

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

OA 2121/2023 WITH MA 3074/2023

Lt Col Anoop Pandey, SC ... Applicant
Versus
Union of India & Ors. ... Respondents

For Applicant : Mr Indra Sen Singh, Advocate
For Respondents : Gp Capt Karan Singh Bhati, Sr. CGSC

CORAM :

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

ORDER

MA 3074/2023

Keeping in view the averments made in the application and in the light of the decision in Union of India and others Vs. Tarsem Singh [(2008) 8 SCC 648), the delay in filing the OA is condoned.

2. MA stands disposed of.

OA 2121/2023

3. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant who is serving officer, being aggrieved by his non-empanelment for promotion to the rank of Colonel by No. 3 Selection Board (SB) and prays for the following reliefs:-

“(a) Call for the entire record of No.3 Selection Board proceedings held in Oct 2022 leading to the Applicant's non-empanelment for promotion to the rank of Colonel and, after perusal thereof, set-aside said selection board proceedings and the result thereof as communicated vide Army HQ letter dated 31.10.2022 (Annexure A-1, Pg38) so far as the same relate only to the Applicant:

(b) Set-aside Para 12 (f) of the impugned MS Branch Army HQ policy dated 23.12.2017 (Annexure A-2, Pg42), whereby the past disciplinary/administrative record of the officers for the entire reckonable period or at least for ten years are required to be placed before the Selection Board, thereby giving a retrospective effect to said policy and permitting the Respondents to take cognizance of the non-recordable censure dated 09.02.2017 awarded to the Applicant under the old DV Branch Army HQ policy dated 23.04.2007;

(c) Call for the entire service record/dossier of the Applicant and, after perusal thereof, set-aside the complete assessment of SRO including the 'Adverse Remarks (if any) in the Applicant's Confidential Report (CR) pertaining to period 25.03.2014 to 31.12.2014, the same being inconsistent with Applicant's overall profile, subjective as not performance based and unduly influenced by the two false & fabricated cases filed against the Applicant by Meerut Police of which the Applicant was subsequently exonerated completely and given a clean chit;

(d) Call for the entire service record/dossier of the Applicant and, after perusal thereof, set-aside any adverse/weak remark entered in the Applicant's dossier on the basis of any Int report or any other adverse report received against the Applicant pertaining to above-mentioned two false & fabricated cases filed against the Applicant by Meerut Police of which the Applicant was subsequently exonerated completely and given a clean chit with judicial approval;

(e) Call for the entire service record/dossier of the Applicant and, after perusal thereof, set-aside any other assessment in Applicant's CR dossier which are found to be technically invalid, subjective or inconsistent with Applicant's overall profile;

(f) Direct the Respondents to re-consider the case of the Applicant for promotion to the rank of Colonel by No. 3 SB as a Fresh Case on the basis of the Applicant's modified/updated record of service after setting-aside Applicant's impugned CRs as prayed for above;

(g) Direct the respondents that while so considering the Applicant's case afresh, no cognizance of Non-recordable Censure dated 09.02.2017 awarded to the Applicant as well as the Intelligence (IB) report or any uncommunicated adverse entry in Applicant's dossier pertaining to Applicant's involvement in any Police cases, whatsoever, would be taken by the Selection Board; and

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

Facts of the case

4. The applicant was commissioned into Infantry, The Rajput Regiment on 09.06.2007. During the course of the service he has been promoted up to the rank of Lt. Col along with his batch mates. Applicant was considered for the promotion to the rank of Colonel as

a Fresh Case in Oct 2022, however, he was held to be non-empaneled by the No. 3 SB.

Submissions on behalf of the applicant

5. Taking us through the service profile of the applicant, learned counsel for the applicant submits that the applicant during his deployment with in his unit (4 RAJPUT) at an altitude of 13000 Ft, has been awarded Shaurya Chakra (SC) on 26.01.2010 for showing exemplary courage and bravery in the face of enemy in the year 2008 and the name of the applicant was also recommended twice for award of Gallantry awards in the year 2021 and 2023.

