

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

OA 601/2019

Maj Gen Naveen Kumar Airy
Versus
Union of India and Ors.

... Applicant
... Respondent

For Applicant:

Shri Indra Sen Singh, Advocate with
Mr. Abhishek Singh, Advocate

For Respondents:

Gp Capt Karan Singh Bhati, Sr. CGSC

CORAM

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

ORDER

1. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a serving Major General who has since retired and is aggrieved by his non-empanelment to the rank of Lt Gen by the Special Selection Board (SSB) and the rejection of his statutory complaint. He has made the following prayers:-

- (a) Call for the entire record leading to the rejection of the Applicant's statutory-complaint dated 08.03.2018 and set aside

the said order dated 14.09.2018 passed by Respondent No.1, the same being arbitrary and illegal;

(b) Call for the entire record of the proceedings of Special selection Board (SSB) held in Oct 2017 as well as Oct 2018 in respect of the Applicant's Batch (1983 Batch) and after making the necessary scrutiny and comparison, quash the Selection Board results in so far as the same relate to the Applicant only, the same being based on Illegal/unsustainable record;

(c) Call for the entire service record/dossier of the Applicant and after perusal thereof set aside complete assessments of the RO endorsed in the Applicant's three CRs earned by him as the GOC 39 Mountain Division, Le. (1) CR for the period 04 March 2016 to 30 June 2016, (ii) CR for the period 01 July 2016 to 30 Nov 2016 and (iii) CR for the period 01 Dec 2016 to 29 March 2017,

(d) Set aside complete assessments/recommendations of the 10 endorsed in the unseen/hidden portion of the Applicant's above mentioned three CRs, in case same are found to be inconsistent with the assessment in the open/shown portion of

the 10's assessments in the respective CR or with the Applicant's over all profile:

(e) Set aside any other assessment in any of the Applicant's CRs within the reckonable profile, which is found to be inconsistent with the Applicant's overall service profile in the reckonable period:

(f) Direct the Respondents to re-consider the Applicant's case for promotion to the rank of Lt General by Special Selection Board (SSB) as a Fresh Case of 1983 Batch with the Applicant's revised/updated record of service as prayed for herein above;

(g) Direct the Respondents that while reconsidering the Applicant's case as Special Review Fresh, the Applicant's record/quantified-merit be compared with that of the officer of his batch (1983-Batch) placed last in order of merit in the Fresh Consideration held in Oct 2017 and to promote the Applicant to the rank of Lt General as a Fresh Case of 1983 Batch, with original seniority, if his record/quantified merit matches with that of the said officer of the Applicant's batch; and

(h) Issue any other order(s) and direction(s) as deemed appropriate by this Hon'ble Tribunal under the facts and circumstances of this case.

Brief Facts of the Case

2. The applicant was commissioned into Infantry (GRENADIERS) on 17.12.1983. Based on his professional acumen, he was promoted from time to time and was promoted to the rank of Maj Gen on 04.03.2016 and assumed command as General Officer Commanding (GOC) of a Mountain Division (Mtn Div). It is the applicant's case that since this formation is an operational reserve Div of a Command, the applicant had a two tiered CR reporting channel, distinctly different from the normal three tiered reporting channel. Thus, in the applicant's case, GOC-in-C Command was his IO and the COAS was the RO.

3. As a GOC the applicant earned three CRs; CR-1 from 03/16 to 06/16; CR-2 from 07/16 to 11/16 and CR-3 from 12/16 to 03/17. CR-1 and CR-2 was initiated by the same IO and reviewed by the same RO. However CR-3 was initiated and reviewed by different IO and RO. It is the case of the applicant, that while all the IO gave the applicant an 'Outstanding' report, it is his apprehension that the RO downgraded the assessment to

'Above Average', contrary to the applicant's exemplary demonstrated performance considering the various operational and professional activities undertaken by the Div with the applicant at the helm of affairs as the GOC.

4. The applicant was considered for promotion to the rank of Lt Gen by SSB in Oct 17 as a fresh case and was not empanelled. The applicant then submitted a statutory complaint dated 08.03.2018, against the non-empanelment and also impugned the three CRs earned as GOC. The complaint was however, rejected by the competent authority vide order dated 14.09.2018. The applicant was then considered by SSB in Oct 18 as a First Review case and remained non-empanelled. Hence the OA.

