

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

OA 463/2019

Lt Col Ray Gautam Prasad ... Applicant
Versus
Union of India & Ors. ... Respondents

For Applicant : Mr. I.S. Singh , Advocate
For Respondents : Mr. Harish V Shankar for R 1-3

CORAM :
HON'BLE MR. JUSTICE RAJENDER 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 2007, the applicant, Lieutenant Colonel of 1993 Batch of Army Ordnance Corps has filed this OA challenging his non-empanelment for promotion to the rank of Colonel by NO 3 Selection Board (SB) due to the impugned CR for the period 26.08.2009 to 31.05.2010, and praying for following reliefs:

(a) Call for the records held by the respondents leading to rejection of the Applicant's statutory complaint and set aside the impugned order date 14.06.201;

(b) Call for the applicant's complete CR-Dossier and, after making necessary comparison, set aside the complete assessments of the IO, RO, SRO and HTO in the Applicant's impugned CR for the period 26 Aug 2009 to 31 May 2010, being illegal, biased, arbitrary, inconsistent and non-objective;

(c) Set- aside all the results of No 3 SB held in respect of the Applicant, whereby the Applicant was non-empaneled for promotion to the rank of Colonel;

(d) Direct the Respondents to consider the Applicant afresh by NO 3 SB for promotion to the rank of Colonel with the Applicant's changed/modified profile after setting aside the impugned CR as prayed for herein above;

2. The applicant was a Short Service commissioned Officer in the Army Ordnance Corps of the Indian Army on 21.08.1993 and was considered for promotion to the rank of Colonel by No.3 SB with revised seniority of 19 April 1994, in June 2012, Dec 2012 and Oct 2017, but was not empaneled for promotion. Aggrieved by the aforesaid non-selection and challenging the impugned CRs, the applicant has approached this Tribunal.

Submissions on behalf of the Applicant

3. It is the case of the applicant that w.e.f 26 Aug 2009, the Applicant was posted to 23 FAD and he performed duties of Administrative Officer 23 FAD from 26 Aug 2009 to 02 Nov 2009. Applicant participated in Exercise Vajra Chunouti and his performance was commended by his IO. Thereafter, from 03 Nov 2009 to 30 Jan 2010, the Applicant proceeded to attend Advance Work Study Course, where he scored 'A' grading. On return from said Course to unit (23 FAD), the Applicant was appointed as Deputy Commandant of 23 FAD, being the second senior most officer posted to this unit, w.e.f. 11.11.2009 to 10.08.2010.

4. Elaborating the factual context, it is submitted by the applicant that he proceeded to IHQ of MoD (Army) to perform duties of OIC Re-Union Cell and was due for CR on 31 May 2010, and that the ACR of the applicant covering the period 26.08.2009 to 31.05.2010 was Initiated by the IO (Respondent No.4) on 17.08.2010, (Records of review of RO not held), SRO on 01.10.2010 (IO, RO, SRO located in same station) and by HTO on 07.11.2010 (HTO- after retirement on 31.08.2010). It is pertinent to note that during the period covered by the impugned CR (i.e. 26.08.2009 to 31.05.2010), the Applicant worked in 23 FAD under the command of said IO, Col Sudhanshu Sharma (Respondent No.4), Dy Commandant 23 FAD for 109 days and as Admin Officer for 68 days. However, in the impugned CR, Applicant's performance has been assessed as 'Commander 1 Ammunition Supply Depot' and as 'Company Commander No.3 Ammunition Company'; both being Command Criteria Appointments.

5. Continuing the factual context, it is submitted by the applicant that the Monthly-Strength-Report (IFF-3008) was manipulated by the IO to show that the Applicant actually worked in the appointments in which the said CR was subsequently written. Thus, the entire impugned CR is actually a

false report as the Applicant never worked in the appointments in which his performance is professed to have been assessed in the said CR.

6. Arguing on the legality of impugned CR, it is submitted by the applicant that besides being a false report, the impugned CR also suffers from a number of other fatal illegalities as mentioned below: -

(a) Entire Impugned CR (26 Aug 2009 to 31 May 2010) is actually a false report as the Applicant worked as Adm Offr till 02 Nov 2009 only for 68 days. He never worked as Cdr 1 Amn Sub Depot & Coy Cdr No 3 Amn Coy in the appointment as shown in the CR, in which his performance is stated to have been assessed in the said CR for pd of 109 days.