6. Learned counsel submits that two false FIRs were registered against the applicant i.e. FIR No. 380/2011 at P.S. Civil Lines Meerut on 14.07.2011 for involvement in an incident of firing at another officer and FIR No.448/2011 at P.S. Inchauli-Meerut regarding illegal sale & purchase of stolen vehicles, and due to the lack of evidence and after investigation by the police, the applicant was exonerated from both the cases.

7. Deliberating on the issue of CRs, learned counsel for the applicant submits that the CR for the period 01.01.2012 to 31.12.2012 earned by the applicant at HQ 5 Sect Assam Rifles as GSO3 (Int) was badly spoiled and statutory complaint dated 06.05.2013 against the CR was rejected by Respondent No.1 (Union of India) vide order dated 19.05.2014. However, the applicant does not wish to raise the same in this OA as the

CR in question is out of his reckonable CR profile for consideration by No 3 SB.

8. Stressing further, learned counsel submits that the applicant was posted on deputation to 1 VIKAS, Special Frontier Force (SFF) and as a practice in vogue, an intelligence report was obtained from the IB (MHA). The IB Department sent the report based on the report received during the time when 2 FIRs were lodged and the applicant believes that IB Department sent the report to IG SFF based on the report sent by the Meerut police during the said period of lodging the initial FIR and instead, did not send the report after investigation report was submitted to the IB Department giving a clean chit to be applicant.

9. Learned counsel for the applicant further submits that based on fresh input received in favour of the applicant, the office of IG SFF wrote a letter to Joint Director IB, New Delhi to provide true facts about the police cases and furnish information whether that applicant was exonerated of the said charges. IG SFF also requested to reconcile its earlier report and provide IB clearance to the applicant for his retention in the SFF. However, the applicant was posted out from 1 VIKAS (SFF) to 58 Rashtriya Rifles w.e.f. 14.01.2015 as no communication was received from IB Department by HQ SFF.

10. Learned counsel also submits that the applicant before being posted out from SFF earned CR for the period 25.03.2014 to 31.12.2014 in 1 VIKAS (SFF) wherein IO rated him with overall

numerical grading above 8.7 with excellent pen-picture and he also believes that the RO has also rated him well but the SRO has downgraded the assessment to overall numerical box grading to '7' with even lower numerical grading in the QsAP columns.

11. Elaborating further, learned counsel states that applicant after being posted to 58 Rashtriya Rifles wrote a letter to MS Branch (MS-2) and DV Branch Army HQ to inform them about his exoneration from all the charges filed by the police earlier and request them that no further cognizance should be taken of the two false and fabricated cases and that the cases should be closed. Meanwhile, the Superintendent of Police Dist-Meerut had forwarded his report on 13.08.2016 to HQ 32 Inf Bde under whom the applicant was serving at that time which categorically stated that the applicant was innocent and according to the investigation carried out by police he was not involved and was wrongly implicated in those cases.

12. Learned counsel further submits that during Junior Command (JC) Course, he entered into an unpleasant altercation with another officer and was awarded 'Severe Displeasure', a Non-Recordable Censure dated 09.02.2017. The Censure was non-recordable and should not have had any adverse impact on the career of the applicant and hence he did not represent against the matter.

13. Learned counsel stresses that the applicant was considered by No 3 SB in Oct 2022 for promotion to the rank of Colonel as a Fresh case of 2007 batch with cut off CR as on 31.12.2021 and was not

empaneled despite his outstanding record of service. However, the adverse reports of two false and fabricated FIRs by Meerut police and the non-recordable censure dated 09.02.2017 had resulted in award of lesser Value Judgment (VJ) marks disproportionate to the applicant's overall quantified merit which was higher than, or at least equal to that of the last officer of his batch placed in the empaneled list in the order of merit.

Submissions on behalf of the Respondents

14. Per Contra, learned counsel for the respondents submits that the Empanelment/Non-Empanelment is based upon the overall profile of an officer and comparative merit within the batch as evaluated by the Selection Board. The recommendations of the Selection Board are only recommendatory in nature and not binding until approved by the competent authority i.e. the Chief of the Army Staff or the Central Government as the case may be.

