

FORM NO – 21

(See Rule 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : OA 93 OF 2013

THIS 4TH DAY OF JULY, 2014

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

IC-46298N Lieutenant Colonel Mukul Dev
Son of Late S.Dayal,
Presently posted at HQ DG, NCC,
New Delhi

.....Applicant

-Vs-

1. Union of India, Service through the Secretary,
Ministry of Defence, South Block,
New Delhi-110 011
2. The Chief of Army Staff,
Army Headquarters, Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO :New Delhi – 110 011
3. Military Secretary, Integrated HQ of M/o Defence (Army)
Defence Headquarters, PO :New Delhi – 110 011
4. Lt. Gen. (Retd.) Gautam Banerjee,
Then Chief of Staff, HQ, Central Command,
P-101, Sispal vihar, Sector-49
Gurgaon
5. Maj Gen (Retd.) R S Rathore,
16, DK Part-I,
Delhi Cantt.

.....Respondents

For the petitioner : Mr. Rajiv Mangalik, Advocate

For the respondents : Mr. Mintu Kumar Goswami, Advocate

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

This is yet another round of litigation being initiated by the applicant, who is a serving Lt. Col of the JAG Branch of Indian Army, ventilating his grievance with regard to “perceived biased” adverse entry in his CR and consequent non-promotion to the rank of Col.

2. The background facts giving rise to this original application filed under Section 14 of the AFT Act 2007 may be stated briefly at the outset. The applicant was initially commissioned in the Corps of Artillery of the Indian Army in 1988 as 2nd Lieutenant. While he was in the Artillery, he pursued higher studies and obtained Degree in Law. Having acquired such professional qualification, he thought that he would be in a better position to utilize his knowledge in law in JAG Branch of Indian Army, which specializes in this particular subject. Accordingly, he applied for Inter Arm Service Transfer (IAST) in 2004 for his lateral transfer to the JAG Branch according to rules. At that point of time he was in the rank of Major. His application for transfer was accepted by the competent authority but as a matter of fact, his IAST was delayed because the applicant in the meanwhile became a Lt Col in his parent unit. It appears that there was some objection from the JAG Branch itself for his induction as he was holding a higher rank of Lt Col while such transfer is permissible up to the rank of Major. That apart, it is also a fact that if the applicant was inducted in a higher rank of Lt Col, he would become senior to many officers who are already in the department, which obviously would not be seen favourably. However, because of non-implementation of the transfer order, the applicant moved the Hon'ble Delhi High Court for redress and finally, the Hon'ble Delhi High Court decided the writ petition in his favour in August 2007 and he was finally posted at the HQ of Central Command at Lucknow in February 2008 in the appointment of AJAG. Even after his posting in JAG Branch in terms of order of the Hon'ble High Court, discontent amongst the existing officers did not end; rather efforts were made to

sidestep him from the JAG branch of Command HQ to another Branch. According to the applicant, respondent Nos 4 & 5 i.e. Lt. Gen Gautam Banerjee and Maj Gen R.S. Rathore (both have since retired) who were at the relevant point of time posted in the Central Command HQ Lucknow and were holding superior position, moved his case before the higher authorities for sidetracking the applicant to any other branch on the ground that he was inadequately qualified and was not in a position to handle sensitive cases independently as AJAG because of lack of experience and exposure etc. vide Annexure A3. However, the higher authorities did not agree to such suggestion and insisted for posting of the applicant in the said HQ in the appointment of AJAG to which he was posted and that was a criteria appointment. Even thereafter, according to the applicant, at the instances of the private respondents 4 and 5, further action was initiated to shift him from the JAG Branch and ultimately he was transferred out to 'Q' Land Branch where he joined on 24-3-2009. The applicant objected to such transfer outside JAG Branch and ultimately, the said transfer order was cancelled. He was brought back to his original place of posting. In view of his posting to 'Q' branch under a different authority, the applicant requested for initiation for NIR (Non Initiation Report) for the period that he worked in 'Q' Branch, which is from 1-12-2008 to 23-3-2009 since he did not complete 90 days mandatory period. Such request by the applicant was not accepted. The applicant filed a non-statutory complaint and thereafter moved this Tribunal by filing this OA 85 of 2012 challenging two CRs for the period from 1-12-2008 to 31-5-2009 and 1-6-2009 to 3-5-2010, because according to the applicant, the IO (Initiating Officer) and the RO (Reviewing Officer), i.e. Respondent Nos 5 & 4 respectively, were ill disposed and biased towards him. Therefore, they could not have written his ACR objectively and dispassionately. The said OA was disposed of by the Tribunal by an order dated 11-12-2012 whereby the applicant was granted relief by way of the setting aside the aforesaid two impugned CRs being technically invalid and also tainted with bias and prejudice.

