

FORM NO – 21
(See Rule 102 (1))

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO: O.A. 106 OF 2012

THIS 17TH DAY OF JULY, 2014

CORAM: Hon’ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon’ble Lt. Gen. K.P.D.Samanta, Member (Administrative)

Colonel Sanjay Srivastava(IC-42361A)
Aged about 49 years
Son of Major General (Retd) S.N. Srivastava,
111 Sub Area Provost Unit,
Pin 908111, C/O 99 APO.

..... Applicant

- Versus –

1. Union of India
Service through the Secretary,
Ministry of Defence,
Government of India,
South Block, DHQ P.O.
New Delhi-110 011.
2. The Chief of Army Staff,
Army Headquarters, South Block,
DHQ P.O., New Delhi-110 011.
3. The Military Secretary,
Military Secretary’s Branch,
Army Headquarters, South Block,
DHQ P.O., New Delhi-110 011.
4. General Officer Commanding in Chief,
Headquarters, Central Command,
Lucknow – 226002.

5. General Officer Commanding,
Uttar Bharat Area,
Bareilly. (UP).
6. Chief Engineer Bareilly Zone,
Station Road, Bareilly (UP).

.....Respondents

For the applicant: Mr. Suman Basu, Advocate

For the respondents: Mr. Mintu Kumar Goswami, Advocate

O R D E R

Per Hon'ble Lt. Gen. K. P. D. Samanta, Member (A):

Being aggrieved by his non-promotion to the rank of Brigadier, the applicant, who is a serving Colonel in Indian Army, has filed this application u/s 14 of the AFT Act, 2007 seeking to redress his grievance.

2. Shorn of all unnecessary details, the factual matrix of the case of the applicant is that after passing out from National Defence Academy and Indian Military Academy with flying colours, he was commissioned in the Indian Army in the Corps of Engineers on 15 Dec 1984. During the course of service, he attended various courses including "Engineer Officers' Degree Engineering" course at CME, Pune, from 1989 to 1992. After obtaining his B.Tech degree, he appeared for competitive examination for undergoing M.Tech course through service channel and was nominated. Accordingly, he pursued M.Tech course from IIT, Chennai during the period Jul 1993- Jan 1995. The detail of the courses attended by the applicant is tabulated in page 5 of the application.

3. According to the applicant, the turning point of his professional career came when question of posting after obtaining M.Tech degree arose. He wanted a posting in non-MES organization but ignoring his request, the authorities posted him in the office of Chief Engineer, Bareilly Zone, a MES unit. Accordingly, he joined at Bareilly. After joining there, the applicant made efforts to do Junior Command Course (JC) and then Defence Services Staff Course (DSSC), as, according to him, passing of these courses would help him in his professional career. However, his requests in this regard were turned down by the local authority; rather, he was advised to drop the idea of appearing in DSSC and JC. According to the applicant, some similarly situated officers like Capt V.Menon, Capt. Sanjay Singh, after doing M.Tech degree, were posted to non-MES organization whereas he was posted in MES against his wishes and he was also not allowed to undergo DSSC and JC courses. Even the vacancy for JC course allotted for him by the HQ Central Command was surrendered and the applicant was told that he would not be allowed to appear in DSSC course by the then Chief Engineer of Bareilly Zone. Being aggrieved, the applicant represented his case before higher authorities alleging discrimination because in case of many others, who had undergone M.Tech course, they were allowed to attend JC course and then DSSC course. He also pointed out that no clear cut policy on the subject was there and he had been subjected to unfair and hostile discrimination. Even, at the intervention of Army HQ vide letter dt. 18 Dec 1995 (annexure-A9), applicant's case was not recommended by the local authority. The applicant continued to pursue his case by filing statutory complaint etc. and ultimately, he was allowed to appear for DSSC Entrance Examination in Sept 1996 at the eleventh hour. Even at this stage, in order to frustrate his attempt to clear the Entrance Exam, the

