

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

OA 643/2015

Col Purna Chandra Patnaik Applicant
Versus
Union of India and Ors. Respondents

For Applicant : Mr. S.S. Pandey, Advocate
For Respondents : Gp Capt Karan Singh Bhati, Sr. CGSC
Advocate

CORAM

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

ORDER

This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a re-employed Col who is aggrieved on not being empanelled by No 2SB to the rank of Brig in all his considerations and rejection of his non-statutory complaint dated 14.08.2012. He has made the following prayers:

- (a) Call for the records of the selection board including the proceedings/Notes on Policy where the Respondents have blatantly violated the policy on reckonable CRs to calculate the quantified merit wrongly resulting in his non empanelment by

the selection board and thereafter quash all such orders including order dated 28.05.2013 passed by Respondent No.1 in the non statutory complaint as also hold the Applicant's retirement on 31.07.2013 at 54 years of age as illegal as irregularity is almost proved to exist in denying him promotion.

(b) Direct the Respondents to recalculate the authorized vacancies of Brigadiers for 1981 and 1982 batch Artillery both due to merit, accrued vacancies as well as allocation of additional AVSC vacancies to 2009 onwards and promote the Applicant on the basis of the same Board, if his merit is found to be within the correct authorized No of vacancies i.e., vacancies had it not been illegally increased for 1981 batch and arbitrarily decreased from 1982 batch, making it the only one that year to have reduced vacancies in comparison to the previous batch. The average points of value judgment by the same Selection Board may be adopted. The Respondents be directed to promote the Applicant w.e.f the date when the last officer of his batch got promoted, even if notionally to restore natural justice and give the benefit of pay & allowances.

(c) Consider the case of the Applicant and order promotion/immediate notional promotion in light of his unique profile given at Para 10.5 and restoring assessments if any of his CR was down moderated and after making necessary changes in his profile (including considering his CR referred at Para 5C above as criteria) and promote the Applicant to the

rank of Brigadier with all consequential benefits including back wages, seniority etc.

(d) Pass any other order/orders as deemed appropriate by this Hon'ble Tribunal in the facts and circumstances of the present case.

(e) In the interim, the Respondents be directed to keep a vacancy of a Brig till the disposal of this case.

Brief Facts of the Case

2. The applicant was commissioned into Artillery on 24.12.1982, was promoted from time to time and was promoted to the select rank of Col in 2003. The applicant retired on 31.07.2013 was re-employed from 06.09.2013 and has since retired. The applicant was considered by No-2 SB as a fresh case of 1982 Artillery batch for promotion to the rank of Brig and was non-empanelled. Aggrieved by the non-empanelment, the applicant first filed a non-statutory complaint dated 11.09.2009. However, this was rejected by the Competent authority vide order dated 04.03.2010. In the meanwhile he was considered as a First Review case of 1982 batch by No-2 SB in Oct 2009 and remained non-empanelled. The applicant then submitted a statutory complaint dated 07.09.2010 (Annexure A-3

colly/page 54). This was disposed of vide order dated 19.09.2011 (Annexure A-3 colly/Page 70), wherein the applicant was granted partial redressal, in that one figurative assessment each of the RO and SRO in two different CRs were expunged on grounds of inconsistency. In the meanwhile, the applicant was considered by No-2 SB in Mar 2010 as a Final Review case and remained non-empanelled. With the partial redressal granted vide order dated 19.09.2011, the applicant was considered by No-2 SB as a Special Review (Fresh) case in Mar 2012, Special Review (First) case in Oct 2012, Special Review (Final) case in Mar 2013, and remained non-empanelled in all these considerations.

3. Consequent to his non-empanelment as a Special Review (Fresh) case, the applicant filed a non-statutory complaint dated 16.08.2012 (Annexure A-3 colly/ Page 63). The initial complaint was followed by additional inputs dated 22.11.2012. During the pendency of the non-statutory complaint, the applicant filed OA 10/2013 in AFT(RB), Guwahati. This OA was disposed of by AFT(RB), Guwahati vide their order dated 09.04.2013 (Annexure A-2), with directions that the non-statutory complaint be disposed of within three months

from the date of receipt of the order. Accordingly, the non-statutory complaint dated 16.08.2012 was disposed of vide order dated 17.05.2013 (Annexure A-1 colly/ page 46).

4. Consequent to filing the non-statutory complaint dated 16.08.2012, the applicant filed an RTI application dated 12.10.2012, regarding promulgation of policy letter dated 31.12.2008 prior to conduct of No-2 SB in Apr 2009, and calculation of vacancies for 1982 Artillery batch for consideration by No-2 SB in Apr 2009 including guidelines for such calculation. The RTI was replied to by RTI Cell letter dated 07.11.2012.

5. Consequent to filing the statutory complaint dated 07.09.2010, the applicant submitted an application dated 10.09.2011 to the MS Branch seeking clarification on the CRs to be included in the reckonable period. This was then followed by another letter dated 20.02.2011. Both these letters were replied by Dy MS(B) vide his DO letter dated 17.01.2011 and 24.03.2011 clarifying the issues raised by the applicant in his application (Annexure A-5 Colly/ Pages 89-92).

