

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

OA 1531/2022

Brig Udai Jawa ... Applicant  
Versus ... Respondents  
Union of India & Ors.

For Applicant : Mr. Rajiv Manglik, Advocate  
For Respondents : Mr. Anil Kumar Gautam, 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 2007, the applicant has filed this OA challenging his non-empanelment to the rank of Major General by No.1 Selection Board (No1 SB), the orders dated 22 Jan 2013 and 15 Oct 2021 granting him partial redress in CRs and non-detailment of the applicant for career course of Higher Command Course (HCC)/Higher Defence Management Course (HDMC). The applicant prays for following reliefs :

*(a) To call for the records of all the No 1 Selection board held for consideration of the applicant for the rank of Maj Gen, files pertaining to consideration of statutory complaints dated 04 May 2012 and 27 Feb 2021 and the complete ACRs of the applicant and declare the action of the respondents as unjust, arbitrary and illegal; and*

*(b) To quash and set aside order dated 15 Oct 2021 and 22 Jan 2013 barring the portions which grant the partial redressal; and*

*(c) To quash and set aside the result of No 1 selection board qua the applicant considering the applicant for the rank of Maj Gen; and*

*(d) To quash and set aside the early CR for the period 07/06 to 07/07 as technically invalid and also not commensurate with the performance of the applicant; and*

*(e) To quash and set aside ACR for the period 07/18 to 04/19; and*

*(f) To direct the respondents that the applicant is entitled for the marks allocated for HCC/HDMC while considering the case of the applicant for future promotion and detailment on career courses; and*

*(g) To direct the respondents to consider the applicant by No 1 SB with the changed profile and if found fit to promote the applicant to the rank of Maj Gen and grant all consequential benefits of the rank of Maj Gen including pay and allowances and seniority; and*

*(h) To pass such other and further orders which their lordships may deem fit and proper in the existing facts and circumstances of the case.*

2. The applicant was commissioned into the Indian Army in Infantry on 16.12.1989 and is a 1989 Batch General Cadre Officer. He has been considered for promotion to the rank of Major General by No 1 SB in three chances. However, in his first two considerations as Fresh Case and First Review Case in May 2020 and Oct 2020 respectively, he was held to be not empanelled and in his third look as Final Review Case in Oct 2021, he was withdrawn.

3. He submitted a Statutory Complaint dated 04.05.2012 against CR 09/06-07/07, which was examined, and he was granted partial redress by expunction of assessment of SRO at Para 24(c) of the aforesaid CR, while all other contentions were rejected.

4. Subsequently, the applicant submitted another statutory complaint dated 27.02.2021 against his non-empanelment to the rank of Maj Gen by No. 1 SB held in May 2020, and challenging his CRs 07/18-04/19 and 07/06-07/07, wherein the applicant was again granted a Partial Redress in way of expunction of assessments of IO & RO in CR 07/18-04/19 in QsAP at Para 12(c) - 'Selflessness and Setting Personal Example' and Para 12(d) - 'Integrity and Moral Courage' on grounds of inconsistency, while rejecting other contentions mentioned in the Stat Complaint. Aggrieved by the aforesaid rejections, and non-empanelment to the rank of Maj Gen, the applicant has approached this Tribunal.

5. Learned counsel for the applicant submits that due to his hard work and dedicated service in all his assignments and excellent results in career courses, the applicant has been found fit for promotion to higher ranks and the performance of the applicant can be judged from the mere fact that the

applicant has been awarded COAS Commendation Card thrice for his devotion to duty, while he has also been entrusted to command 18 Kumaon Regt and later raise a new unit, 3 Naga Regt.

6. With respect to the issue of preliminary objection of delay in challenging the ACR for the period 07/06-07/07, it is submitted by the applicant that the applicant had filed OA 130/2013 challenging the same, but since the applicant was promoted to the rank of Brigadier, during the pendency of the OA, the OA was rendered infructuous vide order dated 05.08.2014 giving liberty to the applicant to file afresh raising all concerned grounds when need arises.

7. On the issue of partial redressal granted by the Competent Authority in Para 12(c) and Para 12(d) of gradings by IO and RO in ACR 07/18-04/19, it is submitted by the applicant that the qualities of Vision and Conceptual Ability, Selflessness & Setting Personal Example, Integrity and Moral Courage are basic inbuilt qualities of any prudent man and it cannot be assessed and stated to be inconsistent unless these qualities have been assessed with biased and subjective mind, wherein once these qualities have been assessed with subjective mind, it cannot be said or imagined that the other

qualities as assessed by the reporting officers are objective and the entire ACRs for the said period are mandatorily required to be set aside.

8. With respect to the ACR for the period 07/06 to 07/07, it is submitted by the applicant that the same is technically invalid, as under Para 32 of the AO 45/2001/MS, wherein the ACR can be initiated only with the prior permission of SRO in case the office reported upon is subjected to disciplinary proceedings when the appointment for which the ACR is initiated is being held by the ratee during such proceedings.

