

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

O. A. NO.44/2015

THIS 11TH DAY OF JANUARY 2016

CORAM

HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S) Col Jiwan Kumar Singh (IC-43230F) son of Shri P. P. Singh, presently posted as the Commanding Officer, Bengal Area Provost Unit, Pin-900285, C/O 99 APO.

-versus-

RESPONDENT(S)

1. The Union of India, Service through the Secretary, Govt. of India, Ministry of Defence, South Block, New Delhi -110 011.
2. The Chief of Army Staff (COAS) Integrated Headquarters of Ministry of Defence(Army), Defence Headquarters, Post Office, New Delhi -110 011.
3. Military Secretary, Integrated Headquarters of Ministry of Defence (Army), Defence Headquarters, Post Officer, New Delhi -110 011.

For the petitioner(s) : In person

For the respondent(s) : Mr. Anand Bhandari, Advocate

ORDER

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

1. This Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal (AFT) Act, 2007, inter alia, seeking relief for empanelment in the rank of Brigadier and for setting aside his two Confidential Reports (CRs) written by IO in September 2006 and SRO in June, 2007.
2. The relevant facts leading to this case are enumerated hereunder. The applicant was commissioned as 2/Lt in the Armoured Corps of Indian Army on 14.12.1985. He served in various units of the Indian Army and has taken on hard core terrorists. He has earned outstanding/extra ordinary reports before and after Commands and has received various decorations owing to his dedication to service. The applicant alleged that while he was posted as CO 45 Cavalry he was detailed to be in Project Management Group at Sriganganagar, when he received instructions from MES and Higher Authorities (IO & SRO among them) to widen the main road of military station at Sriganganagar as part of OTM (Other Than Married) accommodation so that the tank trailers could move on the said road. He did not approve this project works. According to the applicant, this resulted in poor/relatively lower remarks and grading in his CRs for the periods between 2006 and 2007. Selection Board for empanelment of Brigadier assembled, but the applicant could not be empanelled due to aforesaid poor CRs.
3. The applicant then made a non-statutory complaint against non-empanelment and for expunging and upgrading his CRs

between 2006 and 2007. However, the same was disposed of granting some partial reliefs by expunging following assessments on the ground of inconsistency:

- a) CR 06/96-05/97 – ROs assessment
- b) CR 09/03 – 08/04 – IO and ROs assessment.

4. Not being satisfied with the above, the applicant preferred a statutory complaint dated 08.07.2012. The same was disposed of by the Central Government vide its order dated 11.03.2013 by granting substantial relief expunging assessment of RO in the two CRs for the period 12/05-05/06 – 01/07-06/07 on the ground of inconsistency and also restoration of complete assessment of SRO in the CR for the period 01/09-06/09.

5. Yet not satisfied with the above, the applicant preferred second statutory complaint, which was rejected. Being aggrieved by such rejection and non-empanelment the applicant has filed this Original Application.

6. The respondents have contested the case by filing affidavit-in-opposition wherein they have denied all allegations made in the application. They have admitted that the applicant was commissioned in the Armoured Corps on 14.12.1985. The Applicant commanded 45 Cavalry under HQ 16 Infantry Division at Sri Ganganagar from 2005 to July 2007 and earned two CRs for the period 12/05 to 08/06 and 01/07 to 06/07. The applicant's case was considered by No.2 Selection Board for promotion to the rank of Brigadier but was not empanelled on account of his overall profile and comparative batch merit

though he was considered for empanelment as many as six times. The List is reproduced hereunder:

Sl. No.	Type of consideration	No.2 SB held	Result
(a)	Fresh 1985 Batch	Jul 2011	Not empanelled
(b)	Special Review (Fresh) 1985 Batch	Mar 2012	Not empanelled
(c)	First Review 1985 batch	Oct 2013	Not empanelled
(d)	Special Review (Fresh)	Mar 2013	Not empanelled
(e)	Special Review (First)	Sep 2013	Not empanelled
(f)	Final Review	Mar 2014	Not empanelled

7. The applicant submitted non-statutory complaint on 27.09.2011 against his non-empanelment as 1985 fresh case by No.2 Selection Board held in June 2011 challenging adverse remarks entered in his two CRs. Said complaint was disposed of by Chief of Army Staff on 06.02.2012 (Annexure-A4) expunging some of the assessments on the grounds of inconsistency. The applicant again preferred statutory complaint on 08.07.2012 which was examined in the light of his overall profile and was disposed of by the Central Government on 11.03.2013 granting him substantial redressal. Thereafter applicant submitted his second statutory complaint on 30.05.2013 challenging the assessment of IO and SRO in the CRs. His second statutory complaint was rejected by the Central Government by passing a speaking order on 29.01.2014.