Arguments by Counsel for the Applicant

5. The counsel recapitulated the service profile of the applicant, highlighted his excellent performance on various courses, the important appointments held by him, and various achievements. The counsel then emphasised that he had been promoted to the select rank of Col/Brig/Maj Gen in his first consideration at each of these promotions and emphasised that the applicant was at the top of his batch. The counsel then drew our attention to the details of his profile at Para 4(j)(k) of the OA.

6. The counsel then elaborated the applicant's excellent performance as GOC Mtn Div and the achievements of the formation under him. The counsel then elaborated on the three CRs earned by the applicant as GOC, and emphasised that while the IO had rated him 'Outstanding', the applicant believes that the RO has deliberately moderated the assessment downward and assessed the applicant as 'Above Average'. The counsel then added that the first two CRs were endorsed by the same IO and RO, and that the third CR was initiated and reviewed by a different IO and RO.

7. The counsel then elaborated on the consideration by the SSB, the non-empanelment and the rejection of the statutory complaint. The counsel emphasised that in spite of the stellar professional profile of the applicant, he was non-empanelled only due to the three CRs earned as GOC Mtn Div. The counsel said that these three CRs were required to be reviewed and set aside, and the applicant reconsidered for the following reasons; inconsistency of these CRs; lack of objectivity and subjectivity; CRs suffer from malice in law, disadvantage of reserve formations and reduced value judgment marks.

8. With reference to inconsistency in the impugned CRs, the counsel drew our attention to the details of the service profile of the applicant at

Para 4(f)(k) of the OA; the fact that the applicant had been awarded two COAS commendation Cards and three Army Cdr's commendation cards. He then emphasised that consequent to his promotion as Brig, he had earned 13 CRs and emphasised that except for the RO's assessment in these impugned CRs, all his other reports had been outstanding. Thus, the RO's assessment in three CRs were an aberration and was required to be set aside, since they were completely inconsistent with the overall profile of the applicant.

9. With reference to subjectivity in the report, the counsel drew our attention to Para 4(q) and (r) of the OA and highlighted the details of the applicant's demonstrated performance. The counsel then drew our attention to Para 129 of OA 02/2016/MS and the policy dated 28.10.2010 (Annexure A-7) and emphasised that the RO had not given any reasons for downgrading the outstanding assessment. Also that RO had not endorsed whether the IO's assessment was justified/ liberal. The counsel further added that the endorsement by the RO in the first two CRs had been inordinately delayed, hence the report could not have been objective.

10. With reference to malice in law, the counsel emphasised the inordinate delay in endorsement by the RO and relied upon the AFT(PB)

order dated 29.04.2015 in **OA 74/2015, Maj K.K. Sinha v. UoI & Ors** which was upheld by the Hon'ble Supreme Court in CA 23376/2015 judgment dated 03.08.2015, and AFT(PB) order dated 6.11.2015 in **OA 67/2015 Maj Gen Sukesh Rakshit v. UoI & Ors.**

11. With reference to disadvantage of a reserve formation, the counsel elaborated on the normal three tiered reporting system in the Army and emphasised that since the applicant was a Command reserve Mtn Div, the GOC had only a two tiered reporting system with the GOC-in-C as the IO and COAS as the RO. Thus, the applicant did not have the benefit of the endorsement of the SRO as the 'balancer'. He further added that the first IO and both ROs had never visited the applicant's formation and therefore could not have assessed him objectively. The counsel then elaborated on how in the absence of a SRO's report, the average of the assessment in the quantified merit would reduce causing prejudice to the applicant. He further added that many of the previous GOsC of this Div too had not been approved, for this very reason.

12. Further referring to reduced value judgment marks, the counsel emphasised that the applicant had commanded reserve formation both as a Brig and as a Maj Gen under very difficult and peculiar situations and

operational control issues. The counsel then drew our attention to Para 12 of MS Policy letter dated 23.12.2017 (Annexure A-10 Colly) which required the SSB to take cognisance of the service in difficult areas/ challenging environments while awarding Board assessment marks. The counsel emphasised that the applicant was apprehensive that due credit had not been given to this issue by the Board.

13. The counsel concluded by emphasising that the three reports earned as GOC, wherein the RO had lowered the assessment of the RO had caused major prejudice to the applicant culminating in not being empanelled to the rank of Lt Gen despite his stellar professional profile. Thus, considering the various grounds raised and explained, the counsel prayed that the RO's assessment in these three reports be set aside and the applicant be reconsidered by SSB.

