

**ARMED FORCES TRIBUNAL CHANDIGARH BENCH AT
CHANDIMANDIR**

OA No. 167 of 2011

Lt Col PK Bura

.....Petitioner.

Vs.

Union of India & Ors.

..... Respondents.

**ORDER
11.10.2011**

Coram: Justice Ghanshyam Prasad, Judicial Member

Lt Gen H S Panag (Retd), Administrative Member.

For the Petitioner (s) : Col(Retd) N K Kohli, Advocate.

For the Respondent (s) : Ms. Renu Bala Sharma, CGC.

Lt Gen H S Panag (Retd)

1. The application under Section 14 of the Armed Forces Tribunal Act, 2007 has been filed in which the petitioner has prayed for the following reliefs :-

(a) Quash non empanelment of the applicant by No. 3 Selection Board held in Dec 2007 as intimated vide the impugned order;

(b) Summon the records, viz the ACR dossier of the Applicant and set aside the ACR for the period 01 June 2004 to 18 June 2005;

(c) Negative recommendations for promotion by the IO in the impugned report, including in the form of 'may be promoted' be also expunged being inconsistent with overall profile of

the applicant as also due to non communication being adverse input;

(d) Assessment of less than 8 in PQ/DPVs or QAPs by any of the Reporting Officers or negative recommendation for promotion that may have crept in the aforesaid report due to biased underassessment by the IO, may also be expunged and removed from record being inconsistent, subjective and not in congruence with overall career profile of the applicant.

(e) Direction to the respondents to consider the applicant for promotion to the rank of Colonel as a fresh case with original seniority based on his modified profile, i.e. after effects of the aforesaid ACR have been removed in entirety.

2. Very brief averments are that the applicant is third generation from his family to have joined the Army. The applicant was commissioned on 14 Dec 1991 into 1/1 GR. He has served with the unit, on Staff and on ERE in varying terrain including intensive CI Ops and under difficult circumstances. Out of his total commissioned service of about 16 years, he has served maximum (about 11 years) with the regiment. On completion of CI tenure, he was posted to his unit in Dec 2007 as 2IC presumably to take over command of the unit in his own turn after declaration of result of the No. 3 Selection Board. His non-empanelment came as rude shock to the applicant. He states that he has all along been commended by his Superiors and Reporting Officers for the performance of his duties and was never found wanting in any quality. In all mandatory

qualities and maturity, to the best of his recollection, he has been assessed outstanding by the IO. He has no disciplinary or administrative award of any sort from any authority and he has never received any counseling or advice, verbal or written or any weak or adverse or advisory remark from any of his reporting officers.

3. It was further stated that the CRs earned by him in the rank of Maj and Lt Col, which are taken into consideration as reckonable CR profile for consideration by No. 3 Selection Board as per policy, to the best of his recollection, he was never awarded any 7 or below either in Over all Box or in any of the PQ DPs. All along he has been assessed with 9 or 8 by the IO in the open portion with glowing pen pictures. The applicant states that to the best of his recollection, in his reckonable profile, the applicant has earned a total of nine CRs. All the IOs in these CRs besides grading him Outstanding/Above Average in the pen picture that he was an Outstanding Officer and an asset to the organization. He is confident that the RO and SRO in the above mentioned reports would also have assessed him on the similar lines. However, he feels and apprehends that possibly his non-empanelment could be due to some aberration/inconsistent assessment recorded by some reporting officer(s) in closed portion of his reckonable period, which if tested in the light of his overall profile would clearly turn out to be inconsistent and subjective. He further submitted that he never had any difference of view with any of his reporting officers, except one incident which he can recall that he had with one of his IOs, i.e. Col CV Ajay during the period covering his ACR from **01 June 2004 to 18 June 2005**. The applicant states that he was posted to 4/1 GR on 03 Apr 2003 to earn his