9. Elaborating the relevant background, it is submitted by the applicant that the ACR for the period 26.07.2006 to 16.07.2007 was initiated on 17.09.2007 when the Army Rule 180 was already invoked against the applicant, in a Court of Inquiry ordered on 24.07.2007, and thus, the permission of SRO for initiation of ACR was mandatory, which has admittedly not been obtained.

10. It is elaborated by the applicant that the Court of Inquiry was ordered to investigate the circumstances and pinpoint the responsibility under which one ALS, containing rations, was impounded by SWC Intelligence Unit, and it is

trite fact that in such circumstances, the Commanding Officer is to be held responsible, which in this case was the applicant. Thus, it is bound to affect the minds of reporting officers, especially when the applicant was awarded Non-Recordable 'Censure' by the RO on 17.04.2008.

11. It is further submitted by the applicant that the aim of seeking permission from the SRO as enshrined in Para 32 of the aforesaid RO is to ensure that the ACR is objective and the due date of reporting period since the mind with which the ACR is written is affected on the date of writing the ACR, and thus, in these circumstances, the ACR for the period 07/06-07/07 is technically invalid.

12. It is the grievance of the applicant that after being granted redressal, he was not considered by the review board for detailment on HCC/HDMC course, and as a result has not got the weightage of 0.5 marks in the No.1 SB as per policy letter dated 23.12.2017 and the applicant has lost on the said 0.5 marks while being considered in May 2020 by No. 1 SB, wherein the Respondents have cited the reasons for non-consideration for HCC as policy constraints as per Para 11 of the policy letter dated 28 Jun 2013 i.e. Promotion Zone Ban.

13. With respect to the aforesaid issue of 'promotion zone ban', it is submitted by the applicant that the 'promotion zone ban' as envisaged in the policy letter is taking away the right of the officer for level playing field as he is deprived for the 0.5 marks, which his counterparts are entitled, and that the circumstances which led to the change in profile of the applicant due to expunction given by the respondents while disposing off the statutory complaint on 22.01.2013 is beyond the control of the applicant, and it was only due to non-proper scrutiny of the ACR by the Respondents themselves initially and the applicant cannot be made to suffer such lapses of the respondents.

14. Per contra, learned counsel for the respondents submits that the Army has a pyramidal structure and the vacancies for promotion to higher ranks are limited. The promotion boards select the best officers from a particular batch who are considered based on the Confidential Reports, performance in career courses, Honours and Awards and overall service profile which are considered for drawing a merit list.

15. Placing reliance on the aforesaid argument, learned counsel submits that in case any officer gets relief through the mechanism of Statutory/Non Statutory complaints he is

entitled to Special Consideration with the dispensations affecting the changed profile, and that the Outstanding grading of '9' is awarded based on the exceptional performance of the ratee officers and cannot be claimed as a right.

16. Arguing on the issue of award of marks in CR, learned counsel submits that it is solely based on the assessment by the Reporting Officers who have observed the officer's performance during the period of report and thus are competent for objective assessment and that such assessments fall outside the purview of judicial review unless the Confidential Reports are technically invalid or in contravention to rules and regulations or a bias/arbitrariness is clearly established to the satisfaction of the Court.

17. With respect to the ACR for the period 07/06-07/07, it is submitted by the respondents that the applicant was granted partial redressal by the Competent Authority by way of expunction of assessment of SRO in the said CR, and that the applicant is seeking to re-agitate the same CRs in respect of which partial redressal was granted vide order dated 22.01.2013, wherein the applicant is seeking to

re-open an issue that had already attained finality on 22.01.2013.

18. It is elaborated by the respondents that while the applicant became a subject of disciplinary case on 24.07.2007, however, the period of CR earned on unit move as CO 18 KUMAON was from 19.09.2006 to 16.07.2007, and thus, on due date of Early CR, the applicant was not a subject of the disciplinary case, and therefore, the provisions mentioned in Para 32-41 of the AO 45/2001/MS are not applicable in the instant case and SRO's permission was not required prior to initiation of Early CR and the same was accepted being technically valid as per extant policies and instructions.

19. With respect to the consideration of applicant for HCC/HDMC, it is submitted by the respondents that the applicant was considered three times for nomination in HCC & equivalent courses in the years 2010, 2011 and 2012 respectively as per the applicable policy and the non-detailment of the applicant was due to his OAP and not attributed to his impugned ACR for the year 07/06-07/07.

20. With respect to the ACR for the period from 07/2018-04/2019, it is submitted by the respondents

that the aforesaid ACR was earned by the applicant in the rank of Brigadier, HQ SFC, and the same was examined in terms of the Army Order/Policies in vogue, and was found to be technically valid and well corroborated with pen-picture except the part wherein the applicant was granted partial redressal.