authorities handed over him Xerox copies of three pages of ACR for his signature where the applicant noticed that lukewarm with low figurative report was recorded with regard to his performance. According to the applicant, this was purposely done to distract his attention so that he could not be successful in the examination; in fact, the applicant failed in that exam. At this stage, he again prayed for his posting out of MES to any Non-MES organization to avoid any further harm to his future career prospects, which was not accepted. However, he was temporarily posted to a different unit within the MES organization. The applicant made a statutory complaint on 19 Jun 1997 against the lukewarm and low numerical grading in his ACR which was rejected allegedly in a mechanical manner and without disclosing reasons vide order dt. 31 Mar 1998 (annexure-A14).

4. Subsequently, the applicant was approved for promotion to the rank of Lt. Col. in 2001. Thereafter he made another attempt to post him out of MES by filing a representation, which did not yield any fruitful result.

5. In April 2003, the applicant was further promoted to the rank of Colonel. The applicant again renewed his prayer for posting to Non-MES organization, which was also turned down. He was then posted to Jamnagar and then to Kochi in a downgraded post of CWE, Naval Works. His posting was not viewed favourably by the local Southern Naval Command as they wanted the erstwhile incumbent to continue. However, ultimately the post was upgraded to the rank of Chief Engineer and the applicant was appointed to that post in situ and he continued there. During the period from Dec 2006 to May 2009, the applicant was posted at Army HQ as Director and earned commendation card for his selfless work.

6. From June 2009 to April 2011, the applicant was granted study leave and he obtained PG Diploma in Industrial Relations and Personnel Management as also PG diploma in Public Relations with high merit. While he was on study leave, the case of the applicant was considered by No. 2 Selection Board held in September 2010 for promotion to the rank of Brigadier but he was not empanelled. The result was intimated to him vide letter dt. 9.12.10. (Annexure-A1).

7. According to the applicant, his non-empanelment is mainly due to the fact that he was not allowed to do JC Course as also DSSC course for which he could not get weightage marks in selection. Being posted in MES, his chance to be nominated for Higher Command (HC) and Higher Defence Management (HDM) courses was also minimized, because on such courses generally DSSC (Staff College) qualified officers are nominated. The officers, who have done these courses, are posted to non-MES organization like Engineer Regiment as CO or Boarder Roads as Cdr. BRTF where the applicant could not get a chance to be posted. In those organizations working environment is much better. It is also stated that the MES is a service related organization and officers like him are compared with COs of Combat Unit like Engineer Regiment or BRTF where channel of reporting is within the formation and thus advantageous. Thus, as an officer of MES, the applicant has been placed in a comparatively disadvantageous position vis-à-vis his counterparts in combat units, so far as ACR grading is concerned because in MES, it is unlikely to earn outstanding ACR.

8. He filed a non-statutory complaint against his non-empanelment wherein he has complained against all his reckonable ACRs in which low grading was awarded and prayed for their expunction. Such statutory complaint was, however, rejected vide order

dated 09 Mar 2011 for being without merit (annexure-A2). The applicant also filed a statutory complaint which was rejected vide order dt 10 Apr 12 (annexure-A3). Being aggrieved the instant OA has been filed.

9. The sum and substance of the grievance of the applicant is that because of his posting in MES against his wish, he has been made to suffer in the matter of career prospects. His ACRs which he earned while being posted in MES units were not up to the same standard as those earned by his counterparts posted in Combat Engineer units and Border Roads Organization. This is due to fact that in MES there are both civilians and army personnel where working environment is different as compared to other two wings where only army personnel are posted who are more disciplined than civilians in MES. Therefore, as a senior officer in the MES, the applicant had to face and tackle many problems involving civilian employees for which there may be aberrations in his ACR. But had he been posted in other two wings of Engineering Corps, he would not have faced such problems and would have earned better ACR grades. That apart, he could have completed DSSC and JC courses for which higher marks are allotted in No. 2 SB. For all such contributing factors because of his posting in MES, he could not get promotion to the rank of Brigadier. He has, in fact, raised questions about Govt. policy of posting of army officers to MES, which is a mixture of army and civilian personnel. According to him, since posting of Army personnel is done by MS Branch, there must be proper guidelines so that MS Branch could not act arbitrarily and whimsically in the matter of posting and transfer. Making all these averments, the applicant has prayed for the following reliefs:-