(b) The assessment made by the IO (which the Applicant verily believes has been dittoed by the RO & SRO) do not match with the Applicant's over-all profile during the reckonable period (excluding the assessments already set-aside under orders of the competent authority/Court) as they were not even aware of the true appointment and work profile of the Applicant.

(c) The entire assessments by the IO, RO and SRO and HTO are non- objective and not performance based, as the same do not truly reflect the Applicant's actual performance during the period covered by the Impugned CR.

(d) The IO was, admittedly, a strict rater as he publicly aired his views that his "8" assessment is equivalent to "9" point assessment of others. In fact, the 'Quantified-System' of selection having been recently introduced in the Army, he did not realize/appreciate the importance of the difference between an 'above-average' ("8" point) and 'outstanding' ("9" point) assessments in terms of its mathematical impact on promotion. Hence, despite having acknowledged & appreciated the Applicant's outstanding performance on several occasions the IO did not rate him outstanding.

(e) The Impugned CR was written in violation of Para-34(b) of the Guidelines for Rendering Confidential Reports' issued by the MS Branch Army HQ, in so much as the Applicant's excellent performance in the 'Higher Munition Course' held at CMM Jabalpur wherein he secured 'A' grade whereas the same was not reflected by the IO/RO in the impugned CR.

(f) The IO wrote an excellent pen-picture of the Applicant in the impugned CR, thereby describing the Applicant's performance and achievements during the relevant period in the superlative form, yet he refrained from rating the Applicant as 'outstanding' ("9" point) in the Box-grading.

(g) As mentioned above, on 31 May 2010, the Applicant proceeded to IHQ of MoD (Army) to perform duties of OIC Re-Union Cell. The 10 (Respondent No.-4) wanted the Applicant to return to the Unit on 22 June 2010, but his request was turned-down by the Army HQ which the 10 did not like and that was held against the Applicant by the IO. Hence, an element of bias had crept in his assessment by the time he wrote the CR on 17 Aug 2010.

(h) Entire assessment of the HTO is also bad in law, hence invalid, for the reason that same was endorsed by him on 07 Nov 2010, after an in-ordinate delay of more than 67 days after he had already retired from the service on 31 Aug 2010, though the SRO had sent the CR to him on 01 Oct 2010. In fact, all the reporting Officers endorsed their assessment after a huge delay in violation of the existing limitation period/time-line laid down in the extant policy.

As per the extant policy laid down vide MS Branch, IHQ of MoD (Army) letter 17151/MS4(Coord) dated 10.07.2006, the IO was duty bound to initiate and complete his assessment in the impugned CR within 20 days from the due date of the initiation of the CR.

7. Drawing our attention to the proceedings of No.3 SB, learned counsel for the applicant submits that in Jun 2012, No.3 SB was held and the applicant was not empanelled. In Dec 2012, first review by No.3 SB was held and again he was not empanelled. Following his non-empanelment, the Applicant sought relief against not empanelment through a statutory complaint dated 12 Sep 2012 addressed to Respondent No.1 against his three ACRS for the period 2007 to May 2008, CR- Period Jun 2008 to Dec 2008 and CR- Period of Sep 2009 to May 2010. Partial relief was provided to the Applicant on said Stat-Complaint vide Central Government order No-36501/14394/AOC/2012/MS-19 / 96 / SC/2013-D(MS) dated 29th Apr 2013 by expunction of SROs assessment at Para 24 (A) "Foresight and Planning" in CR Period Sep 2009 to May 2010 on ground of inconsistency in the impugned CR.

8. Elaborating further, learned counsel submits that the applicant filed an OA (OA No.163/2015) before the Lucknow

bench of this Hon'ble Tribunal, wherein he had inter-alia challenged validity of his CRs for the Period June 2007 to May 2008, June 2008 to Dec 2008 and Sep 2009 to May 2010 (the CR also impugned herein). Applicant's said OA was partially allowed by the Hon'ble Tribunal vide judgement dated 19.07.2017 thereby setting aside the Applicant's CR for the period June 2007 to May 2008 and June 2008 to Dec 2008. However, the Hon'ble Tribunal refrained to dwell upon the Applicant's challenge to said CR as the Applicant had not arrayed Respondent No.4 as a Party (Respondent) in said OA. Nevertheless, the Hon'ble Tribunal did observe in Para 27 of the said judgement that the CR Sep 2009 to May 2010 was indeed written in violation of Para 34(b) of the MS Branch Army HQ 'Guidelines for Rendering Confidential Reports'. That following the relief granted by the Hon'ble Tribunal, the Applicant was considered by No.3 SB as a Special Review Case in Oct 2017 but was again not empanelled.