21. With respect to the promotion, it is further submitted on behalf of the respondents that Hon'ble Supreme Court has held that the courts should not substitute the findings of the Selection Boards by their own judgment; placing their reliance on the following cases:

- a) *Union of India Vs Lieutenant General RS Kadyan, (2000) 6 SCC 698*
- b) *Major General IPS Dewan Vs Union of India and Others, (1995) 3 SCC 383,*
- c) *Air Vice Marshal SL Chhabra, VSM Vs Union of India, 1993 Supp(4) SCC 441*
- d) *Major Surinder Shukla Vs Union of India and Others, (2008) 2 SCC 649.*

### Consideration

22. We have heard the submissions of learned counsel on behalf of both parties and carefully perused the material placed before us including the pleadings, Confidential Report Dossiers and Statutory Complaints of the applicant. On a

perusal of aforesaid documents and pleadings on record, we frame following issue for our adjudication:

(i) Whether the CR of the applicant for the period 07/06-07/07 is technically invalid on the ground that the permission of SRO was not taken before initiation of the early CR, and thus, in contravention of Para(s) 32, 34, 35 of the AO 45/2001/MS ?

(ii) Whether the applicant is entitled for another consideration for HCC/HDMC in view of his reformed profile, post partial redressal being granted by the Respondents as per order dated 22 Jan 2013.

(iii) Whether the CR of the applicant for the period 07/18-04/19 is non-objective, biased and technically invalid on ground of professional differences which arose between the applicant and his IO for the CR period ?

23. To answer the first question regarding technical validity of the CR 07/06-07/07, we find it essential to examine the relevant contents of AO 45/2001/MS wherein Paras 32, 34 and 35 are reproduced below:-

*“32. CRs will be initiated on all officers under disciplinary proceedings, subject to following conditions being met:-*

*(a) The disciplinary proceedings are completed within the reporting period. Ratee under this provision is also entitled for a delayed CR, if reasons for delay are those other than the disciplinary case.*

*(b) In case, disciplinary proceedings are not completed within the reporting period and the officer continues to discharge his official duties for the appointment posted the CR will be initiated with prior permission of the SRO. It will be ensured that such CRs are objective and do not contain reference to the officer's involvement in the disciplinary case.*

*33. If the officer continues to remain under a disciplinary case during the reporting year, no CR will be initiated and a NIR will be forwarded to the MS Branch, provided the officer has not been initiated and a NIR will be forwarded to the MS Branch, provided the officer has not been discharging his official duties for the appointment posted.*

*34. An officer will be considered to be the subject of a disciplinary case with effect from the earlier of the following two dates:-*

*(a) The date on which a Court of Inquiry is ordered involving his character or military reputation (invoking of Para 180 of Army Rules), or*

*(b) The date on which formal cognizance of an offence is taken against him.*

*35. In case, the date on which cognizance was taken is, on or after the due date of initiation of CR, endorsement by affected reporting officers in respect of those CRs, which have not been initiated and processed to the next level may be debarred by the SRO. The CRs which are already initiated before the date of taking cognizance, will be commented upon for objectivity, by the higher reporting officers and all such CRs will be endorsed by the SRO. However, CRs having reached the MS Branch without the endorsement of the SRO, may be accepted without SRO's endorsement, as per procedures of MS Branch.*

*(emphasis supplied)”*

24. A detailed analysis of the aforesaid Para(s) shows that when an officer is subject to disciplinary proceedings, there are three conditions which are required to be fulfilled. Under the second situation enshrined in Para 32(b), which is closely relevant to the instant case is that when the disciplinary proceedings are not completed within the reporting period and the officer continues to discharge his official duties for the appointment posted, the CR will be initiated with the prior permission of the SRO.

25. It is further emphasized in the aforesaid Para 34(b) that at all the levels of the ACR assessment, it will be ensured that the assessment in the CRs is objective in nature and must not contain any reference to the disciplinary proceedings pending against the ratee. A similar provision also resonates in Para 35 wherein, SRO in exercise of his power 'May' debar the initiation of CRs which have not been initiated after the day on which cognizance was taken. In the instant case, the SRO has chosen not to interfere into the process of initiation of the case, and therefore, we don't find any reason to consider his decision technically invalid.

26. In this background, we now proceed to examine the CR for period 7/6-7/7 from the CR dossier placed before us.

Additionally, we have also taken note of the order of this Tribunal dated 05.08.2014 in OA 130/2013 filed by the applicant challenging the technical validity of CR 7/6-7/7, wherein the said OA was withdrawn, on account of empanelment of the applicant to the rank of Brig.

27. We observe that the early CR in question covers a period from 19 Sep 2006 to 16 July 2007 with the reason for initiating the early CR is recorded as **"Ratee proceeded on posting with unit"**. We find that the CR form is submitted by the applicant to the IO on 16 July 2007 and the IO has initiated the CR on 17 Sep 2007. Similarly, the reviews by RO & SRO are dated 07 Nov 2007 and 17 Nov 2007 respectively.

28. We observe that the Staff Court of Inquiry was directed on 24.07.2007 to investigate the circumstances under which a vehicle loaded with rations belonging to the applicant's unit was impounded by combined team of South Western Command Counter Intelligence Unit (SWCCIU) and civil police of Matsya Nagar (Alwar) at 2140 hrs on the intervening night of 16 July 2007-17 July 2007.