- a) Issue/pass an order to the respondents to set aside /expunge all lukewarm endorsement by IO, RO and SRO in PQ/DPV as well as QAP field of Annual

Confidential Report while posted in any MES establishment as they are likely to be biased endorsement while in service sector, a sector which the applicant tried his utmost to avoid by clearing his DSSC examination.

Weightage for DSSC exam in No. 2 SB be given in view of the fact that in spite of his best efforts the organization did not give him a fair chance to clear the same.

- b) Weightage for HC/HDMC course in No. 2 SB be given keeping in view the forceful change in profile of the applicant much against his wishes by ensuring that he continues in the service sector (MES) where relative assessments in ACR are lower than that in combat units and in Border Roads.
 - c) A moderation factor be applied to bring the service sector (MES) at par with combat engineer units keeping in view the inherent disadvantages of being in service sector. The factor so applied should consider the outstanding ACR's (9 point) being given to CO's and Cdr. BRTF against very good (8 point) ACR's being given to a CWE so that proportional number of officers is approved from each stream. The applicant, by being denied the chance to clear DSSC exam was prevented from becoming CO of a combat unit and earning an outstanding ACR while holding a command appointment.
 - d) Issue/pass an order directing the respondents to analyze the trend in approval for promotion in No. 2 Selection Board for the appointment of commanding Officers Engineer Regiment, Commander BRTF and CWE and if a distinct pattern emerges, the anomalies removed by allocation of pro rata vacancies for each stream, since posting for these appointments are done by Military Secretary's Branch at their own will.
 - e) Issue/pass an order directing the respondents to ensure that posting as CWE is not used as a tool to ensure non-empanelment for select officers.
 - f) Issue/pass an order directing the respondents to review the entire service profile of the applicant especially the reckonable profile against the batch profile of 1984 batch and 1985 batch for which the applicant was withdrawn and remove all aberrations in endorsement by RO/SRO.
 - g) Issue/pass an order directing the respondents to hold a fresh board of the applicant by No. 2 Selection Board and grant original seniority with 1984 batch after above redressal.
10. The respondents have contested the application by filing a written counter affidavit wherein they have denied the allegations made by the applicant on all materials points.

11. It is submitted that the application is fraught with vague allegations and based on applicant's own perceived concept of discrimination and not on any concrete fact. It is submitted that the applicant obtained his M.Tech degree through service channel in "Refrigeration and Air Conditioning". It was considered appropriate by the competent authority to post him in MES where his engineering knowledge in that field could be better utilized. It is further submitted that the allegation that he was denied permission to appear in DSSC course is also not correct. In fact, he appeared in the DSSC Entrance examination, which is a competitive examination, in Sept 1996 but he could not qualify. Therefore, the allegation of the applicant in this regard is totally incorrect. It is also denied that the applicant was given lukewarm and low grading in his ACR for the period Oct 1995-May 1996. In fact, he was assessed as "high average". Therefore, it is not correct that in order to spoil his chance in DSSC examination, Xerox copies of assessment in the ibid ACR were handed over to him prior to such examination. Moreover, his statutory complaint dt. 15 Jul 1997 (annexure-A-15) in that regard was also considered and rejected being without merit. It is further stated that based on such ACRs the applicant was subsequently promoted as Lt. Col. and Col. Therefore, at this stage, the applicant cannot reopen the issue.