AE Reports. He was appointed as 'D' Company Commander wef 04 Apr 03 to 28 Jan 2005 (Annexure A-1). His first criteria report was an ICR covering the period 01 June 2003 to 15 Oct 2003, which was initiated owing to posting out of Col DK Sharma, the then IO. The applicant was assessed over all '8' by him with many '9's and less '8's in PQDP. He is sure that the IO, RO and SRO would have assessed him equally well in the closed portion. The next criteria CR covering the period 15 Oct 2003 to 31 May 2004 was initiated by Col CV Ajay, the then CO. Again the applicant was assessed over all '8' by him with many '9's and less '8's in PQDP. The applicant is sure that the IO and RO and SRO would have assessed him equally well in the closed portion. But during the period of third criteria report, i.e. 01 June 2004 to 18 June 2005, an incident involving the initiation of ACRs of NCOs covering the period 01 Oct 2003 to 30 Sep 2004 of 'D' Company, which the applicant was commanding, took place. Col CV Ajay for reasons best known to him got the ACRs of all the NCOs (barring the CR of one NCO of D Company initiated by Lt Rakesh Chib. The young officer was not even posted in 'D' Company during the said period ie. 01 Oct 2003 to 30 Sep 2004. In fact the said officer was posted as D Company 2IC only on 04 Dec 2004. Till then he was posted as OC 'A' Company (Annexure A-3). He objected to this action of the CO and told him that his action had undermined his position as Company Commander in the eyes of the NCOs of the Company. He brought it to his notice that he had initiated the ACR of one NCO and non-initiation of the CRs of other NCOs of the Company is fraught with serious implications being contrary to SAO, and some NCO could question the same at a later stage. The CO

did not like this at all and he told the applicant in no uncertain terms that it was his Command and the applicant was no one to question this. The CO apparently took the above as an affront to his authority. A few months therefore the applicant's ACR had become due. Although the IO in the open portion of his ACR has given him Above Average but he apparently harmed him in the closed portion ie. QAP by awarding him lukewarm grading i.e. '7'. If it is so, then the same would be highly subjective and inconsistent for the following reasons in addition to the incident mentioned above. The same CO in the previous report covering the period 15 Oct 2003 to 31 May 2004 had given the applicant better grading in open portion as compared to relatively lower grading in the next report. The petitioner further averred that this was probably to render and justify a lukewarm grading in QAP. But he was serving in the same environment and his performance had not gone down in any manner. The IO apparently took advantage of the fact that the applicant had been posted out from the unit wef. 19 June 2005, and was not present in the unit thereafter. He thus took advantage of his absence. He had submitted his CR at the time of his posting out on 18 June 2005. The CO was present in the unit. Yet for inexplicable reasons he did not initiate the same before the applicant left the unit in clear violation of Para 131 of AO 45/2001. Instead, he deliberately delayed its initiation and communicated the extracts to the applicant by post much later vide his letter dated 07 Sep 2005. Even otherwise, as he recollects, the IO had written in the pen picture that the **applicant is an excellent regimental officer and commanded the Company with vigor, focus and motivation despite being a LMC and**

thus is an asset to the org or words to that effect. That being his performance he could not have harmed him 'on the sly' in closed portion because it is well known in the environment that low awards in QAP significantly affect the promotion prospects of officers. In case he has graded the applicant lukewarm in QAP then it would be a case of gross subjectivity being contrary to pen picture and in utter variation to the assessment in PQDP. As per ACR recording policy, an assessment including QAP has to reflect the actual, ie. real performance of officer concerned during the reporting period. When the CO forwarded the CR in question to Brig Shakti Prashad, the then RO, self appraisal of the applicant was also forwarded as per policy and practice vide letter dated 07 Sep 2005. A close examination of self-appraisal and the figurative assessment and en picture given by the IO in the CR in question would establish clearly that the applicant had performed exceedingly well during the reporting period (Annexure A-4). He had preferred a Statutory Complaint dated 22 Jul 2010 against his non-empanelment which has not been decided despite lapse of over six months.

4. Written statement has been filed on behalf of the respondents in which it has been averred that Army has a pyramidal rank structure. The number of vacancies in the higher ranks are less. 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 higher ranks. As per the promotion policy, promotions in the Army upto the rank of Maj were by time scale till 16 Dec 2004. As per the new promotion policy no Selection Board is held for promotion to the rank of Lt Col as

promotions to the rank of Lt Col as promotions to the rank of Lt Col is by time scale. That for promotion to the rank of Colonel three looks are given for promotion by No 3 Selection Board. All officers of a particular batch are considered together with same cut off ACR and inputs and on the basis of individual profile of the officer and batch merit, they are approved/not approved. Seniority in itself is no consideration before Selection Board for approval/non approval. In case, if any officer gets any relief through complaint etc in any ACR after the Selection Board has been held, he is entitled to a special corresponding consideration by the Board with his changed profile, and in case, he is approved at such special consideration, his original seniority remains protected. As per the applicable policy, each officer is entitled for three considerations only for promotion to the selection rank of Colonel and above i.e. Fresh Consideration, First Review and Final Review. In case, an officer is not approved as a Fresh Case, but approved as a First Review or a Final Review case, he loses his seniority accordingly vis-à-vis his original batch. After three considerations if an officer is not approved, he is deemed to be finally superseded.