6. It is the case of the applicant that between Mar 1987 and Dec 2008, officers were assessed by the SBs based on the policy dated 06.05.1987, which was later amended vide policy letter dated 07.10.2002. That the 'Quantified Selection System' (QSS) was introduced from 01.01.2009 vide policy letter dated 31.12.2008 and that this came as a *fait accomplie* to the batches which were considered immediately, like that of the applicant, which was considered in Apr 2009. It is the applicant's case that as per the policy in vogue, only CRs earned in the rank of Lt Col & Col were to be considered in the quantified system. However, in complete violation of this policy, CRs in the rank of acting Maj which were not to be part of the reckonable period were also included in the reckonable period for the No-2 SB. It is also the applicant's case that the MS Branch then tried to justify this inclusion by issuing their policy dated 15.04.2009. It is also the applicant's case that this had been over-ruled by the Hon'ble Delhi High Court vide their judgment dated 19.11.2012 in the case of ***Darshan Lal Chowdhary vs. UOI & Ors (WP (C) No.5182/2012)***. It is again the applicant's case that in spite of the partial redressal granted vide order dated

19.09.2011, in the Special Review (Fresh) and Special Review (Final) consideration, the 'Look Two Down' policy was again wrongly applied and CRs earned in the rank of Maj were once again included. It is also the applicant's case that the pro rata vacancy given to his batch (1982 Artillery) was less as compared to the other Arms/ services. And that the 1982 Artillery batch suffered due to the disproportionate additional vacancies given to the 1981 batch. It is also the case of the applicant that subsequently the vacancy for artillery was again increased from the 1983 batch and thus, it was only the 1982 batch which suffered due to allotment of inadequate vacancies.

Arguments by the Counsel for the Applicant

7. The counsel reiterated the complete service profile of the applicant including his achievements and award of COAS Commendation Card. The counsel then emphasized that in spite of the applicant's excellent service record, and having been approved in his first consideration, both to the select rank of Lt Col in 2000 and Col in 2003, the applicant remained non-empanelled to the rank of Brig by No-2 SB in all his considerations. The counsel emphasized that this had been due to the faulty and incorrect application of policy

on calculation of vacancy and incorrect inclusion of CRs in the reckonable profile.

8. The counsel then drew our attention to the clarification on CRs to be considered by various SBs given vide letter dated 07.10.2002 (Annexure A-4/colly) and emphasized that in No-2 SB for promotion from Col to Brig, only CRs earned in the rank of Col and Lt Col were to be considered. The counsel then drew our attention to the policy letter dated 31.12.2008 on 'Conduct of Selection Boards by Quantification System' and emphasized that with this policy, the selection system had changed from a 'quantitative method' to a 'quantified system'. The counsel then drew our attention to Para 4 of the policy letter dated 31.12.2008 and elaborated on the distribution of marks for No-2 SB. Further referring to Para 5(c), the counsel emphasized that all CRs in the reckonable profile being considered under this policy were to be quantified.

9. The counsel then elaborated that though as per policy dated 07.10.2002 only CRs in the rank of Lt Col and Col were to be considered, the Respondents had included the CRs in the rank of Maj and had covered up this issue by issuing an amendment to the policy

dated 31.12.2008 vide letter dated 15.04.2009. The counsel then drew our attention to this letter and elaborated that while the policy letter of 31.12.2008 had laid down 90 marks for CR in No 2 SB, the letter of 15.04.2009 gave a breakdown of how the 90 marks for CRs were further apportioned. In that 10 marks were now assigned to criteria appointments in the last SB, 30 marks for other reports in the reckonable profile and 50 marks for criteria appointments in the present SB. The counsel then drew our attention to the revised policy dated 04.01.2011 which was to be implemented from 01.04.2011, which at Para 21(c) stated that 'Look Two Down Policy' will continue for 3 SB, 2 SB and 1 SB as hitherto fore and that 'Look Three Down' will be adopted only for Special SB to the rank of Lt Gen. The counsel then elaborated that consequent to the implementation of the AVSC Report, what was earlier exclusive AE appointments of Maj's had now become AE appointments for Maj/Lt Col, and where there were no reports of Lt Col, Maj's reports were extrapolated. The counsel concluded by stating that the No 2 SB had been conducted contrary to the policy promulgated and that the applicant be considered afresh.

Arguments by counsel for the Respondents

10. The counsel briefly recapitulated the various policies pertaining to the QSS starting with the policy dated 31.12.2008, clarification provided by letter dated 04.04.2009 and the subsequent revision vide policy letter of 04.01.2011. The counsel drew our attention to Para 5(c) of the policy letter dated 31.12.2008 and emphasised that the implication was that all CRs in the reckonable profile will be quantified.

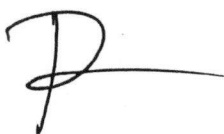
11. The counsel then elaborated that till 31.12.2008, all CRs in the reckonable profile till the cut off CR were considered in the No 4 and No 3 SBs. Till the implementation of AVSC Report on 16.12.2004, all criteria appointments were in the rank of Maj and officers had to hold any Lt Col's appointment for the designated period and earn a minimum of one report in the rank of Lt Col to be eligible to be considered by No-3 SB. He further added that, with the implementation of AVSC Report, the rank of Lt Col also became a time scale rank, and the first select rank was Col. Thus, post implementation of AVSC Report, all criteria reports of Maj were now also applicable to Lt Col, since both ranks were now treated at the

same level of employment. The counsel then drew our attention to the Adequately Exercised (AE) Policy dated 18.08.2005, as amended by policy dated 19.11.2008, where in, an officer could now earn the criteria report for No-3 SB, either in the rank of Maj or Lt Col, or a combination of both (Annexure R-1 colly).