12. It is further stated that DSSC and M.Tech are both competitive courses and weightage for only one of them, which is more beneficial, is given at the time of selection. The applicant was given weightage for his M.Tech degree and therefore, he was not prejudiced in any way.

13. It is further stated that as per para 17 of Special Army Order 9/S/1987, officers are eligible for appearing in entrance examination for DSSC course until 35 years of age as

on 1st Jun of the year in which the course commences. An officer could avail maximum 3 chances. The date of birth of the applicant is 11 Apr 1963. After commissioning in Indian Army in Dec 1984, he obtained B.Tech degree during the period 1989-92 and then M.Tech degree during the period 1993-95 and he appeared in DSSC entrance examination in Sept 1996, but could not qualify. Therefore, he cannot complain that he was not given a fair chance to undergo DSSC. The Army authorities have all along been fair to him by giving him all opportunity to acquire higher qualifications.

14. The respondents have also denied that by being posted in MES he was placed in a disadvantageous position as compared to other two arms of Engineering Corps. It is stated that the applicant while posted in different MES units earned 9 ACRs during the period from Oct 1995 to Aug 2006 in different ranks viz. Major, Lt. Col. Col. He was considered for promotion as Brigadier in Sept 2010 as a fresh case and as first review (withdrawn) case in Oct 2011 but on account of his overall profile and comparative merit within the batch, he could not be empanelled. It is stated that in MES he was assessed as “above average” or “outstanding” with box grading of 8 or 9 as the case may be. The pen pictures are complimentary and do not contain any weak or adverse remarks. Recommendations for promotion are also positive. There is no inconsistency in any of the CRs. Therefore, the allegation of the applicant that due to his posting in MES, he could not be promoted as Brigadier as he was awarded lower box grading is not correct. In fact, all his gradings are very fair. Further, on the basis of these gradings, he got promotions as Lt. Col. and Col. Therefore, when he could not be selected for the next rank because of comparative merit position, he cannot raise the issue of discrimination and bias.

15. So far as Higher Command/Higher Defence Management course is concerned, it is submitted that the applicant was considered twice for these courses in 2008 and 2009 but he could not be selected as he was lower in merit compared to others. His failure to undergo DSSC has also not affected his case for such selection as due weightage was given to his M.Tech course. Therefore, there was no discrimination against him as alleged.

16. The respondents have also denied the allegation of the applicant that MES being a service organization is disadvantageous as compared to combat unit/BRTF. It is stated that such contention of the applicant is incorrect. Every appointment has its own peculiarities, Appointments of CWE, CO of a combat unit and appointment in BRTF are criteria appointments. Quantification system of selection gives weightage to reports earned by an officer in any such criteria appointment irrespective of the environment in which the report is earned. It is further clarified that assessment of a ratee in a CR is done by the reporting officer/reviewing officer and Sr. reviewing officer on the basis of demonstrative performance of the ratee independently. It is also denied that while in the MES the applicant was assessed by civilian officers. They have rejected all the allegations of the applicant made in the OA and have submitted that the application has no merit and is liable to be dismissed.

17. The applicant has filed a rejoinder in which apart from reiterating the contentions raised in the OA; he has emphatically submitted that he has been discriminated against. He has also pointed out that approval for promotion as Brigadier is 60% for COs, 25-40% for CO of BRTF while it is only 10-20% for CWE in MES. Therefore, by posting him in MES, his chance for promotion as Brigadier has been curtailed or minimized.

18. Arguments of Id. advocates for both sides have been heard at length. After conclusion of hearing, Id. adv. for the applicant has also filed written notes of argument. We have also perused the same. Id. adv. for the respondents has produced the ACR dossier and selection board proceeding for our perusal. We have also carefully gone through the same.

19. It appears that the applicant has mainly raised three-fold grievance in challenging his non-selection to the rank of Brigadier.