29. We find that by the time the vehicle was impounded, applicant was already on the move to the new unit location, and he was no longer discharging his official duties for the

appointment for which the aforesaid early CR was initiated, and by the time Rule 180 was invoked against the applicant, he has already moved out with his unit.

30. At this moment, if we re-look at the first aspect of Para 32(b) of the aforesaid AO, in consonance with the facts of the instant case, we observe that wherein if the applicant would have continued to discharge his official appointment of Commanding Officer of 18 Kumaon under the same IO, and the disciplinary proceedings would not have been completed at that moment, the prior permission of SRO would have been required for initiation of CR.

31. We are of view that the objective of this provision is to ensure that during the pendency of the disciplinary proceedings, with applicant continuing to tenant the same appointment, under the same reporting officers prior to as well as post initiation of disciplinary proceedings, their assessment might get blurred by such disciplinary proceedings, and every quality required to be assessed during such assessment period will get coloured by such disciplinary proceedings.

32. However, in the present case, by the time Rule 180 was invoked, the applicant was no longer tenanted the same

appointment under the same reporting officers. It does not matter that ACR was initiated by IO and written by RO and SRO, subsequent to initiation of disciplinary proceedings, till it was for the period, wherein no disciplinary proceedings were in existence.

33. However, to cater to such situations, and to avoid blurred assessment, Para 32(b) provides for the second aspect, which mandates that it will be ensured that the CRs are objective, and shall not contain any reference to the officer's involvement in the disciplinary case.

34. In order to examine the objectivity of the aforesaid early CR of 07/06-07/07, we have examined the aforesaid CR, wherein we find that the CR under consideration is overall an "Above Average" report wherein the IO has graded the applicant with outstanding gradings in 12 qualities out of 22 with a healthy and laudatory pen picture.

35. It is essential to note that we find no reference to the incident of intervening night of 16.07.2006 & 17.07.2006, nor any such associated remark impacting the CR. A similar trend is also reflected in the reports rendered by the RO & SRO in their gradings and the pen pictures. We note that the expunction carried out at Para 24(c) is the quality of "vision

and conceptual ability” based on applicant’s statutory complaint dated 04 May 2012 and partial redress granted to him on 22 Jan 2013 was the only low rating in the entire CR.

36. Thus, in our considered opinion the quality of the rest of the CR is ‘above average’ in all the boxes earmarked for personal qualities, demonstrated performance variables and qualities to assess potential. Hence, we are of the considered opinion that the CR initiated was technically valid, and legal, in absence of any evidence of any bias or malafide on the part of any of the reporting officers, due to disciplinary proceedings pending against the applicant.

37. Having examined the technical validity of the CR and finding the same to be valid, we now examine the aforesaid early CR under consideration for its quality vis-à-vis CR profile of the applicant for which we find it pertinent to peruse the earlier CRs of the applicant to assess if there is any qualitative drop in the trend of the marking by various reporting officers. On a bare perusal of CR of the applicant for period 01 Sep 2005-29 Jan 2006 in the rank of Lt Col in Kumaon Regt Centre, we note that the applicant has been graded as ‘Above Average’ wherein the IO graded him outstanding in 15 qualities out of 22 with a box gradings of

'8' and a similar rating pattern has been adopted by the RO. The SRO has not reviewed the CR due to "inadequate Knowledge".

38. Similarly, on a brief look at another earlier CR for period 01 Jun 2004-30 Apr 2005 in the rank of Lt Col, we find that the applicant has been graded as 'Above Average' with outstanding grading, i.e. '9' in 16 qualities out of 22. Based on a similar exercise of analysis of the subsequent CRs, we observe that the gradings awarded by the IOs in all CRs are in similar trend with the earlier CRs prior to the CR 7/6 -7/7 and in the subsequent CRs, the applicant has been rated as outstanding by many of the reporting offices.

39. Thus, analysing the aforesaid early CR in question, it is evident that the incident of intervening night of 16.07.2007 and 17.07.2007 involving one ALS Lorry belonging to the unit commanded by the applicant being impounded by combined team of South Western Command Counter Intelligence Unit (SWCCIU) and Civil Police of Matsya Nagar PS, Alwar, would have influenced the quality of aforesaid CR 7/6-7/7 as the incident is within the period of reporting as far as the CR in question is considered.

40. Even if we take note of the factum that the incident occurred within the period of reporting and cognisance was taken thereof resulting into award of non recordable displeasure to the applicant by GOC 12 Corps on 17.04.2008 who was also in the Reporting channel of the applicant brings us to a subtle conclusion that while the report being relatively weaker than the CRs initiated prior to and those initiated after the aforesaid CR, it is more of reflective of the performance of the applicant during period of reporting, rather than the reflection of the disciplinary proceedings, even if the CR has been initiated and reviewed by the reporting officers at a later date. We note that there is no adverse rating or weak pen picture by any of the reporting officers which merit any further inference by us.