12. Further referring to the argument that the policy letter of 15.04.2009 had arbitrarily changed the policy dated 31.12.2008, the counsel elaborated that the main QSS policy introduced from 01.01.2009 mandates the quantification of all CRs in the reckonable profile, which was nine years and above with greater weightage to command/criteria appointments. He further emphasized that the letter of 15.04.2009 did not lay down any new policy or amend the policy dated 31.12.2008, it only disseminated the breakdown of marks assigned for CRs in various SBs. Thus for No-2 SB, the distribution of 90 marks for CR was, 50 for criteria appointments for the prescribed SB, in this case, in the rank of Col for No 2 SB, 10 marks for criteria reports in last SB, in this case Maj/Lt Col and 30 marks for all other CRs in the reckonable profile.

13. With reference to the calculation of vacancies for 1981 and 1982 batch, the counsel elaborated that the vacancies for 1981 batch was calculated on the earlier policy based on 'fixed block' of three years, while the vacancies for 1982 batch were calculated based on the 'three year rolling block' method. He further added that thus the vacancies of 1982 Artillery batch was calculated afresh for the batch 1982-1984, so has to reduce the age of command as per the AVSC-II objective. The counsel further elaborated that the PRV for 1981 Batch was 0.61 whereas for 1982 Batch it was 0.617, based on which a total of 20 vacancies were allotted. The counsel then took us through the process of calculation.

14. With reference to the reliance by the applicant's counsel on the Delhi High Court judgment in the case of ***Darshan Lal Chowdhary*** (supra), the counsel elaborated that OA 166/2011 filed by **Maj Gen D L Chowdhary** had been dismissed vide AFT (PB) order dated 23.04.2012. The officer then filed WP 5182/2012 in Delhi High Court which vide its judgment dated 19.11.2012 had set aside the order of AFT(PB). Subsequently, based on an appeal filed by the Union of India, which was later allowed vide Supreme Court judgment dated



11.03.2015 in ***UoI Vs. Maj Gen Srikant Sharma*** (2015) 6 SCC 723 (Annexure A-5) and the High Court judgment was set aside.

15. The counsel then took us through the consideration by No-2 SB and the various complaints filed by the applicant and elaborated on the Special Review consideration granted based on the partial redressal granted to the applicant in his statutory complaint dated 07.09.2010. The counsel emphasized that the applicant had been given a fair consideration by No-2 SB and that he remained non-empanelled due to his overall comparative merit.

Consideration of the Case

16. Having heard both parties at length, the issues that merit consideration are,

- (a) Whether the Respondents were justified in including the CRs of the applicant in the rank of Maj as part of the reckonable profile.
- (b) Whether the vacancies were correctly apportioned to 1982 Artillery batch.
- (c) Whether any of the CRs merit interference.

17. The Respondents have submitted the CR Dossier of the applicant, the files pertaining to the examination of various complaints, file pertaining to the calculation of vacancies. These have been examined in detail by us.

Calculation of Vacancies

18. It is the case of the applicant that the 1982 (Arty) batch was one of the first batches to be considered by No-2 SB in Apr 2009 under the new QSS promulgated on 31.12.2009. ***And that 1982 (Arty) batch was apportioned less number of vacancies in comparison to the vacancies allotted to the 1981 batch and the 1983 batch which followed.***

19. Policy. We have examined the case file related to the allotment of vacancies, and it is seen that the vacancies related selection system was first adopted by the Army in Dec 1998 for better career management of officers. Under this system, the concept of allocation of pro-rata vacancies (PRV) based on batch strength and vacs was formulated. The methodology for allotment of vacancies for No-4 and No-3 SB was promulgated vide MS Branch letter No 04502/MS Policy dated 29.03.2004. This has since been superseded

by MS Branch letter no 04502/MS Policy dated 19.02.2010. While the earlier method was based on the 'fixed block of three years', the revised method of calculating PRV is now based on the 'rolling block' method. The letter dated 19.02.2010 is reproduced below, and this explains both methods.

CALCULATION OF VACANCIES FOR SELECTION BOARDS

1. Ref MS Policy letter No 04502/MS Policy dt 29 Mar 04.

2 The vacancies related selection system (VRSS) was adopted by IA in Dec 1998 for better career mgt of offrs. Under this system, the concept of allocation of pro-rata vacancies (PRV) based on batch strength and vacs was formulated.

3. **Accrual of Vacs**, Vacs accrue in a given period based on the following:-

(a) **Retirement/ PMR**. Vacs arising from offrs retiring/ proceeding on PMR. in a stable cadre structure, this will equal the reqd comd exits for each arm/service.

(b) **Chain Vacs**, Vacs arising from offrs being promoted to higher rk.

(c) **Existing Voids**. Existing voids/ short falls in the auth cadre of select rks

(d) **Addi Vacs**.

(i) Addi vacs when released, viz AVSC II vacs.

(ii) Addi vacs are apportioned amongst various batches such that the benefit of addi vacs is shared by as many batches as reqd.

(iii) Absorption of addi vacs in addn to natural exits can get restd due to narrow comd funnel. In such cases, comd tenures can be

varied and vacs calculated by taking into acct comd exits. Such calculations will be resorted to till the addi vacs are absorbed and stable state achieved

4. Pro-rata Vacs (PRV).

(a) Vacs are calculated over a block of three yrs. This ensures broader base for vac availability, catering for uneven intake and retirement patterns

(b) The PRV for a block is derived from the batch strs and vacancies accruing over the three year block for a particular arm/service. The PRV is calculated based on the following formula-

$$\text{PRV} = \frac{\text{No of vacancies in a block of three years}}{\text{Strength of batches considered in three year block}}$$

(c) The resultant PRV is multiplied with the batch str, to determine the actual vacs for a batch of the arm/service.

5. 'Rolling' Block Method.