20. His first grievance is with regard to his posting in the MES after obtaining M.Tech degree. According to the applicant, he wanted a non-MES posting as, according to his own perception and conception, in the MES; he would not be able to earn desirable ACR which would help him in promotional prospects. We are, however, not inclined to embark upon a judicial scrutiny on this aspect; firstly because he has not sought any relief against such posting, secondly, such posting was made in 1995 after the applicant completed his M.Tech from IIT, Chennai in January 1995. For all these years, even though he made representations for his posting to Non-MES organization, but never approached appropriate legal forum for redressal of his grievance. Thirdly, as per Sec. 3(o) (ii), of AFT Act, 2007, “transfers and postings” are not within the jurisdiction of this Tribunal. However, we would like to observe that it is well settled legal position that transfer and posting are within the domain of executives and the authorities are the best judge to decide as to where an employee is best suited to be posted and where his service can be utilized better in the organizational interest. No employee can claim posting at a particular place or department of his own choice. Here, it is pertinent to note that the applicant obtained M.Tech degree in “Refrigeration and Air conditioning”. The applicant

himself has stated in his OA that MES is a service organization within the Army which is responsible for construction, maintenance of all buildings and other assets/infrastructures. Therefore, the authorities, perhaps, thought that his specialization in “Refrigeration and Air Conditioning” would be better utilized in MES rather in other wings viz. Engineer Regiment, which is a combat unit or Border Road Task Force (BRTF) where the applicant wanted to be posted. We are, therefore, unable to entertain this grievance of the applicant at this stage.

21. The second grievance of the applicant is that he was not allowed fair chance to appear in DSSC Entrance examination for which he suffered in his ACRs, did not get posted to ‘psc’ tenable appointments where chances of earning better ACRs are more and also impacted in getting fewer points for selection boards. According to the respondents, the allegation of the applicant is his own conjecture. The truth is that he was allowed to appear in DSSC entrance examination and he appeared in Sept 1996. But he could not be successful. We notice that the applicant was commissioned in the Engineers Corps of Indian Army in Dec 1984 after he passed out from NDA and IMA. From the chart given at page 5 of the OA indicating various courses undergone by the applicant, it appears that since his commissioning in the Army, he has been undergoing various courses from Jan 1985 to 1997 with short breaks. He was detailed to do his B.Tech degree from CME, Pune, from July 1989- July 1992. In Sept 1992-Nov 1993 he was doing ECC-63 course at CME, Pune. In the next session from Jul 1993 to Jan 1995, he was attending M.Tech course in IIT, Madras and after completing the course, he was posted in the office of Chief Engineer, Bareilly Zone of MES. Immediately on joining there, he wanted to do JC course and thereafter appear in DSSC entrance examination which was not granted at the

first instance. However, subsequently, such permission was granted and he appeared in Sept 1996 without doing JC course, which, according to the respondents, is not mandatory; but he failed to qualify. JC is not mandatory to appear in DSSC entrance examination, but is necessary before joining the Staff College (DSSC). The applicant has now tried to make out a case that his failure in DSSC entrance examination by contending that he was granted permission at the last moment without giving him adequate time to prepare for the course. That apart, he was served with Xerox copies of ACR for the period Oct 1995-May 1996 for his signature, which upset him during preparation for DSSC entrance examination. According to the applicant, the remarks in this ACR were lukewarm and box grading was not up to his expectation. Moreover, he was present at the place of posting; such report could have been shown to him earlier and not just before his examination. The applicant alleges that this was purposely done to distract and divert his attention so that he could not clear the examination. According to the applicant, had he cleared and completed DSSC course, he would have been posted out of MES organization and posted in other two wings where he would have got more favourable ACRs and would, thus, be recommended for empanelment for promotion in the rank of Brigadier. We must say that this argument is fallacious and based on surmise and conjecture. The simple fact is that the applicant was posted at Bareilly zone only in the early part of 1995 after passing his M.Tech course and if the authorities did not allow him to undergo J.C course or DSSC course immediately thereafter in the interest of the organization, no fault can be found nor any motive can be inferred with such action. After all, organizational interest will always take precedence over personal ambition of an individual. The respondents have stated that as per para 17 of Special Army Order