Arguments of the Counsel for the Respondents:

14. Referring to the prayers made by the applicant, the counsel stated that though the CRs pertained to the period from 08/16 to 03/17, the CRs were never challenged and that it was only in 2018 that it was challenged in the statutory complaint.

15. The counsel then took us through the selection process for the select ranks and elaborated upon the details of the conduct of SSB and emphasised, that as per the Transaction of Business Rules, the Appointment Committee of the Cabinet (ACC) was the competent authority to approve the empanelment of officers to the rank of Lt Gen; and that under Para 108 of the Regulations of the Army, Revised Edition 1987 read in conjunction with Army HQ letter No.31525/P/MS-5B dated 06.05.1987, the competent authority had inherent powers to modify, review, approve with variations or repeal the recommendations of the Selection Board. He further stated that the aim of the selection system is to serve the best interest of the Service by selecting only those officers who are considered competent to shoulder the responsibilities of higher rank, by taking various functions into consideration. Thus, it is for the SB to assess the suitability of an officer for promotion based on the applicable criteria and guidelines, and the competent authority has to finally approve such recommendations. The counsel then emphasised that the power of judicial review over selection Boards and promotions are limited and was a settled law based on a catena of judgments.

16. The counsel then drew our attention to rendition of CRs which is regulated by AO 02/2016/MS and other relevant policies issued from time to time. Referring to the three impugned CRs in the OA, the counsel emphasised that all the CRs in the reckonable profile of the applicant were well corroborated, consistent, fair and performance based. The counsel then emphasised that, since these reports were well corroborated and consistent, the statutory complaint too had been rejected.

17. Referring to the endorsement of the CRs by the RO, the counsel emphatically stated that the RO has correctly endorsed the CRs and that it was not mandatory for the RO to physically interact with the ratee for endorsing the ratee's CR, as the COAs has adequate means to access the performance of an officer. The counsel relied on the AFT(RB), Guwahati order dated 23.08.2016 in **OA 27/2015 Lt Col K.D. Chaturvedi v. UoI & Ors**, and AFT(PB) Order dated 20.01.2010 in **TA 160/2009 in Col Amar Narwat Vs. UoI & Ors**.

18. Referring to the reliance by the counsel for the applicant on the AFT(PB) order dated 29.04.2015 in **OA 74/2015 Maj Gen K.K. Sinha**, the counsel emphatically stated that, this case was of no help to the applicant as the facts of the case were entirely different and thus not

applicable to the case at hand. He elaborated that in the case of **Maj Gen K.K. Sinha**, CRs of the officer for three different reports pertaining to different years were forwarded collectively to the SRO(COAS), who then endorsed them just prior to the consideration of the officer by the SSB. Thus, the AFT held it as a case of 'malice in law' since the delay in forwarding the CRs by RO to SRO led to the situation wherein the SRO reviewed all the CRs within a period of 40 days preceding the conduct of the SB, wherein the SRO had assessed the ratio as 'Above Average'. Referring to the case at hand, the counsel emphasised that the RO had endorsed the reports at appropriate time.

19. Referring to the assertion that considering the overall performance as mentioned by the applicant at Para 4(q) and (r), the counsel emphasised that the IO and RO had assessed the applicant based on his performance which was duly reflected in the CR. Further referring to the assertion that the RO had no interaction with the applicant, the counsel relied on the AFT(PB) order dated 19.01.2016 in **OA 208/2015 Maj Gen R.P.S. Bhaduria Vs. UoI & Ors** and emphasised that a COAS had various modes of getting inputs regarding the performance of officers commanding various Divisions.

20. Further referring to the assertion by the applicant on the disadvantages of being a commander of a reserve formation, the counsel emphasised that the command and control of various formations was decided based on the operational requirements, which were paramount, and the assumption that merely because the applicant was commanding a theatre reserve Division, he was disadvantaged in his assessment was not borne out by any facts and was merely an apprehension of the applicant. He emphasised that all officers were assessed based on the performance in the appointment/ post held during the period of assessment.

21 He concluded that the applicant's CRs were well corroborated, consistent and technically valid and that he had not been empanelled due to his overall comparative merit amongst those considered.

Consideration of the Case

22. Having heard both sides at length, the only issue for consideration is whether any of the impugned CRs merit interference. We have examined the CR Dossier, files pertaining to the examination of complaints and the Board Proceedings of the SSBs, submitted by the Respondents.