41. In the case of the *Union of India and others v. Lt. Gen. Rajendra Singh Kadyan and another*, the Hon'ble Supreme Court dealing with the issue of exercise of judicial review in such case, cautioned to the effect:

*"29. ... It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has*

*been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government."*

42. We find our resonance in the views expressed by this very Bench while passing orders in the case of Brig Vishal Mohanlal Murada Vs. Union of India & Ors. in OA 1256/2022 which reads to the effect:

*"16. .... It is our considered opinion that the courts are not in a position to assess the competence of the employee and over ride the assessment of the reporting officers to upgrade for Above Average (8) to Outstanding (9). We are neither privy to the performance of the employee nor the inter personal aspects of the organizational health. This aspect has been adequately answered by Honorable Supreme Court in the case of Union of India Vs Lieutenant General RS Kadyan (2000) 6 SCC 698 and Major General IPS Dewan Vs Union of India and Ors (1995) 3 SCC 383 (Supra). If the courts were to upgrade all above average (8) Confidential Reports to Outstanding (9), we will be swarmed by applicants seeking the intervention of courts for upgradation of their CR ratings which would cause gravious injury to the overall health of the Armed Forces and render the entire system of Confidential Report and Quantification System of Selection redundant. Thus we do not consider it prudent to upgrade the Confidential Report ratings through our judgment. For this, case of Brigadier Mandeep Singh Vs Union of India (OA No 905/2015) deserves mention wherein the Armed Forces Tribunal has noted :-*

*"Firstly, we would like to reiterate that the guidelines have no statutory effect. Thus it is clear that box gradings are assessments to be made by the Reporting officers who are in the best position to assess the officer in his individual qualities and also his performance when compared to his peers. They are legally entitled to do so and being responsible officers senior in the chain of Command to the applicant, are eminently competent to do so. Unless any clear infraction of rules, orders, regulations or instructions in the recording of the impugned CRS are brought to our notice, we would not be in a position to interfere in the matter in any way".*

*17. In a similar case of Union of India Vs SK Goel and Ors 2007; 14 SCC 641, the Hon'ble Apex Court has observed :-*

*"It has to be held that the Tribunal was in error in going into the question whether the applicant had been rightly graded as 'outstanding' in ACR for the years 1990-91 and 1991-92. The observations of the Tribunal that of the two 'outstanding grading' does not flow from various parameters given and the reports entered there in, cannot thereof, be upheld and are accordingly set aside".*

*Commenting further on the issue, the Apex Court held :*

*"Evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose".*

*18. Dwelling further on the aspect of examination of the other Confidential Reports of the applicant in the rank of Brigadier, we have once again observed that there is no bias or arbitrariness in any of the four reports examined and thus there is no cause of action therein. Similar impressions have also resonated in the disposal of the second statutory complaint by the Respondents. The entire CR profile of applicant has mix of Above Average (8) and Outstanding (9) box gradings by reporting officers. Since the ratee officer is not privy to the entire contents of the Confidential Report except for the part which he/she signs as read, most rating being Outstanding as perceived by the applicant are not true. In conclusion, we do not find any cause for us to affect an upgradation in the subject Confidential Report."*

43. Similar observations have made by this Tribunal in the case of *Brig Mandeep Singh* in OA 905/2015 while discussing the judicial review of CRs and the interaction between the reporting officers with the ratee which read to the effect :

*9. As far as adjudicating on the grading given in a CR is concerned, we would like to emphasize that the role of the courts on this account is restricted within a very narrow compass confined to bias, arbitrariness or illegality, Hon'ble Apex the case of UOI v. S.K. Goel, 2007: 14 sec. 641 has held as follows:-*

*"It has to be held that the Tribunal was in error in going into the question whether the applicant had been rightly*

graded as 'outstanding' in ACR for the years 1990-1991 and 1991-1992. The observations of the Tribunal that of the two outstanding grading' does not flow from various parameters given and the reports entered there in cannot therefore, be upheld and are accordingly set aside".

Commenting further on the issue, the Apex Court held:

"Evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose".

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12. As regards the issue of following the guidelines and the claim of the applicant that getting seven '9's in the individual qualities out of 11 would amount to predominance and the box grading should have been '9', we find no legal mandate to support the claim of the applicant. Firstly, we would like to reiterate that the guidelines have no statutory effect. Be that as it may, para 35(b)(1) of the box grading specifically states that box grading represents overall assessment of performance as well as potential for promotion. Para 35(b)(ii) states that the reporting officer must clearly differentiate between truly outstanding officers and others. Grading all officers outstanding would defeat the very purpose of appraisal system. Para 35(b)(ii) states that the box grading is not meant to be a mathematical average of the awards in indl qualities. The word 'predominance' heavily relied upon by the learned counsel for the applicant. It has no legal definition. The dictionary meaning of 'predominant' is 'present as the strongest or main element; having or exerting greater control or power'. On the other hand Oxford English Dictionary clarifies 'Outstanding' as 'exceptionally good' or 'clearly noticeable'. Box grading of seven '9 was predominant in the gradings made but only that each grading numbered more than the lesser gradings. Predominance demands eclipsing of the lesser gradings as insignificant, and it can be so only in a case where lesser grading is limited to one or two. Thus it is clear that box gradings are assessments to be made by the Reporting Officers who are in the best position to assess the officer in his individual qualities and also his performance when compared to his peers. They are legally entitled to do so and being responsible officers senior in the chain of Command to the applicant, are eminently competent to do so. Unless any clear Infraction of rules, orders, regulations or instructions in the recording of the impugned CRs. are brought to our notice, we would not be in a position to interfere in the matter in any