9/S/1987, officers are eligible for appearing in DSSC entrance examination up to the age of 35 years as on 1st June of the year in which the course commences. Maximum three chances are allowed. The applicant's date of birth being 11 April 1963, he got the first chance at the age of 33 + and thereafter became over-aged when the next course commenced. As already indicated above, the applicant was posted in MES in the first part of 1995 and wanted to do his JC course which he considered as a pre-requisite for DSSC entrance examination. The applicant has even alleged that one vacancy for JC course was allotted for him but the local authorities at Bareilly where he was posted did not permit him to do JC course and returned the vacancy. It is clarified by the respondents that no vacancy can be earmarked for any particular individual and vacancy is always allotted for the unit as a whole. Therefore, allegation of the applicant in this regard is incorrect. However, he was permitted to appear in DSSC entrance in the next chance in 1996 without undergoing JC course. Therefore, no injustice was done to him.

22. The applicant made both non-statutory and statutory complaints against denial of permission but ultimately he was permitted to appear which he did. Once he appeared and failed, he cannot be permitted to recline back and raise finger against the authorities for his failure.

23. The applicant has also alleged discrimination with regard to his posting and has named two persons i.e. Capt. V.Menon and Capt. Sanjay Singh, who were posted in CME, Pune after M.Tech course whereas he had been posted to MES against his wishes. It is, however, not indicated in what stream the aforesaid two officers have done their M.Tech nor any other details about them have been disclosed. Similarly, in the annexure he has also named some other officers without any details.

24. The applicant made a statutory complaint on 19th June 1997 against the lukewarm and low figurative ACR of Oct 1995-May 1996 which was, however, rejected on 31 Mar 1998 (annexure-A4). The applicant did not pursue his grievance thereafter before appropriate legal forum. Therefore, at this stage, it is not open to him to rake up such stale issue. The fact, however, remains that he was allowed to appear in entrance examination for DSSC but he failed. It is quite evident that for his non-selection to the rank of Brigadier in Sept 2010 as fresh case, the applicant has raked up all old issues in order to justify his grievance. It is also pertinent to note here that the applicant was promoted as Lt. Colonel and Colonel in 2000 and 2003 respectively based on his ACRs including the ACR of Oct 95-May 96 against which he made such statutory complaint and there was no grievance at that point of time.

25. One of the contentions of the applicant is that by not allowing him a fair chance to clear DSSC course, he lost 0.75 marks in the Brigadier selection. The applicant has annexed at annexure-A20 the policy letter dt. 4 Jan 2011 regarding conduct of selection boards by quantification system. As per para 6 of this policy letter, marks to be awarded by different selection boards on performance of different courses has been indicated. So far as No. 2 selection board i.e. for promotion from Colonel to Brigadier, it appears that for DSSC/TSOC, 0.75 marks are allotted. JC Course has been stated to be mandatory course for No. 3 SB but not for any other selection boards including No. 2 SB. Therefore, for not doing JC course, the applicant was not prejudiced.

26. The respondents have also clarified that the applicant was considered for Higher Command/HDMC but he could not be nominated as he was low in merit. Therefore, the allegation of the applicant that because he was not given fair chance to complete DSSC,

he was also not considered for HC/HDMC does not appear to be correct. He was considered but could not be nominated because of comparative merit position. We have also gone through the departmental record in this regard and we find that indeed the applicant was considered on two occasions i.e. in 2008 and 2009 but he could not be recommended on merit, though the difference in merit in respect of the last officer selected and that of the applicant was insignificant. He was also granted maximum weightage admissible for PG course (MTech). When selection is based on merit, difference of even a fraction of a number amongst the candidates would always matter.