9. Learned counsel for the applicant submits that thereafter, the applicant preferred a statutory complaint dated 27.12.2017, addressed to the Central Govt (Respondent No.1), against his non-empanement for the rank of Colonel by the Special Review (Fresh) consideration held in Oct 2017, thereby also

challenging the validity of the assessments of the aforementioned reporting officers in the impugned CRs (i.e. CR for the period 01 September 2009 to 31 May 2010); thereby challenging the validity of the impugned CRs inter-alia on the ground mentioned above. The office of Respondent No.1 arbitrarily rejected the Applicant's said statutory complaint through an unreasoned, non-speaking, stock and routine order dated 14.06.2018, without objectively analyzing the issues raised in the said statutory complaint.

10. Concluding his arguments, it is submitted by the learned counsel that all the considerations given to the Applicant by the No.3 SB for promotion to the rank of Colonel are completely vitiated as the same were based on the aforesaid illegal assessments made in the Impugned CR, which are manifestly illegal and invalid, and on the illegal extrapolation of the Command Criteria CRs also as the staff CRs which was without authority of law.

Submissions on behalf of the Respondents

11. Per Contra, raising preliminary objections, it is submitted by the respondents that the Regional Bench, Lucknow vide their order dated 19.07.2017 granted partial relief to the applicant by directing expunction of impugned CRs 06/07-05/08

and 06/08- 12/08. However, the Hon'ble Tribunal having considered the facts of the Confidential Report impugned in the present OA, and the objections of the Respondents about non-joinder of the Reporting Officers of the impugned CR as party to the OA, refrained from recording any finding with regard to the rating of the applicant in the said Confidential Report on the ground that the applicant had not arrayed the concerned officers as party in the OA.

12. It is submitted further by the respondents that the Applicant neither sought review of the said judgment nor preferred an appeal and thus, the Judgment of the Hon'ble Tribunal became final on both parties. The respondents have now complied with the said Orders of the Hon'ble Tribunal Regional Bench, Lucknow in letter and spirit.

13. The Respondents therefore submit that the Applicant now is barred by the principles of 'Res Judicata' to challenge the same impugned Confidential Report of Sep 09 to May 10 before this Hon'ble Tribunal in the present OA and the Hon'ble Tribunal may be pleased to dismiss the present Original Application on this ground alone.

14. Referring to the factual context, it is submitted by the respondents that the applicant was commissioned in Army

Ordinance Corps (AOC) on 20 Aug 1993 with date of his seniority as 19 April 1994. He was considered by No 3 Selection Board for promotion to the rank of Colonel as 'Fresh Case of 1994 Batch in June 2012. However, based upon his overall profile and the comparative merit as evaluated by the Selection Board he was not empanelled. Aggrieved by his non-empanelment by No 3 Selection Board in Jun 2012, the applicant had filed a Statutory Complaint dated 27 Sep 2012. The said statutory complaint of the applicant was duly examined by the competent authority and he was granted redress by way of expunction of the SRO's assessment at Para 24 (a) in CR 09/09-05/10 vide Ministry of Defence order dated 24th April 2013.

15. It is further submitted by the respondents that following the said grant of redressal and change in his profile, the applicant was again considered by No 3 Selection Board for promotion to the rank of Colonel as Special Review (Fresh) of 1994 Batch by No 3 Selection Board in June 2013. However, based upon his overall profile and the comparative merit as evaluated by the Selection Board he was not empanelled. He was again considered by No 3 Selection Board for promotion to the rank of Colonel as First Review case by No 3 Selection in

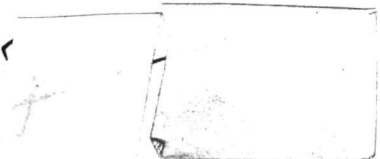
Dec 2013 and as Final Review in June 2014. Both the time, based upon his overall profile and the comparative merit as evaluated by the Selection Board he was not empanelled.

16. Elaborating, it is submitted by the respondents that the applicant approached Hon'ble AFT (RB, Lucknow) by filing OA. No. 163/2015 in which the Hon'ble Tribunal wide their order dated 19.07.2017 granted partial relief to the applicant by directing expunction of impugned CRs 06/07-05/08 and 06/08-12/08. However, the Hon'ble AFT did not grant any relief to the applicant in respect to the impugned CR 09/09-05/10, mainly on the ground that the reporting officer against whom bias was alleged, was not made party to the OA.