3. It appears that after this order, the respondents complied with the order and his case was considered as Special Review (fresh) case for promotion to the rank of Col. in Jan 2013. However, the applicant could not be empanelled for promotion by the No.3 Promotion Board. The applicant in the meantime filed another OA, being OA 2 of 2013 challenging his non-empanelment by No.3 Selection Board held in December 2012 as also the CRs for the periods from 1-6-2008 to 30-11-2008, 1-6-2010 to 30-11-2010 and 1-12-2010 to 31-5-2011. The said ACRs were not challenged by the applicant in OA 85 of 2012. The said OA was disposed of by this Tribunal on 17-1-2013 directing the respondents to treat the said OA as statutory complaint of the applicant against the aforesaid CRs and dispose of the same within 60 days. In compliance with the said order, Central Government considered the matter and decided the statutory complaint of the applicant by an order dated 29-4-2013 (Annexure A1) whereby the applicant was granted partial relief by way of expunction of complete assessment of HOS in the CR of December 2010 to May 2011 on the ground of inconsistency. However, so far as his grievance with regard to other CRs was concerned, no relief was granted as it was held that all CRs in the reckonable profile of the applicant were consistent, well corroborated, objective, performance based and technically valid and therefore, need not be interfered with on the ground of inconsistency.

4. Subsequent to such order of the Central Government, the applicant was again considered for promotion by No. 3 SB to the rank of Col with revised profile, but on this occasion also he could not be empanelled which was communicated to the applicant on 14-8-2013. Being aggrieved, the applicant has again approached this Tribunal by filing the instant OA challenging the order of the Central Government dated 29-4-2013 and his non-promotion to the rank of Col by the Number 3 Selection Board held in June 2013.

5. According to the applicant he came to know subsequently that there was another CR which was written by the same Respondent Nos 4 & 5 being RO and IO for the period from

1-6-2008 to 30-11-2008 which might have gone against him because as was held in OA 85/2012 that the above two respondents were biased against him and were instrumental for his sidetracking from JAG branch and thus were also prejudiced against him. Apprehending that there may be some adverse remarks in this CR of June 2008 to November 2008 which was initiated by respondent No.5 as IO and reviewed by respondent No.4 as RO, he could not be empanelled in the last No.3 Selection Board held in June 2013 even after partial relief granted to him by expunction of assessment of HOS in respect of CR of December 2010 to May 2011 on the ground of inconsistency. The applicant apprehends that there may be similar inconsistency in respect of the ibid CR for the period from 1-6-2008 to 30-11-2008 which might have adversely contributed to his non-empanelment. Accordingly, he has prayed for the following main reliefs:

- a) To quash and set aside the order dated 29-4-2013,
- b) To quash and set aside the ACR covering the period from 1-6-2008 to 30-11-2008
- c) To direct the respondents to reconsider the petitioner for promotion to the post of Colonel through No.3 Selection Board as a Special Review (Fresh) candidate after quashing the said ACR and restoring the seniority of the applicant of his own batch of 1989.

6. The official respondents have contested the application by filing a reply-affidavit in which they have stated that the applicant has filed this application simply on apprehension and conjecture without bringing on record any supporting materials. They have also pointed out that the applicant was posted at HQ, Central Command, Lucknow for the period from February 2008 to May 2010 and in all three CRs for the periods from (a) June 2008 to November 2008, (b) December 2008 to May 2009 and (c) June 2009 to May 2010 were raised during the entire period.

7. In the earlier OA (OA 85/2012) the applicant did not raise any grievance against the CR for the period from June 2008 to November 2008 and challenged only the later two CRs. However, while adjudicating the matter, all the three CRs were produced before this Tribunal and the Tribunal did not find any inconsistency or bias or lack of objectivity in respect of the ibid CR for the period from June 2008 to November 2008 which has been impugned in this OA. It is therefore submitted that the applicant is now estopped from challenging the said CR. The respondents have also stated that in terms of order dated 17-1-2013 passed in OA 2 of 2013, the matter was considered by the Central Government by treating the said OA as a statutory complaint and accordingly partial relief was granted to the applicant as already stated above. It is submitted that all actions taken by the Government are justified and there was no infirmity in the decision of the Government while disposing the statutory complaint. It is further submitted that No. 3 Selection Board considered his case as a special review case but on merit even on the basis of revised profile, he could not be empanelled. It is further pointed out that Court or Tribunal cannot interfere with the recommendation of the Selection Board as the applicant has not alleged any mala fide on the part of the said Board and therefore, they pray for rejection of the OA.