15. With respect to the submissions pertaining to the SRO, it is submitted by the learned counsel for the applicant has made specific allegations against his SRO of having downgraded his CR for the period between 03/14 to 12/14 which if true, are only within his personal knowledge. Hence, the applicant should have made his then SRO, a party to the OA so that the SRO could have been provided an opportunity to answer the allegations labeled against him.

16. Learned counsel argued that as per policy in vogue, the past disciplinary/administrative record of the officers for the entire reckonable period or at least ten years are placed before the Selection

Board while assessing officers with disciplinary background which considers, the gravity and nature of offence and the service level at which the offence was committed and accordingly, evaluate the fitness of the candidates fitness for selection for holding higher rank.

17. Through a detailed counter affidavit, learned counsel for the respondents has elaborated the details of the consideration of the applicant for promotion to the rank of Col by No. 3 SB in Oct 2022 wherein he was considered as a Fresh case and the applicant stood non-empanelled due to his overall profiled low order of merit amongst all candidates of the batch considered.

18. Learned counsel for the respondents submits that the CR from 25.03.214 to 31.12.214 was analyzed in accordance with the extent of internal assessment norms and was found devoid of any inconsistency and accordingly, was accepted by the MS Branch.

19. Learned counsel further states that the applicant was non-empanelled for promotion; based on his overall profile, comparative merit vis-a-vis his batch mates weighed against the available vacancies for promotion.

Consideration

20. We have given our balanced consideration to submission of both parties and perused the documents related to redressal to the applicant, his Confidential Report Dossier and the Selection Board Proceedings of No 3 SB in which the applicant has been considered for promotion.

21. The questions for consideration in front of us are whether the impugned Confidential Reports in respect of the applicant have been appropriately considered for redressal by the respondents as per existing mechanism and whether he has been considered by No 3 SB as per policy for promotion to the rank of Colonel and if he is entitled to get relief as sought for in the above mentioned OA for reasons and grounds stated therein ?

22. It is pertinent to note that the Indian Army has a paramedical rank structure and the number of vacancies in higher ranks are limited. From the broad base of the pyramid, only those officers whose record of service within a particular batch are better, are selected to fill up the vacancies available in the higher ranks. All officers of a particular batch are considered together with same cut off ACRs and inputs and on the basis of individual profile of the officer and the comparative batch merit and they are either empanelled/not empanelled. Seniority in itself is no consideration before the SB for empanelment or non-empanelment.

23. In case any officer gets any relief through complaint etc in any CRs, after the SB has been held, he is entitled to a special corresponding consideration by SB with his changed profile, and in case, he is empanelled by such special consideration, his original seniority remains protected.

24. As per the extant policy, each officer is entitled to only three considerations for promotion to the selection ranks, i.e. fresh consideration, first review and final review. In case an officer is not

empanelled as a fresh case, but empanelled as a first review or final review case, he loses seniority accordingly vis-a-vis his original batch. After three considerations, if an officer is not empanelled, he is deemed to be finally superseded.

25. While considering an officer for promotion to a selection rank, the SB takes into consideration a number of factors such as war/operational reports, course reports, ACRs, performance in command and staff appointments, honours and awards, disciplinary background etc and not just the ACRs or one/few ACRs. Empanelment/non empanelment is based upon the overall profile of an officer and comparative merit within the batch as evaluated by the SB.

26. In Dalpat Abasaheb Solunke Vs. B.S. Mahajan [AIR 1990 SC 434], Hon^{ble} Supreme Court observed:

".....It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc."

27. In Union of India v. Lt. General Rajendra Singh Kadyan [2000 (6) SCC 698], Hon^{ble} Supreme Court observed as under:

".....Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. Maybe one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. 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 a decision has been observed correctly and not the decision as such.....”

28. Examining the scope of judicial review in cases pertaining to selection, Hon'ble Supreme Court in Surinder Shukla Vs. Union of India [(2008) 2 SCC 649] observed as reproduced:

“11. Considering the comparative batch merit, if the Selection Board did not recommend the name of the appellant for promotion to the rank of Colonel which appears to have been approved by the Chief of Army Staff, it is not for the court exercising power of judicial review to enter into the merit of the decision.....”