8. While explaining the procedure prescribed in the policy documents and relevant guidelines laid down for promotion, the respondents have further submitted that the applicant was not empanelled on account of his overall profile and comparative batch merit as further highlighted which is quoted hereunder :

"(i) The Army has a pyramidal rank structure. Thus the number of vacancies in higher ranks are limited. From the board based of the pyramid, only those officers whose record of service within a particular batch are better and selected to fill up the vacancies available in the higher ranks. As per the promotion policy which was applicable till 15 December 04, promotions in the Army till to the rank of Major were by time-scale. Promotions from Major to Lt Col and above were decided through Selection Board (policy contained in para 108 of the Regulation for the Army 1987 [Revised Edition, Army HQ Letter No. 31525/P/MS-5B dated 06 May 1987 and IHQ of MOD (Army letter No. 04502/MS Policy dated 31.12.2008.

After the implementation of AVSC/1 recommendations, promotions till Lt Col are by time scale. All officers of a particular batch are considered together with same cut off ACR and input and on the basis of individual profile of the officer and the comparative batch merit, they are approved/ not approved. Seniority in itself is no consideration before the selection board for approval or non-approval. In case any officer gets any relief through complaint etc. in any CR, after the selection board has been held, he is entitled to a special corresponding consideration by Selection Board with his changed profile, and in case he is approved by such special consideration his original seniority remain protected.

ii) As per the applicable 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 approved as a Fresh Case, but approved as a First Review or Final Review case, he loses seniority accordingly vis-à-vis his original batch. After three considerations, if an officer is not approved, he is deemed to be finally superseded.

iii) The assessment of officers in ACR was regulated by SAO 3/S/89 (which has now been replaced by Army Order 45/2001/MS) and other relevant policies at any given time. The gradings are numerical from 1 to 9 (overall as well as in Personal Qualities and Performance Variables in different qualities) and in the form of pen picture also. The entire assessment of an officer in any ACR consists of assessment by three different Reporting Officers i.e. Initiating Officer (IO), Reviewing Office (RO) and Senior Reviewing Officer (SRO) whose assessments are independent of each other.

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

v) It was up to the Selection Board to assess the suitability of the applicant for promotion. The assessment of the Selection Board is recommendatory in nature and not binding until approved by the competent authority viz. the Central Government as the case may be."

9. It is further submitted by the respondents that the application filed by the applicant is misconceived, baseless and devoid of merit. The applicant was qualified in Technical Staff Officers' Course and Senior Command Course but was not nominated on merit based Higher Command Course / Higher Defence Management Course equivalent course. His course profile is 'Average' to 'Above Average' with 'B' grading in Junior Command Course and 'A' grading in Technical Staff Officers Course. He has earned 17 CRs in the reckonable profile of which 10 CRs are in the rank of Major / Lt. Col. While 7 CRs are in the rank of Col., including six criteria reports. His CR profile is predominantly above average. Therefore, the application deserves to be dismissed with exemplary cost.

10. We have given our anxious consideration to the rival contentions, have gone through all averments and perused various documents and citations that have been produced and referred before us.

11. The applicant appearing in person would submit that poor/low merit entries in the CRs for the period from December 2005 to August 2006 and from January 2007 to June 2007 directly resulted in gross degradation in merit due to 50 per cent weightage in promotion for Command performance because of which his name was not considered by the concerned Selection Board for the purpose of his empanelment in the rank of Brigadier; when the assessment of the applicant by the RO for the period 12/05-08/06 - 01/07-08/07 was expunged by the Central Government then it was also incumbent upon it to expunge report of the IO written in September 2006 and SRO in

2007 being biased, subjective and being not demonstrated his outstanding Command performance. According to the applicant, the report of the IO in 2006 was biased and subjective and report of the SRO in 2007 was incorrect due to his less interaction, negative feedback and under influence of the RO.