(a) Hitherto, PRVs were being determined over a 'fixed' block of three yrs. Once approved, PRV remained constant over the three yr block. Over the yrs, it was experienced that this system was not as flexible as it did not cater for changing batch strs/ exit vacs caused by PMR. There were also large block to block variations in the PRV

(b) In order to make the sys more flexible and responsive, it has been decided to adopt the 'rolling' block method of calculating PRVs. In this method PRV is continually updated over a 'rolling block' wherein vacs are calculated afresh for each batch by making a block of current and next two batches. Thus each year a fresh batch is added and previous batch dropped from the rolling block.

(c) An illustration of this method is given below:-

Batch	Batch Str	Exits	Three Year Rolling Block			
			Net Batch Str	Net Exits	PRV	Vacs for batch
(i) 1983	102	59	354	180	180/354=.51	102x.51=52
(ii) 1984	121	62	376	186	186/376=.49	121x.49=59
(iii) 1985	131	59				
(iv) 1986	124	65				

6. **Minor Corps.** The block method of calculation of vacancies is not applicable for minor corps due to low batch strength and limited accrual of vacancies. The vacancies for minor corps is worked out based on functional requirements and are mainly dependent on the actual retirement/chain promotions.

7. The overall aim of adopting the rolling block model for determining PRV for a batch is to provide higher satisfaction levels and better promotion prospects with least turbulence within different batches. Simultaneously, the system ensures check on the overall cadre strength as well as quality of selection in various arms/services.

8. Our letter under reference is hereby superseded.

(VS Sreenivas)
Col
Col MS (P. CM &)
for MS

20. PRV Index and Vacancy. For No. 2 SB, the calculation of PRV is normally based on a block of three years vis-a-vis three Batches. Under this system, the vacancies are calculated for three years and distributed on a pro-rata basis to the three batches on the basis of PRV Index obtained. PRV Index = Vacancies for two/three years

divided by the total batch strength of three batches. The vacancy for each batch = Batch Strength x PRV Index.

21. In Sep 2007, No-2 SB was scheduled to consider various Arms and Services including the 1980 (Arty) batch. Examination of the relevant files submitted by the Respondents, it is seen that based on a fixed block of three years, the vacancies for 1980, 1981 and 1982 were worked out based on the fixed block PRV method. The PRV index was worked out based on the batch strength of 1980,1981 and 1982 batches and total of 87 vacancies for the period of three years from 01.11.2007 to 01.10.2010. Thus, based on the PRV index of 0.61, the vacancies for 1980/1981/1982 batches was worked out as 28/35/24. As per the policy the vacancy for 1980,1981 and 1982 were fixed permanently, then such vacancy worked out for block of three years were fixed. The batches of 1980 (Arty) and 1981(Arty) were both considered with the vacancies worked out and frozen in Sep 2007. However, in 2008, the QSS was introduced with effect from 01.01.2009 vide policy dated 31.12.2008. With this the policy of vacancy calculation also underwent a change and finally the PRV based on the 'rolling block' of three years was promulgated vide

policy dated 19.02.2010, the details of which are given in the Para above.

22. Post implementation of AVSC-II vide letter dated 21.01.2009, in order to bring down ages in command in respect of Inf, Armd Corps, Mech Inf and Arty, based on MS (Policy) Note No A/40720/2009/MS-9A dated 10.02.2009, PRV was to be now calculated based on vacancies of two years. Thus, the vacancies for the No-2 SB (Arty) of 1982 batch was worked out based on the PRV index calculated afresh based on the batch strength of 1982, 1983 and 1984 (32+54+55=141), and the total vacancy of 87 accruing over two years covering the period 04/09 to 03/10 and 04/10 to 03/11. The total vacancies for each year include the existing panel, retiring vacancies and the additional vacancies arising out of AVSC-II which are spread over batches. Thus, the PRV Index was $87/141=0.62$, and the vacancies for 1982 batch with a batch strength of 32 was $32 \times 0.62 = 19.84$; 20 vacancies.

23. To further absorb AVSC-II vacancies and reduce age of command, calculations of vacancies for Inf, Armd, Mech Inf and Arty were to be calculated on the basis of command exits per year, based

on the approval of the COAS dated 17.10.2008 on Note-2 in MS Policy PC No 04502/MS Policy. Thus, in the case of 1983(Arty) batch, considered by No-2 SB in Oct 2009, vacancies were worked out based on the batch strength of four batches and command exit vacancies of three years. However, in the case of Armd Corps and Mech Inf, based on the status that both were holding surplus Brigas as on 01.09.2009, their PRV was worked out with batch strength of four years and 'Natural Exits' over three years. Accordingly, the PRV index for 1983(Arty) batch was worked out based on the batch strength of four years (1983 to 1986) totaling 191 and equitable exit vacancy of 41 each year three covering the period from 01/10 to 12/13, totaling 123. Thus, the PRV Index = $123/191=0.64$. With this PRV Index, the vacancies allotted to 1983 batch was $49 \times 0.64 = 30.38$; 30 vacancies.

24. As a matter of interest, for the 1984 batch which was considered by No-2 SB in Mar 2010, calculation of vacancies for Arty was done based on the command exit for the first two years and based on natural exits for the third year., with the batch strength of four batches being taken into account for calculation. The summary of details of Arty batches from 1980 to 1984 are tabulated below.