*way. Neither has the applicant brought any such infraction to our notice nor has he made out a case of malice or bias against any of the respondents. On the power of the courts to interfere in such matters, the Hon'ble Supreme Court in the case of Air Vice Marshal S.L. Chhabra v. UOI (1993 Supp (4) SCC 441 has stipulated as follows:*

*"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 grading of an officer".*

*In view of the above, we find no reason to interfere in the box grading of '8' given to the applicant in the impugned CRs."*

44. Accordingly, we are not inclined to set aside the entire CR 07/06-07/07 on the grounds of technical invalidity or not being commensurate with performance of the applicant as prayed for at Para 8(iv). It is clearly evident from the records that the incident occurred involving a vehicle belonging to the unit commanded by the applicant within the period of reporting. Therefore, we as a Tribunal cannot sit in appeal direct the superior officers to not take adverse notice of the happening and grade the applicant an 'Outstanding' grading.

#### **Issue No. 2**

45. In consideration of Issue No.2, it is now essential to analyze the prayer of the applicant to re-consider him for HC/HDMC consequent to grant of redressal on by 22 Jan 2013, for which we find it pertinent to take note of the Para

11 of MS Branch Policy letter of 28 June 2013 which reads as under:-

*11. Promotion Zone Ban. Officers will not be eligible for HCC/HDMC/HACC/NHCC if their promotion board is scheduled before 01 June of the year of the courses.*

A similar clause for Promotion Zone Ban also exists in the MS Branch Policy letter No 04485/MS Policy dated 11.11.2010 with identical wordings as quoted above.

46. As has been elaborated in the pleadings, we find that the applicant was considered thrice for nomination in HC and equivalent Courses in the year 2010, 2011 and 2012 and his non-detailment for the course was due to his OAP. On grant of partial redressal granted by MoD vide order dated 22.03.2013, there was a changed profile and accordingly he was eligible for further two looks in 2013 and 2014. While he was considered for HCC & equivalent courses in 2013 and not selected due to low order of merit, later on he became ineligible having come under Promotion Ban Zones as per Para 11 of the policy letters No 04485/MS Policy dated 11.11.2010 and dated 28.06.2013 respectively, for subsequent consideration.

47. At this moment, we note that the said CR was reviewed by the SRO on 17.11.2007, and non-recordable censure 'Reproof' was awarded on 17.04.2008. However, it was only after 4 years, the same was challenged vide Stat Complaint dated 04.05.2012, for which he was granted partial redressal. That apart, while we can consider that issue pertaining to downgrading of CRs could have arisen on non-empanelment to the higher rank, the issue of technical validity of the CR arises immediately when the said CR is initiated.

48. Subsequently, while the applicant filed an OA 130/2013 challenging the aforesaid CR, yet he did not pursue the same when he was held empanelled to Brigadier, wherein had he been empanelled for HCC/HDMC post the lifting of his promotion zone ban, he would have been sent for the aforesaid course, which he knew was extremely important for his promotion to the next rank, and that, it would have been much possible for him to be restored to a position. However, the issues were not agitated further, and the issue of consideration of HCC/HDMC post grant of partial redress in the aforesaid CR until now did not come for consideration before this Tribunal.

49. At this point, we find that the present dilemma has been dealt by this Tribunal in Maj Gen Jagjeet Singh Nanda v. UoI & Ors. [TA 10/2023 AFT PB; Date of Decision: 23.11.2023], wherein this Tribunal observed herein as under:

*26. In Hardev Singh Vs. Union of India & Ors. reported as (2011) 10 SCC 121, the Apex Court has held that an officer will be considered by the policy as applicable on the date of consideration. The relevant para is reproduced below:*

*"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. We would like to quote the decision of this Court in Virender S Hooda v. State of Haryana where this Court had held in para 4 of the judgment that:*

*'4.....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."*

*27. In Deepak Agarwal Vs. State of UP reported as (2011) 6 SCC 725, the Hon'ble Supreme Court observed as under:*

*"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "Rules in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284: 1983 SCC (LAS) 382] lays down any particular time-frame, within which the selection process is to be completed. In the present case,*

*consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment.*

*28. Similarly, the Hon'ble Supreme Court in Union of India Vs. Krishna Kumar, reported as (2019) 4 SCC 319, held that:*

*12. Recently in State of Tripura Vs. Nikhil Ranjan Chakraborty, reported as (2017) 3 SCC 646, another Bench of Hon'ble Supreme Court held that:*

*"9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in Deepak Agarwal [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725: (2011) 2 SCC (L&S) 175], in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24-11-2011."*