Complaints

22. The applicant has filed a total of two statutory complaints. The first complaint dated 30.11.2012 was against one CR earned as Col and two CRs earned as Cdr of an Inf Bde. Vide order dated 21.10.2013, the competent authority had granted partial redressal, in that two figurative assessment by the IO in the CR 09/06-08/07 were expunged on grounds of inconsistency.

23 The second statutory complaint dated 08.03.2018 has been filed against non-empanelment to the rank of Lt Gen in his fresh consideration by the SSB held in Oct 2017. The grounds raised in the complaint are similar to the prayers in this OA. He has impugned the three CRs earned as GOC of the Mtn Div. In that, he was disadvantaged by the two tier reporting system applicable in his case as the GOC of a Command reserve Div. That except for the IO in the period of the third CR, no other IO/RO had visited him. That he was in a similar disadvantaged position while commanding his Bde which was also a reserve formation. That certain difference of opinion on administrative matters had been taken adversely by the staff at the Command HQ including the GOC-in-C. That his actions against an errant Bde Cdr led to the applicant being maligned by this Bde

Cdr with assistance from certain staff at the Command HQ. That he was possibly awarded less value judgment marks due to certain perceived interpersonal issues with the COAS, when the applicant had accompanied the COAS to Bhutan. The applicant had therefore, prayed that he be given notional marks for the missing the third tier of reports, in consonance with the IO's assessment. That any anomaly in the hidden portion of the CRs and assessment by RO be reviewed and be suitably moderated. That since he held the appointment of BGS 16 Corps, he be awarded marks equivalent to NDC qualifications, though he had been nominated to attend AAPA course. As part of the examination, all the CRs earned in the reckonable period were reviewed, and the competent authority concluded that all the CRs were well corroborated, with positive pen picture and recommendation for promotion, and no weak remarks. It was also established, that the apprehension of a downward assessment due to lack of intervention by the RO was entirely misplaced. Further, that marks for courses were awarded as per the laid down policy on the subject. Therefore, finding no merit in the complaint the competent authority rejected the complaint vide order dated 14.09.2018,

CRs

24. We have examined the CRs in the reckonable profile. The applicant has a total of 18 CRs in the reckonable profile; 10 CRs in the rank of Col; 5 CRs in the rank of Brig and three CRs in the rank of Maj Gen. On examining the three impugned CRs it is seen that contrary to the apprehension of the applicant, all three CRs are boxed 9/9 by IO/RO with matching pen pictures and positive recommendations. Thus, they do not merit any interference. An evaluation of the box gradings of the 18 CRs in the reckonable profile indicates that 100% of the box trading in the rank of Brig and Maj Gen are outstanding. In the rank of Col, 50% of the box gradings are outstanding, while the balance 50% are above average. Further analysis of the CRs in the rank of Col indicates that the applicant has earned an equal mix of outstanding and above average box gradings with no 7s or any adverse remark. Thus all CRs are clear above average/ outstanding reports and no CR merits any interference.

No 2 SB

25. The applicant was considered as a fresh case of promotion to the rank of Lt Gen by SSB held in Oct 2017. A total of 76 officers were considered for 15 vacancies, 11 in the command and staff stream and four

in the staff only stream. The 76 officers included 36 officers of 1983 batch including the applicant who were considered as a fresh batch. The competent authority approved the empanelment of 15 officers of whom 14 officers were from the applicant's batch and one officer of First Review Special who was approved for staff only. The applicant's merit was 93.682 whereas the merit of the last officer empanelled was 94.383. The applicant was considered as First Review case by SSB held in Oct 2018. This SSB considered a total of 86 officers for a total of 10 vacancies (9 for command & staff stream and one for staff only stream). The 86 officers included 36 officers of 1984 fresh batch and 19 officers including the applicant who were considered as first review case of the 1983 the Batch. The 10 officers empanelled are all from the 1984 fresh batch. The applicant's overall merit was 94.444, while that of the last empanelled officer was 95.816. Thus, the applicant was not empanelled due to his overall comparative merit amongst others considered.

Conclusion

26. In view of the above consideration, we conclude that none of the CRs merit any interference and that the applicant has not been empanelled due to his overall comparative merit amongst those considered.

27. Accordingly, the OA is dismissed being bereft of any merit.

Pronounced in the open Court on this day of ^{9th}..... August, 2024.

(RAJENDRA MENON)
CHAIRPERSON

(P M HARIZ)
MEMBER(A)

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