Ser	Batch/ No-2 SB	PRV calculation	Vacancies	Batches considered	PRV Index	Vacancies
	1980(Arty) Sep 2007	Fixed bloc based on vacancies for 3 years and batches of 3 years	01.11.07 to 01.10.10 87	1980-46 1981-57 1982-38	87/141- 0.61	1980 46x0.61=28 1981 57x0.61=35 1982 38x0.61=24
(a)	1981(Arty) Oct 2008 35/57 – 61.4%	for No 2 SB of 1980 batch	Based on fixed block vacancies worked out in Sep 07 for a batch str of 57			1981-35
(b)	1982(Arty) Apr 2009 20/32 – 62.5 %	PRV -total vac of two yrs - batch str of three years	04/09- 03/10:38 04/10- 03/11:59 <i>Total – 97</i> <i>Less 10-87</i>	1982-32 1983-54 1984-55 <i>Total-141</i>	- 87/141- 0.62	1982 32x0.62=19.84 (20) 1983 54x0.62=33.48 (33) 1984 55x0.62=34.10 (34) Total-87
(c)	1983 Oct 2009 30/49– 61.2 %	PRV -Total command exit vac of three years -Batch str of four years	01/10- 12/10:41 01/11- 12/11:41 01/12- 12/13:41 <i>Total-123</i>	1983-49 1984-55 1985-50 1986-37 <i>Total-191</i>	123/191- 0.64 <i>Reduced</i> <i>to 0.62</i> <i>Par with</i> <i>Inf 7</i> <i>better</i> <i>absorption</i> <i>of AVSC-II</i> <i>vac</i>	1983 49x0.62=30.38 (30) 1984 55x0.62=34.10 (34) 1985 50x0.62=31 (31) 1986 37x0.62=22.94 (23) Total-118
(d)	1984 Mar 2010	PRV -Total command exit vac of two years -Natural exit in 3 rd year -Batch str of four years	01/11- 12/11:41 01/12- 12/12:41 01/13- 12/13:30 (natural exit) Total-112	1984-48 1985-42 1986-35 1987-46 Total-171	112/171- 0.65 Restd to 0.60	1984 48x0.60=28.80 (29) 1985 42x0.60=25.20 (25) 1986 35x0.60=21 (21) 1987 46x0.60=27.60 (28) Total-103

25. It has been the contention of the applicant that 1982 (Arty) batch got less vacancies as compared to 1981 and 1982 batches. From the details summarized above, 1981 (Arty) batch had 35 vacancies for a batch strength of 57, with satisfaction level of 61.4%. 1982 (Arty) batch though was initially worked out at 24 vacancies for a batch strength of 38, its batch strength was 32 when considered by No 2 SB in Apr 2009. The vacancies were worked out afresh at 20 for a reduced batch strength of 32, with a satisfaction level of 62.5%. 1983 batch finally had 30 vacancies for a final batch strength of 49, with a satisfaction level of 61.2%. Thus all the three batches of 1981, 1982 and 1983 Arty batches have had an equitable satisfaction level, and therefore the contention of the applicant is not borne out by facts. We therefore uphold the allotment of vacancies and find no mala fide in the process. It is seen from the file that in the transition from fixed block PRV to rolling block PRV and introduction of QSS, the organization has had to also implement modifications in deriving the PRV Index to reduce the age of command and facilitate absorption of additional vacancies allotted in AVSC-II. It is also seen

that necessary steps were taken in order to maintain balance of an equitable allotment of vacancies for various Arms and Services, based on peculiarities and issues pertaining to specific Arms and Services. With the above calculation of vacancies, the No-2 SB when conducted, considers in addition to the fresh batch, those who are deferred and under First/Final/Special Review category against the total vacancy calculated for each batch.

CRs in Reckonable Profile

26. It is the case of the applicant that based on the policy of 'Look Two Down' for No-2 SB, in the fresh consideration of the applicant by No-2 SB held in Apr 2009, only CRs earned in the rank of Col and Lt Col should have been included and that the Respondents had erred by including CRs earned in the rank of Maj.

27. We have examined the policies pertaining to reckonable profile and inclusion of CRs for consideration. The policy letter No 04477/MS Policy dt 07.10.2002 states that the reckonable profile for No-2 SB is "*all CRs earned in the rks of Lt Col and Col*". The Quantified Selection system was first introduced vide policy letter No 04502/MS Policy dated 31.12.2008 on conduct of Selection Bds by Quantification

System. Para 4 lays down the distribution of marks for various SBs, in which, the distribution of marks for No-2 SB is 90 marks for CRs, 5 marks for Honours and Awards and 5 marks for 'Value Judgement', thus making a total of 95 marks which are quantified. Para 5(c) of this letter states that "*all CRs in reckonable profile being considered under the existing policy will be quantified*". Subsequently, policy letter No 04502/MS Policy dated 15.04.2009 clarified the distribution of marks assigned for CRs, in that as a policy, it would consider criteria reports for the present SB, criteria reports of the last SB and all other CRs included in the reckonable profile. Thus, for No-2 SB, the break down of 90 quantified marks assigned to CRs will consist of 50 marks for criteria reports for the present SB, in this case, in the rank of Col for consideration for promotion to the rank of Brig; 10 marks for the criteria reports considered in the last SB, in this case, those considered by No-3 SB for promotion to the rank of Col.

28. It is thus the contention of the applicant that this clarification was promulgated only to cover up the fact that instead of strictly applying the policy of 'Look Two Down' and considering only CRs in the rank of Col and Lt Col, the Respondents had included CRs in the

rank of Maj too. As seen from the records, till the implementation of AVSC Report in Dec 2004, Lt Col was also a selection grade where Maj were considered for promotion to the rank of Lt Col by the No-4 SB. Thus, till then the criteria appointments and reports for No-4 SB was **ONLY** in the rank of Maj. Consequent to the implementation of AVSC Report in Dec 2004, the rank of Lt Col too became a time scale rank and the first selection grade rank was that of Col. With this, the criteria appointments (and reports) for consideration by No-3 SB for promotion to the rank of Col could be held either in the rank of Maj or Lt Col, or a combination of both ranks. Thus the policy dated 19.11.2008 on '*Adequately Exercised(AE) Policy for Consideration by No-3 Selection Board*', states that an officer is required to earn a minimum of two CRs for 24 months in a criteria/ part criteria appointment and that the tenure of 24 months in a AE appointment can be tenanted either in the rank of Lt Col or Maj, or a combination of both. Relevant extracts of this policy letter is reproduced below.