29. In this background, we now proceed to examine the applicant's profile, wherein we find it essential to refer to the Intelligence Bureau recommendations dated 12.06.2014 wherein the applicant's deputation to SFF was considered not advisable due to adverse inputs against him in their records and accordingly office of IG SFF addressed a communication dated 02.09.2014 to MS Branch, Army HQ recommending the reversion of the applicant to Army. However nearly at the same time Commanding Officer of the applicant recommended retention of the applicant through his DO letter dated 04.09.2014 to Commandant of his higher HQ explaining the entire incident of alteration of the applicant and alleged purchase of stolen vehicles and firing on vehicle of another officer of 4 RAJPUT for which two cases were registered against the applicant on 14.07.2011 and 16.08.2011. It was further explained to the higher authority that no evidence was found by the police after investigation and he was accordingly exonerated. The applicant has also placed before us a letter dated 10.09.2014 initiated by the

IG, SFF addressed to Joint Director, Intelligence Bureau to reconcile and reconsider the recommendation for deputation of the applicant to SFF based on facts on record. Further the applicant has also placed before us the communication dated 13.08.2016 from the office of SP City, Meerut confirming the innocence of the applicant and that the investigation has found no involvement of the applicant.

30. It is also essential to take note of censure awarded to the applicant by the Commandant, Army war College dated 09.02.2017 for entering into an altercation with another fellow officer attending the same course by way of a 'Severe Displeasure' which is governed by policy of AG's Branch, Army HQ vide their letter No 32908/AG/DV-1(P) dated 23.04.2007 which states to the effect at Para 6(d) :

<u>Authorities who can award censure</u>	<u>Type of Censure that can be awarded</u>	<u>Persons to whom awarded</u>	<u>Recording and Validity</u>
(a) to (c)	xxx	xxx	xxx
(d) GOC Corps DGAR, DGBR DGNCC (not recordable) below Lt Gen	(i) Severe Displeasure	Offr/JCO	Operable for three years from the date of Award. The censure will be removed from the dossier on completion of the operable period
	(ii) Severe Displeasure (Non recordable)	Offr/JCO	Not recorded in the Dossier
	(iii) Displeasure	Offr/JCO	-do"
(e) GOC Div/Area Comdt Cat 'A' Est, GOC HQ CIF, IGSFF Inspector Gen Assam Rifle (not below	(i) Severe Displeasure	Offr	Not recorded in the Dossier

Maj Gen)

(ii) Severe
Displeasure

JCO

Recorded for
three years in
the Dossier.
The Censure
will be removed
from dossier
on completion
of three years
from the date
of award.

(iii) Displeasure

Offr/JCO

Not recorded in
the dossier."

31. However, the policy was further modified vide AG's Branch letter of even No dated 11.08.2017 in which Para 8 which is relevant is reproduced below:

"8. Displeasure/Severe Displeasure. The authority to award censure, the type of ensure that can be awarded and its operative duration given below :-

Authorised who can award Censure	Type of Censure that can be Awarded	Recording and Validity
(a) Central Government	(i) Severe Displeasure	Permanently Recorded in the Dossier
	(ii) Displeasure	Permanently Recorded in the Dossier
(b) COAS	(i) Severe Displeasure	Permanently Recorded in the Dossier
	(ii) Displeasure	Permanently Recorded in the Dossier
(c) GOC-in-C Comd, C-in-C (Army) Andaman & Nicobar Comd, and C-in-C (Army) strategic Forces Comd	(i) Severe Displeasure	Operative for ten years effective from date of award
	(ii) Displeasure	Operative for ten years effective from date of award
	(iii) Displeasure	Operative for ten years effective from date of award
(d) GOC Corps, GOC Area, DG AR, DG BR, DG NCC, Commandant Cat "A" Est (not below Lt Gen), Dy C-in-C (Arm Strategic Forces Comd (not below Lt Gen)	(i) Severe Displeasure	Operative for ten years effective from date of award
	(ii) Displeasure	Operative for ten years effective from date of award

32. On a bare perusal of the letter dated 11.08.2017, we find it pertinent to note that that the communication does not differentiate between recordable and non-recordable

format the cert has been amended and offrs from now onward are reqd to furnish the Cert as per format all at Appx.