12. In the alternative it was also argued by the applicant that he should be considered for empanelment in the rank of Brigadier ignoring his old poor CRs and taking into consideration his recent CRs. For this, he placed reliance upon the judgements of the Hon'ble Supreme Court in the case of J.D.Shrivastava Vs. State of M.P. & Ors. reported in 1984 AIR 630; and Brij Mohan Singh Chopra Vs. State of Punjab reported in 1987 AIR 948.

13. In substance, the main grievance of the applicant is that the Central Government ought to have expunged the report of IO written in September 2006 and SRO written in June 2007 when he was posted at Sriganaganagar being biased, subjective and without interaction and he be considered afresh for empanelment to the rank of Brigadier. It is also urged by the applicant that during such consideration for empanelment his recent CRs only be taken into consideration.

14. Respondents have circulated MOD, MS Branch, DHQ New Delhi guidelines No. 04502/MS Policy dated 04.11.2011 regarding conduct of selection Boards by quantification system had been issued. For the sake of convenience the same is quoted below :

Overall Distribution of Marks in the Quantified Model
The overall distribution of maks of the quantified system will remain the same as earlier and are as follows :

(a) 95 marks will be given for quantified parameters to include confidential reports (CRs), Courses, Honours and Awards.

(b) Five marks are earmarked for Value Judgement (VJ) by the Selection Board members for aspects that cannot be quantified.

CR Profile

4. The allocation of marks for CR profile is based on the following considerations :

a) Primacy of CR – Primacy of the CR vis-à-vis other criteria like performance of courses, honours and awards has been maintained.

b) Comd vis-à-vis other CRs – Greater weightage has been given for Command / Criteria Appts as compared to Staff / Instructions / Extra Regimental Employment. While ensuring greater weightage to criteria reports, a minimum of 50% of the total weightage for the CRs is allotted to criteria reports earned in present rank.

c) Reckonable Profile – All CRs in reckonable profile being considered will be quantified 'Look Two Down' principle, by taking into consideration all CRs earned in the present rank and previous rank, will continue for No.3SB, No. 2SB and No.1SB as hitherto. 'Look Three Down' principle by taking into consideration all CRs in previous to previous rank will be adopted for SSB only.

d) War Reports / Op Reports Earned outside reckonable profile – These CRs will be reflected in MDS for the purpose of Value Judgement of SB Members in all SBs and will not be quantified, if out of reckonable profile.

e) Derivation of weightage for officers not holding criteria / non criteria appointments - In case an officer does not get exposure in staff / instr/ other non criteria appointment in a particular rank, the quantified total marks earned in Criteria reports in that rank will be taken into consideration to derive weightage for the non criteria reports in the required proportion. In special circumstances such as 100% AE waiver for war wounded officers, extrapolation from non-criteria to criteria reports will be carried out for non general cadre officers, the value for Command / Criteria Reports will be derived from reports earned in staff / ERE / Institutional appointments. This ensures that laid down percentage of weightages for current rank vis-à-vis previous rank(s) is not violated.

Distribution of Marks

5. The revised distribution of marks for various SBs is as under:

Type of CR	No.3SB	No. 2SB	No.1SB	SSB
Criteria (Maj/Lt Col)	50	15		
Staff / Instr/others (Maj/LtCol)	39	07		
Criteria (Col)	-	45	19	04
Staff / Inst / Others (Cols)	-	23	08	02
Criteria (Brg)	-	-	46	20
Staff / Instr / others (Brg)	-	-	18	06
Criteria (Maj Gen)	-	-	-	46
Others (Maj Gen)	-	-	-	14
CR Total	89	90	91	92
Courses	04	03	02	01
Honours & Awards (Gallantry awards only)	02	02	02	02

<i>Quantified total</i>	95	95	95	95
<i>Value judgement</i>	05	05	05	05
<i>Grand total</i>	100	100	100	100

Performance of courses

6. The weightage of courses are based on the category of course that is competitive courses, mandatory courses and other courses weightages assigned for courses in various SBs are as follows :

<i>Courses</i>	<i>No. 3 SB</i>	<i>No. 2 SB</i>	<i>No. 1 SB</i>	<i>SSB</i>
<i>JC/Mandatory courses</i>	0.75	-	-	-
<i>DSSC/TSOC</i>	1.50	0.75	0.50	0.25
<i>SC*</i>	-	0.50	0.25	-
<i>HC/LDMC/HACC/0.50XNHCC</i>	-	0.75	0.50	0.30
<i>NDC/0.70 X APPA</i>	-	-	0.75	0.45
<i>Others courses</i>	1.75	1	-	-
<i>Total</i>	4	3	2	1

7. *DSSC/TSOC & JC* - Marks for DSSC / TSOC and JC are allotted on sliding scale based on the grading obtained as given in Appendix A.