*ADEQUATELY EXERCISED (AE) POLICY
FOR CONSIDERATION BY No 3 SELECTION BOARD*

*Appces:- A Definitions.
B Frequently Asked Questions on AE*

Refs:

- (a) MS Branch letter No 04479/MS: Policy dated 18 Aug 05
- (b) MS Branch letter No 04479/MS: Policy dated 27 Feb
- (c) MS Branch letter No 04479/MS: Policy dated 20 Sep 06.
- (d) MS Branch letter No 04479/MS Policy dated 23 Apr 07.

General

1. The shortage of offr in the Indian Army and resultant cadre mgt constraints has necessitated the need for a fresh AE policy, which meets the org and indl regmts to the optimum level. The implementation of AVSC I recommendations wef 16 Dec 2004, wherein the age of commanding offr was brought down, necessitated regulated tenures and faster turn over from comd This required more No of Selection Bde to be held at relatively earlier service which exacerbated the problem of inadequate AE for a No of affected offers

Aim

2. The aim of this policy is to lay down the AE norms, as revised, for the calculation of AE tenure. This policy will be applicable to all Arms and Services 3. with imdt effect.

AE Policy

3. The basic tenets of the new AE policy are as follows:-

(a) AE period to commence wef completion of nine years of reckonable commissioned service till 1993 Batch. From 1994 Batch onwards, AE period will commence wef completion of eight years of reckonable commissioned service From 2002 batch onwards AE period will commence wef completion of seven yrs of service.

(b) An offr is reqd to eam a min of two CRs in a criteria appointment for 20 months. In case an offr tenants criteria and part-criteria appointments, the offr will eam a min of two CRs for 24 months with the following stipulations -

(i) Min of 12 months must be tenanted in a criteria appointment. The balance period could be in the combination of criteria and part-criteria appointment.

(ii) *The tenure of 24 months could be tenanted either in the rank of Major or Lt Col or a combination of both.*

(iii) *In case the CRs for the criteria/part-criteria appointment have been earned in the rank of Major only, then the offr should learn at least one report in the rank of Lt Col in any appointment and should also have held the rank of Lt Col for at least 11 months.*

(c) *The provisions of para 4 (b) above will be applicable upto 2002 Batch. Wef 2003 batch, an offr will be reqd to earn a min of two CRs in a criteria appt for 24 months. In case an offr tenants a mix of Criteria and Part Criteria appointment, the offr will require to have completed min 12 months in a Criteria appt.*

(d) *If the above period is tenanted in one continuous stretch, the offr must earn min one CR in each reporting year. 3*

(e) *Where an offr is completing AE in two separate tenures, & is mandatory to have at least one CR in each tenure.*

(f) *Period Contributing Towards AE. The period for calculation of AE will commence from the time an offr is initially placed on the criteria appt and will terminate when the offr relinquishes the appt irrespective of service under the reporting offr. The min period spent in each tenure should be three months*

(g) *NIR. Offis will be given benefit of NIRs, initiated on a criteria/part- criteria appointments towards calculation of AE tenure provided the NIR succeeds or precedes a valid CR on a criteria/part-criteria appointment in the same unit*

5 to 9 xxxx

10. Policy letters referred to al Para 1 above are hereby superseded.

29. The applicant was considered by No-2 SB in Apr 2009. Since by then the new QSS was implemented and No-2 SB was to follow a 'Look Two Down' policy and the fact that CRs considered in the last SB were also apportioned a certain quantified weightage, it was

(ii) The tenure of 24 months could be tenanted either in the rank of Major or Lt Col or a combination of both.

(iii) In case the CRs for the criteria/part-criteria appointment have been earned in the rank of Major only, then the offr should learn at least one report in the rank of Lt Col in any appointment and should also have held the rank of Lt Col for at least 11 months.

(c) The provisions of para 4 (b) above will be applicable upto 2002 Batch. Wef 2003 batch, an offr will be reqd to earn a min of two CRs in a criteria appt for 24 months. In case an offr tenants a mix of Criteria and Part Criteria appointment, the offr will require to have completed min 12 months in a Criteria appt.

(d) If the above period is tenanted in one continuous stretch, the offr must earn min one CR in each reporting year. 3

(e) Where an offr is completing AE in two separate tenures, & is mandatory to have at least one CR in each tenure.