17. Continuing further, it is submitted by the respondents that following the grant of redressal by Hon'ble AFT (Regional Bench), Lucknow in OA No 183/2015, the applicant was again considered by No 3 Selection Board for promotion to the rank at Colonel as Special Review (Fresh) by No 3 Selection Board in Sep 2017. However, based on overall profile and the comparative merit as evaluated by the Selection Board he was not empanelled. He was again considered by No 3 Selection Board for promotion to the rank of Colonel as Special Review

(First) case by No 3 Selection in Oct 2018 and as Special Review (Final) in Mar 2019. Both the time, based upon his overall profile and the comparative merit as evaluated by the Selection Board, he was not empanelled.

18. In reply to the contention of the applicant that he never worked as Commander 1 ASD & Company Commander No 3 Ammunition Company, it is submitted by the respondents that the applicant worked as Adm Officer with effect from 26 Aug 2009 to 30 Jan 2010 and as Commander 1 ASD & Company Commander No 3 Ammunition Company with effect from 31 Jan 2010 to 31 May 2010 and that the applicant himself has certified in Part I of his Annual Confidential Report for the period 26.08.2009 to 31.05.2010 that he worked as Adm Officer with effect from 26.08.2009 to 30.01.2010 and as Commander 1 ASD & Company Commander No 3 Ammunition Company with effect from 31.01. 2010 to 31.05.2010. The applicant has also rendered a irrevocable certificate certifying the factual correctness of the said facts, while submitting his ACR for the said period. The applicant is therefore now estopped from retracting his certificate to suit his requirement. The respondents undertake to produce the said certificate signed by



the Applicant on 17 Aug 2010 as contained in ACR for the period 26.08.2009 to 31.05.2010, for perusal of this Tribunal.

Consideration

19. At the time of final arguments on 20.09.2024, Learned Counsel for applicant submitted before us that he will be satisfied in case a definite answer is provided to him that the impugned CRs i.e. June 2007 to May 2008 and June 2008 to December 2008 were removed from the dossier of the applicant as per orders of AFT (RB), Lucknow in OA No 163/2015 dated 15.02.2015 when he was considered by NO 3 SB as a Special Review Fresh Case in October 2017 and thereafter.

20. Hence, in the light of above submission, we have gone through the CR Dossiers and Selection Board records placed before us to find the answer to the query posed by the applicant to satisfy the grievance. The applicant apprehends that the CRs in question which should have been expunged and removed from his profile during his considerations by No 3 SB may have continued to remain on his record as such. Accordingly, we have proceeded to examine the Confidential Reports Dossier (CRD) of the applicant as well as the board proceedings of No. 3 SB pursuant to the orders of AFT (RB) Lucknow dated 19.07.2017 in OA 163/2015 qua the applicant.

21. On a perusal of the records, we find that pursuant to the order dated 19.07.2017 passed by AFT (RB) Lucknow) in OA 163/2015, the applicant was considered by No 3 SB as follows: -

(a) With AOC, 2000 Batch as a Special Review (Fresh) case in October 2017.

(b) With AOC 2001 Batch as Special Review (Frist) case in October 2018.

(c) With AOC Deferred/Withdrawn cases as Special Review (Final) case in March 2019.

22. On examination of the CR Dossier of the applicant, we find that complete CRs from June 2007 to May 2008 and June 2008 to December 2008 have been expunged vide MS Branch authority letter dated 24.08.2017 and accordingly, these CRs no longer exist in the profile of the applicant. Hence, we have no hesitation in concluding that the applicant has been considered in all the three chances with the impugned CRs having been deleted from his profile. He was considered appropriately as per policy in vogue. For the sake of justice, we have also perused the results of the three boards to observe that even after the expunctions having been affected in the Member Data Sheet (MDS) as per the CR Dossier, the applicant's merit has remained below the bench mark i.e. marks of the last officer of the batch empaneled by the board for promotion to

rank of Colonel and therefore the applicant has been non-empaneled for promotion. The details are appended below :-

(a) During his consideration as Special Review (Fresh) case by No 3 SB in October 2017 his modified total marks after expunction of impugned CRs and award of fresh value judgment marks by the Board Members were compared to the bench mark of last officer in the order or merit at 19. His notional merit is at 29.

(b) His notional merit when considered as Special Review (First) case in October 2018 is 26 compared to last officer promoted being at Order of merit 12.

(c) He was considered as a Special Review (Final) case in March 2019 wherein he stood as 27th in notional order of merit compared to last officer promoted being at Order of merit 10.

23. In light of the aforesaid the OA is disposed off as dismissed.

24. 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/ps