8. *M.Tech* - The weightages for M Tech assigned for various SBs are as follows :

<i>SBs</i>	<i>M.Tech through competitive selection by MT Dte (Cat I)</i>	<i>M. Tech other than by Competitive Selection by MT Dte (Incl. Advance course) Cat-II</i>	<i>M. Tech while on study leave / others Cat III</i>
<i>No.3 SB</i>	1.00	0.75	0.50
<i>No. 2 SB</i>	0.65	0.50	0.35
<i>No.1 SB</i>	0.30	0.20	0.15
<i>SSB</i>	0.15	0.10	0.07

Notes

- The above are maximum marks in each category. Marks will be awarded based on CGPA / Grading obtained as given in Appendix B
- The above marks will be applicable for all Arms / Services.
- In case the offr has done DSSC/TOC and M Tech / Advance course the better of the two aggregates will be awarded.
- Advance courses will be form part of other courses in No.3 SB and No.2 SB.

Honours and Awards (H & A)

9. Gallantry Awards (Mention-in-Despatches and above) have been given maximum of two marks which will be applicable for two SBs after the awards. Thereafter the Gallantry awards shall be value judged by subsequent SBs. The Distinguished service awards will be value judged for all SBs.

10. The weightages assigned for gallantry awards are as follows

<i>Sl. No.</i>	<i>Type of awards</i>	<i>Marks</i>
(a)	PVC	2.00
(b)	AC	1.75
©	MVC	1.25
(d)	KC	1.2
(e)	VrC	0.9
(f)	SC	0.8
(g)	SM(G)	0.5
(h)	Mention-in-despatches	0.3

Value judgement

11. Five marks have been earmarked for value judgement by Selection Board. The selection parameters that cannot be quantified will be considered by the Selection Board members for value judgement as given in succeeding paragraphs.

12. Performance

(a) Operational experience / battle performance reports (OP PWAN, OP MEGHDOOT, OP VIJAT (KARGIL) / or subsequent operation in future throughout the career.

(b) Consistently in overall performance.

(c) Service in difficult field areas and relatively challenging environment.

13. Potential – Suitability for being employed in higher ranks.”

15. From the aforesaid guidelines it is manifestly clear that while considering the officer for promotion to a selection rank the Selection Board takes into consideration a number of factors such as war/operational reports, Course Reports, ACR performance in command and staff appointments, honours and awards, disciplinary background, etc and not just the ACRs. Empanelment or non-empanelment is based upon the overall profile of an officer and comparative merit within the batch as evaluated by the Selection Board.

16. The applicant has not leveled any specific charge of mala fide or bias against the IO, RO and SRO, who wrote his two CRs when he was posted at Sriganganagar during the period from 2006 to 2007 nor he has impleaded them as party respondent. However, his grievance, if any, was against the then reporting officer Lt Gen N S Brar. The Central Government considering his statutory complaint expunged all the CRs reviewed by the RO in the above years. Thus, despite absence of any specific allegation the applicant's grievance stands redressed. The applicant himself admitted above fact in para (xiii) of the application, same is reproduced below :

"That although the poor/low merit entries in regard to the assessment of the applicant by the RO for the period from

12/05-08/06 and 01/07-06/07 was expunged, however since no relief in regard to non-empanelment was granted to the applicant by the aforesaid statutory complaint, the applicant, once again, filed a statutory complaint on 30.5.2013 seeking reliefs"

17. So far as reports of the IO and SRO are concerned, on examination of record we do not find any inconsistency when compared with his earlier reports. The applicant has further did not raise any specific charge of mala fide against the IO or SRO nor impleaded them as party respondent. The Hon'ble Supreme Court in the case of Amrik Singh Vs. Union of India & Ors (2001 (10) SCC 424) has held as under :

"18. So far as the very adverse remark itself is concerned, our attention was invited to the letter written by Lt. Colonel Patwardhan on 25.2.1991 making certain allegations against the R.O. who gave the said adverse remarks to the appellant. But inasmuch as no specific allegations of mala fide have been made in the writ petition and the R.O. was not impleaded as a party to the case. It could not be said that the adverse remarks in the ACR of the year 1985-86 by the R.O. was mala fide."