8. Despite service of Notice, Respondent Nos 4 and 5 did not enter appearance either in person or through their counsel, nor have they filed any reply. Therefore, the matter is being decided in their absence.

9. We have heard the learned counsel for both the parties. The official respondents have produced CRs Dossier of the applicant and also the departmental file in which the statutory complaint of the applicant was dealt by the Central Government. We have also perused the same very carefully in detail.

10. Mr. Rajiv Manglik, the learned counsel for the applicant has only referred to the previous judgement of the Tribunal in OA 85 of 2012 dt. 11.12.2012 (annexure-A4) and

submitted that it was clearly held in the said order dated 11-12-2012 that Respondent No.4 & 5 (who were respondent Nos 5 & 6 in that OA) were biased against the applicant and accordingly the Tribunal quashed the CRs for the period from 1-12-2008 to 30-5-2009 and 1-6-2009 to 31-5-2010 being tainted with bias and prejudice. It is submitted by Mr.Manglik that after the applicant was granted relief by the Tribunal in terms of the order dt. 11.12.12, the applicant was considered for promotion as special review case with revised profile, but he could not be empanelled. At that point of time, it came to the knowledge of the applicant that his ACR for the period from June 2008 to 30-11-2008 was also written by the same respondents as IO and RO while the applicant was posted at Central Command HQ at Lucknow, and the same might also be tainted with bias and prejudice as a reason of which he could not be empanelled. In such view of the matter he preferred a statutory complaint raising grievance against the impugned ACR as also two other CRs impugned in the earlier OA. He raised apprehension against the biased attitude of the concerned IO and RO in respect of this CR as well but the Central Government, as it appears, has rejected his grievance so far as this CR is concerned without proper application of mind and without passing any order with reasons as to why this particular CR could not be expunged even though this was also written by the said Respondent Nos 4 & 5 who were already held by a Judicial pronouncement as biased and prejudiced towards the applicant. Mr. Mangalik, however, could not produce any relevant materials to support his apprehension in that regard.

11. Mr. Mintu Kumar Goswami, the learned counsel for the respondents has strongly opposed the contention of Mr. Manglik, the learned counsel for the applicant and submitted that the applicant cannot be allowed to make such wild allegation against the said respondents in respect of the impugned CRs because he did not challenge the same in the earlier OA (OA 85/2012) even though he could have done so very well. That apart, the Central Government

clearly held that the said CR was consistent and need no interference. Of course, the Govt. granted partial relief in respect of other CR against which the applicant was aggrieved.

12. Mr. Goswami has placed reliance on the decision of the Hon'ble Apex Court in the case of **Amrik Singh –vs- UOI & Ors**, (2001) 10 SCC 424 as also a decision of the Principal Bench of AFT in OA 18/2010 (**Lt. Col. P.S.Shekhawat –vs- UOI & Ors**) decided on 6.5.2010 (unreported).

13. We have given our anxious consideration to the contentions advanced by both the parties.

14. In this case, the entire submission on behalf of the applicant with regard to challenge to the CR for the period from 01.06.2008 to 30.11.2008 rests mainly on the presumption and assumption that since the subsequent two CRs (01.12.2008 to 31.05.2009; and 01.06.2009 to 03.05.2010), which were endorsed by respondent Nos.4 & 5 as RO and IO respectively, were set aside by this tribunal in O.A. No.85/2012 being biased and tainted with prejudice, the impugned CR (from 01.06.2008 to 30.11.2008), having been endorsed by the same respondents in identical capacity, should also be treated as biased and prejudiced. Therefore, it should be set aside on that ground as was done in case of subsequent two CRs by this Tribunal in OA 85/2012. No other ground has been adduced in support of the contention that the said respondents were biased so far as the ibid ACR was concerned. His entire challenge against this CR is based on sheer surmise and conjecture and not on any concrete materials.

