while endorsing the expunction of effected to CR 10/2017 -08/2018 when applicant was Col (OSD) (ASEAN ML Division, MEA).

26. On the third question of consideration of the applicant by No 2 SB for promotion to the rank of Brigadier, we have

perused the proceedings of the Selection Board and observed that the applicant was considered as a Fresh case of 1994 batch of Mechanised Infantry by No 2 SB held in December 2019 wherein he was non-empaneled due to low comparative merit. This promotion board considered 07 officers of Mechanised Infantry as fresh cases for 03 vacancies wherein the applicant was at order of merit position 05. He was considered for the second time as a First Review case alongwith Fresh Batch of 1995 by No 2 SB held in December 2020 for 05 vacancies and held non-empaneled due to similar reasons of comparatively low position in the merit list wherein his order of merit was 11. Finally, he was considered for the third time as Final Review case by Promotion Board held in July 2021 alongwith 1996 Batch in which he was once again held Non Empanelled due to low merit wherein he was at 17th position against 04 vacancies filled. Therefore, we do not find any reason to interfere with the proceeding of the promotion boards which has been conducted as per policy guidelines.

27. Before parting we must observe that given the peculiarities of CRs of officers of the defence forces, the authorities must adopt appropriate measures to sensitise the civilian officers reporting on the defence officers, when they

are posted on appointment outside the Armed Forces with respect to the policy and procedure of initiating the CRs. This will serve the overall career interests of the officers as their performance reports are rendered invalid due to inaccurate CRs being raised mostly due to lack of awareness about writing CRs.

28. In the light of above discussions the OA is dismissed being devoid of merit.

29. No order as to costs.

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

Pronounced in open court on this 3rd day of July 2024.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

[LT GEN C.P. MOHANTY]
MEMBER (A)

Akc/ps