18. The Hon'ble Supreme Court in the case of Union of India & Ors Vs. Lt. Gen Rajendra Singh Kadyan reported in (2000) 6 SCC 698 has also held as under :

"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."

19. The Hon'ble Apex Court in the case of Air Vice Marshal S.L.Chhabra Vs. Union of India & Ors reported in 1993 Supp (4) SCC 441 has held in para 10 as under :

"It is well-known that a Selection Board, while considering the suitability of an officer for promotion to a higher post or rank, takes into consideration several factors and it is not solely based on the Appraisal Report of the controlling officer. The learned Additional Solicitor General produced the proceedings of the

Selection Board of 1987 and pointed out that the Selection Board had postponed the promotion of the appellant on the ground, that only one report was available by that time and as such decision was taken to watch the performance of the appellant at least for a year more, to assess his potentiality and suitability for discharging the higher responsibility attached to the rank of Air Vice Marshal. The aforesaid fact has been mentioned in the proceedings of the Selection Board of the year 1987. In such a situation, it was neither possible for the High Court, nor is possible for this Court to act as a court of appeal against the decision of the Selection Board, which has been vested with the power of selection of an officer for being promote to the rank of Air Vice Marshal. No oblique motive has been suggested on behalf of the appellant against any of the members of the Selection Board and there is no reason or occasion for us to infer such motive on the part of the members of the Selection Board for denying the promotion to the appellant with reference to the year 1987. Public interest should be the primary consideration of all Selection Boards, constituted for selecting candidates, for promotion to the higher posts, but it is all the more important in respect of Selection Boards, meant for selecting officers for higher posts in the Indian Air Force. The court cannot encroach over this power, by substituting its own view and opinion. According to us, there is no scope to interfere with the decision of the Selection Board of 1987, merely on the ground that adverse remarks, in the Appraisal Report of 1986, which were placed before the Selection Board in the year 1987, were later expunged."

20. Considering the above aspects of the matter in our opinion while considering the case of the applicant, the Chief of the Army Staff as well as Central Government have granted substantial relief removing all the inconsistencies found in the overall profile of the applicant and thereafter he was considered as many as six times for empanelment by the Selection Board, but was not successful due to more meritorious performance shown by other officers of his batch. Therefore, applicant's challenge on this ground is not tenable.

21. So far as the rule of law laid down by the Hon'ble Supreme Court in J.D.Shrivastava Vs. State of M.P. & Ors. reported in 1984 AIR 630; and Brij Mohan Singh Chopra Vs. State of Punjab reported in 1987 AIR 948 is concerned the same is not at all applicable in the facts and circumstances of the present case inasmuch as the said decision dealt with compulsory retirement

under FR-56 and not with promotion. The said decision is based upon stale entries made more than 10 years earlier, whereas the applicant's case for empanelment for the rank of Brigadier was considered as per the promotion policy in vogue at the relevant time. The same view has also been taken by the Hon'ble Apex Court in Brij Mohan Singh Chopra' case (supra). In J.D.Shrivastava's case (supra) the Hon'ble Apex Court has held as under:

"that it is true that in the early part of his career, the entries made do not appear to be quite satisfactory, they are of varied kinds. Some are good, some are not good and some are of a mixed kind. But being reports relating to a remote period, they are not quite relevant for the purpose of determining whether he should be retired compulsorily or not, as it would be an act bordering on perversity to dig out old files to find out some material to make an order against an officer. We, therefore, confined our scrutiny to the reports made in respect of the appellant for about ten years prior to the date on which action was taken against him to retire him compulsorily."

Therefore, the above contention raised by the applicant is also devoid of merit.

22. True the applicant is an excellent officer but other officers of his batch have shown more excellent performance than him, then obviously he would not be selected, more so the competition in the higher rank is very high owing to pyramidal structure of Defence services and only due to that the applicant could not be empanelled in spite of his good service to the Defence forces.

23. Considering the all aspects of the matter we do not find any merit in the application. In the foregoings, the application fails and is hereby dismissed. No order as to costs.

24. Original records that have been produced by the M.S. Branch of the respondents be returned to the representative of the M.S. Branch of the respondents under proper receipt, till then the same be kept in the safe custody of the Registry.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice N. K. Agarwal)
Member (Judicial)