15. Mr. Goswami, ld. adv. for the respondents, on the contrary, has raised an objection that since the ibid CR was also produced before the Tribunal for scrutiny along with the subsequent two CRs mentioned above, during adjudication of O.A. 85/2012. The Tribunal had made no observations on this CR, which is now impugned in the present O.A. Moreover, no grievance was raised by the applicant in respect of the same; therefore, the applicant cannot now re-open the issue.

16. Mr. Mangalik has, however, resisted this submission by contending that the Tribunal only noted the contention of the respondents in that regard and did not express any opinion. In fact, in the earlier OA (OA 85/2012) there was no challenge against the now impugned CR and, therefore, the Tribunal obviously did not adjudicate upon it. When the applicant did not get any redress from the Central Govt. through his statutory complaint with regard to this CR, only then he has challenged the same in this OA; therefore, there is no bar in doing so.

17. Having heard both sides on this aspect, we notice from our order dated 18.12.2013 passed in the instant OA, that the same preliminary objections were raised by Mr. Goswami while arguing with regard to maintainability of the present O.A. The objections now raised by him were also dealt with in our order dt. 18.12.13. This Tribunal had accepted the submissions of the applicant and accordingly, overruled the objection of Mr. Goswami in that regard. The maintainability issue having been settled and set at rest, therefore, at this stage the same plea as raised by Mr. Goswami cannot be entertained as this would mean indirectly reviewing our own order, which is not permissible.

18. As stated earlier, after the order was passed in O.A. No.85/2012 giving some relief to the applicant his case was considered by No.3 Selection Board with revised profile for promotion to the rank of Colonel as special review case but he could not be empanelled. It was then that the applicant apprehended that the ibid CR of June – November, 2008 as also subsequent CRs of June – November, 2010 and December, 2010 to May, 2011 might also contain inadequate remarks about his performance for which he could not be empanelled. Therefore, he filed O.A. 2/2013 challenging the aforesaid CRs. However, this Tribunal directed him to file statutory complaint in that regard which he filed and the Central Govt. considered the same and granted him partial relief vide order dated 29.04.2013 by way of expunction of complete assessment of HOS (Head Of Service) in respect of CR for December, 2010 to May, 2011 on the ground of inconsistency. However, in respect of other

CRs assailed by the applicant in his statutory complaint including the ibid impugned CR of June-November 2008, the Central Govt. has passed the following order :-

“The Statutory Complaint of the officer has been examined in the light of his career profile, relevant records and analysis/recommendations of Army Headquarters. After consideration of all aspects of the complaint and viewing it against the redress sought, it has emerged that all CRs in the reckonable profile of the officer are consistent, well corroborated, objective, performance based and technically valid except assessment of HOS in the CR 12/10-05/11 which merits interference on grounds of inconsistency.”

19. It, therefore, appears that in respect of other CRs no relief was granted to the applicant and it was opined by the Central Govt. that those were consistent and needed no interference. However, the applicant in this O.A. has only challenged the ACR of June – November, 2008. There is no other material before us to verify the allegation of the applicant that respondent No.4 & 5 were biased when they initiated the impugned ACR; although admittedly they were found to be biased against the applicant in our order passed in O.A. No.85/2012 so far as subsequent two CRs were concerned.

20. We have perused the original ACR /dossier of the applicant which were produced before us by the MS Branch directly. We find from the impugned ACR for the period from 1st June, 2008 to 30th November, 2008 that it was initiated by respondent No.5 who was Dy. JAG at the relevant point of time as IO (Initiating Officer) and reviewed by respondent No.4 as Reviewing Officer (RO) being COS of HQ Central Command. We find that both, the IO and RO have awarded box grading of ‘above average’ to the applicant. This was further reviewed independently by the SRO (Sr. Reviewing Officer) who was the GOC-in-C of Central Command. He has also given the same box grading as was awarded by the IO and

RO but he has given a further observation against column 16(b) that the judgement of RO in respect of paras. 9(h) and 10(e) was strict and has accordingly recommended for expunction of those two figurative assessments. We find that there is no indication whether any action was taken on this recommendation of SRO who is the highest in the chain of Command of the concerned Command HQ and is of the rank of Lt Gen holding the appointment of GOC-in-C.

21. On consideration of this report we find that the allegation of the applicant against respondent Nos.4 & 5 being RO and IO respectively during the relevant period is without any substance. That notwithstanding, we cannot ignore the remarks of the GOC-in-C as SRO in the impugned ACR where he has clearly opined that the RO was 'strict'. Accordingly he has recommended certain numerical assessments as noted above should be expunged thus moderating the RO's assessment to an extent. Unfortunately these expunctions do not appear to have been carried out by the MS Branch, nor have the assigned any reasons as to why it was not done.