(f) Period Contributing Towards AE. The period for calculation of AE will commence from the time an offr is initially placed on the criteria appt and will terminate when the offr relinquishes the appt irrespective of service under the reporting offr. The min period spent in each tenure should be three months

(g) NIR. Offis will be given benefit of NIRs, initiated on a criteria/part- criteria appointments towards calculation of AE tenure provided the NIR succeeds or precedes a valid CR on a criteria/part-criteria appointment in the same unit

5 to 9 xxxx

10. Policy letters referred to al Para 1 above are hereby superseded.

29. The applicant was considered by No-2 SB in Apr 2009. Since by then the new QSS was implemented and No-2 SB was to follow a 'Look Two Down' policy and the fact that CRs considered in the last SB were also apportioned a certain quantified weightage, it was

necessary in the case of the applicant that CRs considered in the last SB (in this case No-3 SB) was also included. The applicant and his batchmates had however tenanted the criteria appointments applicable for No-3 SB in the rank of Maj and not Lt Col. In order to give all officers under consideration the weightage of the complete quantification marks, the reports in the rank of Major also formed part of quantification merit model and were included for working out quantified merit. Subsequently, vide letter dated 15.04.2009 the details were amplified based on the clarification sought by the environment. In case, the officers were considered under the old policy of 07.01.2002, the applicant and his batch mates would not have received the weightage of the "Reports of criteria appointment of the last SB'. Thus, from the records it is seen that for No-2 SB (Arty) held in Apr 2009, all CRs in the rank of Col, all CRs in the rank of Lt Col and criteria CR in the rank of Maj were considered as part of the reckonable profile of all officers including the applicant. Therefore, we conclude that no prejudice was caused to the applicant alone, as this policy was applied uniformly across the batch. The

Respondents are authorised to make policies to meet their operational and HR management requirements.

30. The Hon'ble Supreme Court has held in a various cases that the Govt is entitled to make policies and make changes to such policies as deemed necessary, and that a court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. Further in cases pertaining to promotion it has held that the promotion has to be governed by the policy in vogue at the time of the promotion.

31. Thus the Hon'ble Supreme Court in the case of ***State of M.P. Vs. Narmada Bachao Andolan***, (2011) 7 SCC 639 held that-

"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P. [(2007) 6 SCC 44] , Villianur Iyarkkai Padukappu Maiyam v. Union of India [(2009) 7 SCC 561] and State of Kerala v. Peoples Union for Civil Liberties [(2009) 8 SCC 46] .)

37. Thus, it emerges to be a settled legal proposition that the Government has the power and competence to change the policy on the basis of ground realities. A public policy cannot be challenged through PIL where the State Government is competent to frame the policy and there is no need for anyone to raise any grievance even if the policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions."

32. The Hon'ble Supreme Court in their judgement dated 14.09.2011 in the case of **Hardev Singh Vs. U.O.I. & Anr**, CA 3973/2020, held that it is always open to an employer to change its policy in relation to giving promotion to the employees. This Court would normally not interfere in such policy decisions.

"25. In our opinion, it is always open to an employer to change its policy in relation to giving promotion to the employees. This Court would normally not interfere in such policy decisions.

26. We would like to quote the decision of this Court in ***Virender S. Hooda v. State of Haryana*** [(1999) 3 SCC 696 : 1999 SCC (L&S) 824] where this Court had held in para 4 of the judgment that: (SCC p. 699)

- "... When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same."

Similarly, in ***Balco Employees' Union v. Union of India*** [(2002) 2 SCC 333] it has been held that the court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the court to weigh the pros and cons of the policy or to test the degree of its beneficial or equitable disposition."

33. Further the Hon'ble Supreme Court in the case of **IVS Gahlot Vs. Union of India (UOI) and Ors.** [Civil Appeal No. 8047 of 2018] held that-

15. Furthermore, the earlier policy was issued on 14.01.2004 and in accordance with the Appellant, it could have been reviewed only after five years. Admittedly the Appellant came for consideration by the Promotion Board on 15.11.2011 i.e. much after five years from the issue of the policy on 14.01.2004. At the time when Appellant was considered the amendment dated 22.05.2006 was in force. An officer has to be considered in accordance with the policy as prevalent at the time of his consideration. Hence, we do not find any error in consideration of the claim of the Appellant as per the amended policy dated 22.05.2006.

Complaints

34. The applicant had filed a total of four non-statutory complaints and five statutory complaints in his service career. Of these, two non-statutory complaints dated 11.09.2009 and 16.08.2012 and one statutory complaint dated 7.08.2010 pertain to the non-empanelment to the rank of Brig and these are being examined in detail here. All the other complaints were primarily against his CRs and removal of 'Reprimand' from his dossier.

35. Non Statutory Complaint 20.09.2009. This complaint was against the applicant's non-empanelment by No. 2 SB in his fresh consideration in Apr 2009. The applicant had prayed that the allotment of vacancies of 1981 and 1982 batch be reviewed and that

any excess vacancies allotted to 1981 Batch be corrected; no weightage exists for civil qualification like Ph D; that his entire reckonable profile be examined for any aberration/inconsistency, and these be then removed, specially his command report CRs from 2003 to 2005 and that he be then considered afresh by No-2 SB. The examination reviewed all CRs covering the period from 07/92 to 08/08; a total of 20 CRs. The CRs covering the period 7/92 to 05/01 had already been examined as part of the examination of the non-statutory complaint dated 24.01.2002 against non-empanelment by No-3 SB. The examination of the CRs from 06/01 to 08/08 held that these were predominantly 'Above Average' reports. The CRs covering the command reports from 12/03 to 08/05 were also both clear 'Above Average' reports with no aberrations and therefore, did not merit any interference. Thus, the competent authority considered that all CRs in the reckonable period were performance based and technically valid, with no evidence of any subjectivity or inconsistency and that the applicant had not been empanelled due to his overall merit amongst those considered. Accordingly, the complaint was rejected vide order dated 15.03.2012.