4.

XXXX

XXXX

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SD/-XXXXX
(Vinayak Saini)
Brig
Brig D & V (Discp)
For Adjutant General"

34. There is profusion of judicial authority on the proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. In Commissioner of Income Tax Vs. Vatika Township [(2015) 1 SCC 1] Hon'ble Supreme court, speaking through a Constitution Bench, observed as follows:

*"31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips vs. Eyre*[3], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law. 32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd*[4]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."*

35. Another equally important principle applies: in the absence of express statutory authorization, delegated legislation in the form of rules or regulations, cannot operate retrospectively. In Union of India Vs. M.C. Ponnose [1970 SCR (1) 678] this rule was spelt out in the following terms:

“The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.”

36. The principle has been affirmed in many decisions such as Hukum Chand Vs. Union of India [(1973) 1SCR896]; Regional Transport Officer Vs. Associated Transport Madras [(1980) 4SCC597]; Federation of Indian Mineral Industries Vs. Union of India [(2017) 16SCC186] and recently, in Union of India Vs. G.S. Chatha Rice Mills [(2021) 2 SCC 209].

37. Holding that the censure being ‘Non-Recordable’ cannot be recorded in the CR dossier of the applicant, we now proceed to examine the impugned CR of the applicant which is for period from 25 Mar 2014 to 31 Dec 2014 while the applicant was holding the assignment of Adm Officer of HQ SFF. We observe that there is no adverse remark of any kind by any of

the reporting officers in the impugned CR. All reporting officers have graded the applicant 'Above Average' with laudatory pen pictures and the individual qualities having a healthy mix of Outstanding and Above Average gradings. In fact, we note that the impugned portion of the CR endorsed by the SRO has no adverse grading whatsoever with a grading of '8' in the box and the pen picture records herein to the effect:

"Maj Anoop is physically fit. He is tactically and administratively sound. Overall an above average performance".

38. Thus, in view of the aforesaid findings, and with no reason to interfere with any of the portions of the impugned CR, we find that the prayer of the applicant with respect to the impugned CR is purely devoid of merit, in absence of any manifest arbitrariness.

39. Proceeding to evaluate the board proceedings of No 3 SB held from 10-22 October 2022 when the applicant was considered as a Fresh Case of Infantry 2007 batch, we find that the applicant is placed at Order of Merit 412 as against 204 vacancies set aside for Infantry. We also note that the censure of "Severe Displeasure" (Non-Recordable) has not been displayed on the Member Data Sheet (MDS) of the applicant in the Selection Board and therefore, we are of the view that the apprehensions of the applicant are misplaced. As regards the Value Judgment (VJ) Marks awarded by board members in

concerned No 3 SB, we note that he has been awarded marks which is in consonance with his Quantified Marks out of 95 and having viewed and compared his VJ marks against similarly placed candidates in the order of merit amongst his batchmates, the board members have awarded him high marks which is possibly attributable to his gallantry award. Therefore, we do not find any reason to conclude that the selection board has suffered from any bias against the applicant and it is our well-considered observation that the applicant has been non-empanelled for promotion squarely because of his low comparative order of merit amongst his batch mates.

40. In fact, we observe that during the pendency of this case, the applicant was considered by NO 3 SB on 25 October to 03 November 2023 wherein the applicant was considered as a Review case, the outcome herein as well is similar to the status of the applicant in the No 3 SB held in October 2022 as the applicant has not been found empaneled for promotion due to his low Order of Merit, i.e 406 as compared to 203 vacancies, and thus, we note that the VJ marks in his favour are high and there is no adversity and perversity or bias in the same.

Conclusion

41. In view of the aforesaid observations, we are of the considered opinion that present OA is devoid

of merit and thus, is liable to be dismissed.

42. Consequently, this OA 2121/2023 is dismissed.

43. No order as to costs.

44. Pending miscellaneous application(s), if any, stand disposed of accordingly.

Pronounced in the open Court on 13 day of January 2025.



(JUSTICE RAJENDRA MENON)
CHAIRPERSON



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

/akc/