*29. The provisions for foreign assignments in the present case are governed by MS Branch policy dated 28.06.2013. An individual has to make a considered choice when opting for foreign assignment which has certain benefits and prestige attached to them. In this case the applicant has rendered a willing certificate dated 09.05.2014 stating that "I willingly and consciously accept any effect on my future career in terms of the following a) Non-placement/delay in placement on Criteria/Command appointment. (b) Non being adequately Exercised (c) Non-detailment on career courses/ subsequent courses. (d) Delay in assumption of higher rank till return to*

*India (e) Delay in subsequent promotion. Thus having made a considered and conscious decision knowing that in the intervening years the applicant's batch will be considered for NDC and for promotion by No 1 SB, the applicant cannot now claim to have been deprived of an opportunity.*

*30. Importantly, the applicant was considered as per the policy dated 23.12.2017 in his consideration by No 1 SB in Jan 2018 and he was empanelled. Thus, it is not now open to the applicant to challenge the very same policy as per doctrine of 'Approbate and Reprobate'. The Hon'ble Supreme Court in Union of India Vs. N Murugesan reported as (2022) 2 SCC 25 explained the doctrine as under:*

*26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party."*

*31. xxx xxx xxx xxx xxx*

*32. In view of the above consideration, we conclude that the applicant had made a considered choice to proceed on a foreign assignment knowing fully well that he was due for consideration for NDC and No 1 SB. Having rendered certificate dated 09.05.2014, he cannot now claim that his fundamental right for consideration for NDC has been denied. It is also concluded that the respondents have rightly not considered the applicant for NDC on his return, since he was already empanelled and this decision is in consonance with the*

*policy in vogue, which is uniformly applicable to all such similarly placed officers. We also find that no further interference is needed in the disposal of the statutory complaint. It is also seen that the applicant has been given fair consideration by SSB for promotion to the rank of Lt Gen including special reviews as eligible.”*

50. With respect to the discriminatory application of policy letters No 04485/MS Policy dated 11.11.2010 and dated 28.06.2013, being same in verbatim, we find it essential to refer to the observations of this Tribunal in Col Ajeet Ashok Deshpande v. UoI & Ors. [OA 1529/2016 AFT PB; Date of decision: 02.05.2017], reproduced herein as under:

*16. Regarding the applicant's claim for being considered for HCC/HDMC Courses, we are in agreement with the stand of the respondents that officers who are granted redressals in CRs. can be re-considered for HCC/HDMC only under the existing policies. As per the policies dated 11.11.2010 and 28.06.2013, one such mandatory requirement is that the officers should have minimum of five years residual service on the date of termination of the course and for the consideration during February 2017, the applicant should have been born on or after 02.03.1969. Since the applicant is born in July 1968, he has become overage for the consideration in February 2017 and is thus not eligible. No consequential benefits can be granted to the applicant as claimed by him. This has been amply clarified in AFT Chandigarh order dated 04.08.2015 in OA No. 1307 of 2013, Col. Pawan Singh Samyal v. UOI whose relevant portions are reproduced below:—*

*“11 Five years residual service as laid down in letter No. 04485/MS Policy dated 28.06.2013 (Annx MA/R-1) is an important facet, as the Higher Command Course is of one year's duration, with the aim to train officers for Higher Command and staff appointments. It is therefore only logical,*

*that they must have adequate residual service for the organization to utilize them gainfully.*

*12. Consequential benefits does not imply turning back the clock in such a manner, that the benefit be granted even if the benefit being so sought is against the existing policy..."*

51. We find resonance in the ratio of this Tribunal in *Col Pawan Sanyal (supra)* that consequential benefits do not imply turning back the clock in such a manner that if a benefit has to be granted, such benefit goes against the existing policy in vogue.

52. On the aspect of notional award of 0.5 marks for HCC/HDMC for consideration of the applicant by No. 1 SB, we are of the considered view that marks for a course can only be awarded after a candidate qualifies in the course and not merely, if found to be eligible to undergo a course for which marks are awarded for attaining a higher qualification.

53. Therefore, with respect to Issue No. 2, we are of the considered view that the applicant cannot seek the benefit of reconsideration for HC/HDMC and equivalent courses at this belated stage, being in contravention of the existing policy. Further, we do not find any merit in the prayer for consideration and award of marks for HCC/HDMC in the applicant's consideration by No 1 SB.

54. That apart, we made an extra effort to assess the results of No. 1 SB qua the applicant to reassure ourselves if the loss of award of 0.5 marks could have rendered the applicant non-promotable to the rank of Maj Gen. However, contrary to the same, on perusal of the Board Proceedings of No 1 SB scheduled on 27.05.2020, we observe that the last candidate approved for promotion had total marks of 95.111 whereas the applicant's marks was 92.500. Similarly, during the No.1 SB held on 26.10.2020, the last candidate selected for promotion had 95.300 marks and the applicants marks were 92.638. It is revealed from the No 1 SB Board Proceedings held on 20 Apr 2023 that the applicant had quantified marks of 93.088 as against 95.157 marks scored by the last candidate promoted. Thus, by far the award of 0.5 marks to the applicant does not facilitate his promotion to Maj Gen in any way.