36. Statutory complaint – 07 Sep 2010. The applicant had reiterated the same issues raised in his non-statutory complaint dated 20.09.2009. The applicant had elaborated on the challenges faced during his command tenure of an Artillery Regt in CI/CI operations. He has also raised the issue pertaining to the calculation of vacancies and highlighted that the policy of 31.12.2008 was adopted without adequate notice, rationale and feedback from the environment. The applicant had once again prayed that the calculation of vacancy for the batch be corrected; extensive field service in intense CI operations be given separate weightage; any low assessment in the hidden portion be, specially by SRO be reviewed and removed, and that he be considered afresh by No-2 SB. The issue pertaining to the method of vacancy calculation for 1981 and 1982 batch was examined in detail and the competent authority concluded that the calculation had been done as per the policy in vogue adopted with the implementation of the policy dated 31.12.2008. After examining the CRs in the reckonable profile, the competent authority granted partial redressal by expunging two

figurative assessments by RO and SRO in two different CRs, and the complaint was accordingly disposed of vide order dated 19.09.2011.

37. Non-statutory complaint 16 Aug 2012. This complaint had been filed against his non-empanelment in his Special Review (Fresh) consideration by No-2 SB in Mar 2012. The main issues raised in the complaint were that though the policy stated that only CRs in the rank of Lt Col and Col will be considered for No-2 SB, the Respondents had also included CRs in the rank of Maj; that the value judgment had not been commensurate to his profile; that vacancy calculation had been done incorrectly; that SB held prior to 15.04.2009 should have considered CRs in the rank of Lt Col and Col only as upheld by the Delhi High Court in its judgment dated 19.11.2012, in the case of **Darshan Lal Chowdhary**, and that AFT(RB), Guwahati had directed that his non-statutory complaint be disposed of earliest. The applicant had therefore prayed that quantification be worked out based on 'Look Two Down' policy dated 31.12.2008; that the special CR earned in the rank of Lt Col from 01/02 to 10/02 be considered as a criteria report; the calculation of vacancies for 1981 and 1982 Batches be once again verified and that

he be considered afresh. The CRs from 7/92 to 03/09, had already been examined during the consideration of the applicant's non-statutory complaint dated 11.09.2009 and statutory complaint dated 07.09.2010. No new facts pertaining to these CRs had been placed on record. Subsequent to 03/09, the applicant had earned four CRs, all of which were again clear 'Above average' reports with no 7s. The examination also stated that the issue of vacancy calculation had already been examined as part of the statutory complaint dated 07.09.2010 and had been stated in the order dated 19.09.2011 while disposing of the complaint. The examination also concluded that CR 05/2-09/2 cannot be included as a criteria report as it was earned in a non-criteria appointment as per the list of criteria appointments promulgated vide policy dated 30.05.1997. The issue of CRs to be included in the reckonable period was also examined in detail and concluded that the CRs had been correctly included as per policy and had been applied for all officers across the board. The examination also noted that with reference to the Delhi High Court judgment in the case of **Darshan Lal Chowdhary**, the Apex Court had already stayed the Delhi High Court judgement when the complaint was

being examined. The competent authority thus concluded that no CR merited any interference, that CRs had been correctly included in the reckonable profile as per policy and that the applicant had not been empanelled due to his overall comparative merit. Accordingly, the complaint was rejected vide order dated 17.05.2013.

CRs

38. We have examined the CRs of the applicant. When considered as a fresh case in Apr 2009, CRs from 7/92 to 08/08 were included in the reckonable profile. Further when the applicant was considered as a Special Review (Fresh) case, the reckonable period now included CRs from 7/92 to 08/11. It is seen that the applicant has a predominantly 'Above Average' profile. Of the total box grading in the complete profile up to 8/11, the applicant has 7% 'Outstanding' assessment and the balance 93% are 'Above Average' assessment. His CRs up to 01/02, have a sprinkling of 7s in various figurative assessments, across this period. Thus, the applicant has not been empanelled due to his overall comparative profile amongst those considered.

No-2 SB Consideration

39. The applicant has been granted a fair consideration by the No-2 SB as applicable. Apart from his regular three considerations, based on the partial redressal granted in his complaint, he was granted three Special Review considerations. The details of these considerations are summarized below :

Ser	No 2 SB	Consideration	BYOS	Results
(a)	Apr 2009 1982 (Arty)	Fresh	1982	NE Merit-86.709 Last offr 88.672
(b)	Oct 2009 1983 (Arty)	First Review	1983	NE Merit – 86.184 Last offr 87.961
(c)	Mar 2010 1984 (Arty)	Final Review (Fresh)	1984	NE Merit 86.289 Last offr 87.891
(d)	Partial redressal in statutory complaint dated 07.09.2010 order dated 19.09.2011			
(e)	Mar2012 1986 (Arty)	Special Review (Fresh)	1982	NE Merit- 86.474 Last offr 88.672
(f)	Oct 2012 1987 (Arty)	Special Review (First)	1983	Ne Merit-86.420 Last offr-87.961
(g)	Mar 2013 Review/Defer/Withdrawal cases	Special Review (Fiinal)	1984	NE Merit-86.485 Last offr-87.891

Conclusion

40. In view of the above consideration we conclude that the Respondents were justified in including the criteria reports earned in the rank of Maj as part of the reckonable profile of the applicant for

his fresh consideration by No-2 Sb in Apr 2009, and that this process has been applied across the board for all officers considered in this SB. We also conclude that the pro-rata vacancies for No-2 SB of Apr 2009 have been calculated by the three year 'rolling block' methodology based on the implementation of the AVSC Report and the requirement of reducing the age profile of commanders at all levels, and that this has been done with the approval of the competent authority. There is equitable satisfaction level amongst 1981,1982 and 1983 batches of Arty. The applicant has an overall 'Above Average' profile and he has not been empanelled because of his overall comparative merit amongst those considered.

41. The OA is accordingly dismissed.

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

(JUSTICE RAJENDRA MENON)
CHAIRPERSON

(LT GEN P.M. HARIZ)
MEMBER (A)

/ashok/