5. The respondents averred that it is figment of imagination of the applicant that he was posted as Second-in-Command (2IC) presumably to take over command of his own unit. He has "High to Above Average" course gradings and is a non psc/Senior Command qualified Infantry officer with sprinkling of 7s in many Confidential Reports. The non-empanelment was based on his overall profile vis-à-vis profile of his batch mates and the limited number of vacancies available for promotion in the higher ranks. He

was only assessed "Outstanding" twice by Initiating Officer alone which are not corroborated by the Reviewing Officer and the Senior Reviewing Officer. The applicant possesses "Above Average" profile with sprinkling of 7s in reckonable profile Confidential Reports including the shown portion. It was further clarified that in pre-reckonable profile, the applicant has been assessed even 6(High Average) in box gradings and 7s(Above Average) by the Reporting Officers in various Confidential Reports and reiterated that applicant's profile is not as projected by him. He was fairly considered by the No. 3 Selection Board and was not found fit for empanelment. In the impugned Confidential Report covering the period from 01 Jun 2004 to 18 Jun 2005, he was assessed "Above Average" with numeric 8 and 9 in the Personal Qualities(PQs), Demonstrated Performance Variables (DPVs) and the Qualities to Assess Potential (QsAP) with positive recommendations for promotion. The applicant was admitted in different Military Hospitals for a considerable period and the D Company in his absence was looked after by Lt Rakesh Chib. The applicant wants to cover his inefficiency of non-initiation of Confidential Reports of the NCOs in time and has not disclosed his absence due to hospitalization which necessitated initiation of reports of affected NCOs. Hence timely action was taken by Col CV Ajay, the Commanding Officer and Lt Rakesh Chib was ordered to initiate Confidential Reports of the NCOs who had looked after the D Company in absence of the applicant. Accordingly he was asked to initiate CRs of the NCOs being due on 01 Oct of the year.

6. We have considered the submissions of the learned counsel for both the parties as also the Dossier of the applicant. We analyzed in detail

the impugned CR (01 Jun 2004 to 18 Jun 2005) in relation to his overall career profile. We also examined his entire career profile for any aberrations.

7. The applicant has just Average course gradings. He did not qualify for Defence Services Staff College which is based on a competitive examination. He was also not selected for the Senior Command Course for which officers are selected based on their CR merit. As far as the impugned CR is concerned, it is a clear Above Average CR with Box Gradings of 8 by the IO and the RO. In the PQs/DPVs also both the IO and RO have given him a grading of 8 or 9. In the QAP grading also, he has been graded 8 both by the IO and the RO. Both in the open and the closed portion which is not shown to the ratee, he has been graded above average. The SRO has not endorsed the impugned CR due to inadequate knowledge of the ratee. Thus, the officer's contention that the IO was biased against him has no merit.

8. The applicant has further prayed that any grading of 7 given Box grading or in PQs, DPVs and QAP in the entire reckonable profile should be expunged. The contention of the applicant has no merit, as gradings of 7 and 8, are both considered Above Average as per the policy. A ratee is assessed based on his performance during a specific year by IO, RO and SRO. It is a matter of objective judgment whether a person graded Above Average shall be given a grading 7 or 8. The system has inbuilt safeguards of a three tier assessment to cater for bias and aberrations. The applicant cannot contend that he only deserves a grading

of 8 or 9. Aforesaid, notwithstanding, we scrutinized his entire career profile and found no aberrations that merit our intervention.

8. Thus we do not find any force in the petition and the same is dismissed.

(Justice Ghanshyam Prasad)

**11 .10.2011
s.n.s**

{{Lt Gen HS Panag(Retd)}}