27. The third and the main grievance of the applicant is with regard to lukewarm endorsements made by the IO, RO and SRO in his ACR while posted in any MES establishments as they were likely to be biased. In fact, the applicant has prayed for quashing of all the reckonable ACRs which he had earned while posted in MES, which according to the applicant, is a service sector. According to the applicant, his posting in MES after doing M.Tech degree was issued as a 'tool' to ensure non-empanelment in promotional posts. It is contended that he wanted to avoid such posting and tried time and again for a posting outside MES.

28. The Corps of Engineer to which the applicant belongs, has three streams i.e. MES (Works), Engineer Regiment (Combat Troops) and Border Roads. It is the case of the applicant that in the MES, there are only 10% army personnel and rest are civilians, who are not governed under Army Act. Therefore, working environment and work culture in MES are different as compared to other two wings where cent percent are uniformed soldiers and officers. Since MES not only provides service to the organization but also to the families of the staff officers, therefore, there is likelihood of criticism for non-

performance. In the matter of writing ACR, the IO and RO, SRO may be civilians whose endorsement are always below expectation without proper appreciation of performance of army personnel. The situation is different in other two organizations where it is an 'in house' matter and therefore, chance of earning 'outstanding' ACRs is very high. Thus, those who are posted in these two wings are likely to be graded better than those posted in MES.

29. According to the applicant, since during his posting in MES, he was denied fair opportunity to appear in JC Course and DSSC examination despite recommendation of higher authorities, it is likely that he may not be assessed properly and with biased mind without proper appreciation of his performance. He has also called in question his ACR while posted in Southern Naval Command against which he also filed statutory complaint which was rejected.

30. The respondents have submitted that the applicant has earned total 9 ACRs while serving in the MES during the period from Oct 1995 to Aug 2006. Out of 9 ACRs, one CR for the period Oct 95 to May 96 was not considered by No.2 SB. In respect of remaining 8 CRS, the applicant was assessed "above average" or "outstanding" with box grading of '8' or '9'. Assessment in every CR is mutually corroborative and the pen pictures are complimentary and do not contain any weak or adverse remarks. Recommendations for promotion are also positive. Therefore, the apprehension of the applicant in his regard is totally baseless.

31. We have also gone through the ACRs dossier of the applicant as produced before us. The applicant's grievance is with regard to the ACRs which he had earned during his tenure in MES. As stated by the respondents, the applicant earned total 9 ACRs in MES

of which 8 ACRs were considered by the selection board except Oct 95-May 96. We find that in all other ACRs the applicant was graded 'above average' (8 box grading) or 'outstanding' (9 box grading). Therefore, we do not find that any injustice was done to the applicant in awarding grading in his ACRs while he was in MES. Moreover, the applicant has not alleged any bias or mala fide against his IO, RO or SRO nor has he indicated any particular ACR for which he has specific grievance. His grievance is in general against all ACRs that he earned in MES. "Above average" or "outstanding" is the maximum grading that one generally can get and the applicant got that grading. We, therefore, find no merit in this grievance of the applicant. An individual may have his own perception that he would get 9 or more than 9 grading in his ACR but the grading is awarded by his superior authority based on assessment of performance. No body can claim that he must get grading of 9 or more. We also notice that his grading in MES and non-MES postings was more or less identical. Therefore, the grievance that because he was posted in MES, he got lower grading than his counterparts who were posted in other two wings i.e. in combat force or in Border Road is not substantiated.

32. The reliefs claimed in para 8(b), (c), and (d), (e) and (f) are all policy matters which are in the exclusive domain of the executive authority. Court or Tribunal does not formulate policy. It is for the Govt. in the MoD to frame appropriate policy/guidelines for recording of ACR or conduct of Promotion Boards. Weightage for particular course or providing proportional or pro rata grading in respect of officers posted in MES or as CO in combat force and BRTF is also to be decided by the Govt. and not by the court. Therefore, no relief can be granted in that regard nor any comment can be made by this

Tribunal on this aspect which is for the Govt. to consider and decide in the interest of the administration and for better personnel management system.