22. We have gone through the judgements cited by Mr. Goswami. We find that these decisions have no application to the present case. In **Amrik Singh** (Supra), the Hon'ble Apex Court has held that single adverse remark in CR within the period of consideration followed in subsequent years by good remarks and even categorisation as outstanding, may result in non-promotion and non-promotion on such a remark is not subject to judicial review nor can the court examine the correctness of such a remark. In the present case, the applicant has alleged bias against the IO and RO which we have already held as unfounded and unsubstantiated.

23. In OA 18 of 2010 (**Lt. Col. P.S.Shekhwat**) filed before AFT, Principal Bench, the applicant also alleged bias against IO, RO and SRO. However, the Principal Bench of AFT

found that all the three authorities graded the applicant “above average” and it was found that there was no inconsistency in such remarks, even though there was some delay in recording the remarks of SRO. But allegation of bias was unfounded. Accordingly, the said OA was dismissed. In view of our observations made earlier, this decision is also of no avail because we have also held that the allegation of bias against IO or RO (respondent 5 and 4) is without any basis.

24. Now, coming to the other aspect of the matter, we notice that while dealing with the statutory complaint of the applicant, noting was made at page 15(g) of the departmental file indicating the recommendation of the SRO for expunction of the above numerical assessment (7) in respect of two items by the RO, it was observed that the SRO though rating the RO ‘strict’ and recommending expunction of two numerical gradings (7), has himself given only ‘flat 8s’ in QsAP. It is also observed that this ACR was also scrutinised by this Tribunal in the earlier litigation (O.A. 85/2012) and was found to be consistent. As already indicated earlier, this ACR was not the subject matter of our consideration in the earlier OA (OA 85/2012) and therefore, it was not within the scrutiny of the Tribunal. The Tribunal only noted the observations/contentions of the parties without expressing any clear opinion. It is not factually correct on part of the authorities to state that the Tribunal had scrutinised the impugned ACR earlier. It is the duty of the competent authority to consider the points raised by the applicant in his statutory complaint and pass appropriate order. When there was a recommendation from SRO, who is the superior authority to RO it was incumbent upon the COAS to consider this aspect and give his finding on such statutory complaint. There was clearly lack of application of mind and reason in deciding to ignore without assigning as to why such recommendation of the highest authority in the chain of Command could not be implemented. Under such circumstances, we are of the considered view that the recommendation of the SRO should be carried and implemented by expunging the figurative

assessment of the RO in respect of the two items indicated above. As indicated earlier, the applicant has earned the impugned CR on his first posting in HQ of Central Command. We find from the CR dossier that during the earlier CR covering the period from 1st June 2007 to 08 Feb 2008, the applicant was also in JAG service as Lt. Col. at 11 Corps, Jalandhar where his numerical box grading and gradings on different attributes including 9(h) and 10(e) were slightly better. Similar is the case in subsequent assessment period. Therefore, not interfering with the recommendation of SRO on ground of 'consistency' does not apparently stand substantiated.

25. In view of our above finding, we dispose of this OA with the following directions:-

- i) The respondents 1 to 3 are directed to act according to the recommendation of the SRO so far as the impugned CR covering the period June – December 2008 is concerned, by way of expunction of two numerical gradings given by RO in respect of para 9(h) and 10(e).
- ii) If after such expunction, the overall reckonable profile of the applicant is altered, then in that case, his case be considered by No. 3 Selection Board as a special review (fresh) case in accordance with relevant rules/policy.
- iii) This order be implemented within 60 days from the date of communication of this order.
- iv) No costs.

26. The original CR dossier and connected departmental file have already been returned to the MS Branch on request from them on 9th June 2014 on proper receipt after re-sealing the files. The remainder documents, primarily the complaint file in original dealing with the statutory complaint pertinent to this case be returned to MS Branch on proper receipt. Until they are collected, they will continue to remain in custody of PPS to Member (A). OIC, Legal

Cell, HQ Bengal Area shall intimate the MS Branch either to collect them or authorise him to collect them on their behalf.

27. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(LT. GEN. K.P.D.SAMANTA)
ADMINISTRATIVE MEMBER

(JUSTICE RAGHU NATH RAY)
JUDICIAL MEMBER