**Issue No. 3**

55. Proceeding to examine the third question regarding tech validity, objectiveness and bias of CR for period 07/18-04/19, we have perused the CR placed before us by the respondents as a part of CR dossier. While challenging the

impugned CR, the applicant has submitted to the effect that there were some personal differences between him and his IO and thus, resultantly, he has received low rating by superior reporting officers.

56. We have also taken note of the Statutory Complaint of the applicant dated 27.02.2021 wherein he has challenged CR 7/6- 7/7 and 7/18-4/19. Restricting our discussion to CR 7/18-4/19, we find that the MoD has expunged the assessment of IO & RO on the grounds of inconsistency in the qualities of "*selflessness and setting personal example*" at Para 12 (c) and "*integrity and morale courage*" at Para 12(d) of CR. There is no endorsement by the SRO in the CR.

57. While comparing the impugned CR, with the CR for the previous period for 01/18 to 06/18, we observe that the CR for the previous period for 01/18 to 06/18 has been initiated and reviewed by the same officers as of the instant CR under consideration. We note that there is a drop in the instant CR 07/18-04-19 in comparison to the earlier CR for which the CR has been marked as "D" meaning 'Deflated' by the MS Branch during the internal audit.

58. Further, while comparing the CRs of the applicant with the earlier CRs earned in the same appointment in the same

rank of Brigadier, we observe that the applicant had been rated outstanding in all three CRs by IO & RO. We note that the RO who has reviewed the CR 7/17-1/18 had graded the applicant outstanding whereas on the contrary, he has downgraded his own gradings to Above Average in CRs 1/18-06/18 and 7/18 to 04/19.

59. It is pertinent to observe that while the MoD has granted partial redressal by expunctions of figurative ratings at Para 12 (c) and (d) of the CR by IO & RO, we are of the considered opinion that the CR in question is particularly in departure from the CRs earned by the applicant before and after this assignment wherein once again, he continues to be graded outstanding.

60. Considering that there is no adverse pen picture in the CR by IO or RO, we are of the concluding view that the impugned CR is not in consonance with the rest of the CR profile of the applicant which is a marked dip in the CR profile. Therefore, in the interest of justice, we are inclined to set aside the entire CR for the period 7/18-4/19.

61. That apart, we must iterate that we do not subscribe to the contentions of the applicant that the character qualities such as vision and conceptual abilities, selflessness, setting

person example, integrity and morale courage etc are basic inbuilt qualities and they cannot be inconsistent. It is our considered opinion that the observations of the reporting officers on above qualities are bound to be dependent on their assessment of the said qualities in the ratee and therefore, we are inclined to grant the freedom to assessing officers to assess their subordinate employee about the character qualities as demonstrated by the employee and their perception thereof for the period of reporting.

62. In light of aforesaid discussion, we direct that the entire CR for period 07/18- 04/19 be set aside and the applicant be considered by No 1 SB as a special review case with the revised CR profile. If approved, he shall be eligible for all consequential benefits.

63. In parting, we consider it essential to express our opinion on the contents of Para 11 of the MS Branch Policy letter dated 28.06.2013 on nomination of officers on HCC/HDMC and equivalent courses which debars a candidate from being nominated for the courses if he is within the promotion zone.

64. Reading this policy restriction in conjunction with MS Branch Policy letter No 04512/MS Policy dated 23.12.2017

titled "Quantification System of Selection" we have taken note of the factum that qualification on above quoted courses earns a benefit of 0.5 marks for promotion for Brig to Maj Gen. Even though the courses in question are generally supposed to be done in the rank of Colonel, before their promotion to Brigadier, there is no benefit of 0.5 marks granted for promotion from Col to Brig for the said course while an officer is considered by No 2SB, which ultimately defeats the purpose of such course itself. It is always possible that an officer might become Brigadier without HCC/HDMC. To the contrary, an officer might qualify for HCC/HDMC, yet not become Brigadier because such officers are not being awarded marks for the HCC/HDMC courses.

65. Thus, it is our considered opinion that even though a candidate is in the promotion zone and eventually promoted to the rank of Brigadier, denial of opportunity to undergo the course on the grounds of 'Promotion Zone Ban' tantamounts to denial of fair consideration to an employee for the next higher rank. Therefore, we are of the considered opinion that this disabling provision merits review by competent authority.

66. Consequently, this OA 1531/2022 is partially allowed to the extent of expunction of the entire CR for

period 07/18- 04/19, and subsequently, re-consideration by  
No. 1 SB.

67. This order shall be given effect to by the Respondents  
within four weeks of the receipt of this order.

68. Pending miscellaneous application(s), if any, stand  
closed.

69. No order as to costs.

Pronounced in the open Court on <sup>M H</sup> 24 day of February 2025.

(JUSTICE RAJENDRA MENON)  
CHAIRPERSON

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

/Ps/