33. We have also gone through the selection board result. We find that the applicant was duly considered for promotion by No. 2 SB in September 2010 as fresh case and in Oct 2012 as first review case. We find that the applicant could not be recommended because of his merit position and here again the difference in merit between the last person selected and the applicant is not much, even less than one. It is well settled that consideration for promotion is a right but not promotion by itself. Brigadier is a selection post and more meritorious person can always supersede a senior.

34. However, we notice that there is a note where it is recorded that “as per the extant policy the maximum marks that could be allotted to the officer for M.Tech were 0.25 and maximum marks that could be allotted to an officer for DSSC were 1.00”. On going through the policy dated 4th January, 2011 (Annex.A20) we find from Para 6 that for DSSC/TSOC, 0.75 marks are allotted for No.2 SB whereas for M.Tech degree holders, who were selected through competitive selection by MT Dte. (Cat-1), 0.65 marks are allotted for No.2 SB which is applicable for the applicant. It is further provided in the note below that the aforesaid maximum marks for M.Tech will be awarded based on CGPA/Grading obtained as per Appendix B. From Appendix B we find that for No.2 SB, in respect of Cat-1 different marks varying from 0.65 to 0.25 depending on CGPA ranging from 8.5 and above to 4.0 – 4.99 is to be allotted. CGPA grading in respect of the applicant in his M.Tech examination is not available on record nor have the respondents disclosed the same. The M.Tech certificate awarded by the IIT Madras, which is available on record, also does not disclose the grading or class secured by the applicant.

Therefore, this aspect cannot be verified by us. Moreover, for DSSC, maximum 0.75 marks are allotted as per this policy whereas from the result sheet produced by the MS Branch it appears that maximum 1.00 was allotted for this course. Prima facie, there is some anomaly in awarding weightage for DSSC and M. Tech degree holders in this selection. However, it is also to be noted that the first Selection Board was held in September, 2010 whereas the policy is of January, 2011, which amended the earlier policies on the subject of May, 1987, December, 2008 and April, 2009. These old policy circulars are not available on record. Therefore, it is not possible to decide whether the weightage that was awarded to the applicant and others in the September, 2010 selection was correctly awarded or not. Apparently, there was incorrect award of marks – more to the DSSC degree holders and less to the M. Tech degree holders like the applicant. As already indicated the difference of marks between the last person selected and that of the applicant in both September, 2010 and October, 2012 Selections for promotion to the rank of Brigadier was very narrow, even less than one. Incorrect or wrong award of weightage marks for DSSC and M.Tech could obviously vary the result. However, in the absence of earlier policy letters we cannot definitely come to a conclusion that there was wrong award of marks. We, therefore, are of the view that the respondents should look into this aspect and if weightage for the aforesaid courses was awarded wrongly then appropriate remedial measure should be taken urgently. In case the marks were awarded correctly as per extant policy i.e. December, 2008 or April, 2009, appropriate reasoned order should be passed and communicated to the applicant for transparency.

35. In view of what has been discussed above, we dispose of this application with a direction to the competent authority to have a re-look into the weightage awarded for the

DSSC and M. Tech. degree holders in No.2 Selection Board for promotion from the rank of Colonel to Brigadier that was held in September, 2010 and October, 2012 in which the applicant was considered as fresh case of 1984 batch and first review case of 1985 batch respectively and take action, as indicated in the preceding paragraph, within sixty days from the date of communication of this order. No cost.

36. Let the original records be returned to the respondents (MS Branch) after re-sealing the same on proper receipt.

37. Let a plain copy of the order, duly countersigned by the Tribunal Officer, be furnished to both sides after observance of usual formalities.

(Lt. Gen. K.P.D.Samanta)
MEMBER (ADMINISTRATIVE)

(Justice Raghunath Ray)
MEMBER (JUDICIAL)