**(SEE RULE 102 (1))**

**ARMED FORCES TRIBUNAL, KOLKATA BENCH**

**O.A. No. 25 of 2013**

**THIS 15th APRIL, 2016**

**CORAM**

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

**HON’BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)**

APPLICANT(S) **Major Amit Kumar**

 **320 Field Hospital**

 **C/o 99 APO**

Versus

RESPONDENT(S) 1.  **Union of India,**

 Through Secretary

 Ministry of Defence

 New Delhi – 110 011.

 2. **The Chief of Army Staff,**

 Through Adjutant General

 Army Headquarters

 New Delhi – 110 011.

 3. **Director General Dental Services**

Ministry of Defence

L Block, New Delhi – 110 001.

For the applicant (s) Mr. K. Ramesh with Mr. S.K.Choudhury, Advocates.

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

**O R D E R**

**PER LT GEN GAUTAM MOORTHY, HON’BLE MEMBER (ADMINISTRATIVE)**

1. This is an application filed by the applicant under section 14 of the Armed Forces Tribunal Act, 2007 by which the applicant, a Short Service Commissioned Officer (SSC) in the Army Dental Corps challenged non-grant of extension of service to him communicated vide letter of 15 Nov 12. The facts, in brief, are as under :

2, The applicant DS-12310X Maj Amit Kumar was commissioned on 17.7.2008 into the Army Dental Corps as a Short Service Commissioned Officer as per terms and conditions laid down in Army Instructions 15/79 as amended for an initial contractual period of five years.

2

3. On nearing completion of the initial period, the respondents vide the letter of 4.4.2012 sought willingness from all eligible SSC officers for further extension by a spell of another five years. The applicant gave his willingness for the same and his name along with many others of his batch were considered for grant of extension by a duly constituted board of officers on 12.10.2012. However, the applicant could not qualify due to not meeting certain essential criteria.

4. Aggrieved with the decision, the applicant filed statutory complaint on 28.1.2013 and also filed this instant OA on 5.7.2013. The applicant has alleged in particular, that his CR 2009-10 has come in the way of his extension and hence this impugned CR be assessed for any anomaly, inconsistency and aberrant endorsement not in conformity with his general performance and if found to be such, be expunged. Based on the pleadings before this Bench and the fact that the statutory complaint had not yet been disposed off, this Bench on 5.7.2013 granted stay of the operation of the impugned order dated 15.11.2012 under which extension of service was not granted to the applicant and the officer was to have been released from service from 16.7.2013. The impugned order dated 15.11.12 is reproduced below :-

  *“Rakshak Mantralaya*

 *Karyalaya Maha Nideshak*

 *Sashatra Sena Chikitsa Seva*

 *New Delhi 110 001*

 *15 Nov 2012*

 *Integrated HQ of Mod (Army)*

 *Dte Gen of Dental Services*

 *‘L’ Block, New Delhi.*

 *RELEASE FROM SERVICE (SSC): ARMY DENTAL CORPS*

 *OFFICES (SSC)*

 *1.The under mentioned AD Corps officers will be released from Military Service on completion of mutual contractual period of 5 years/extended period of 10 years with effect from the dates mentioned against their names :-*

*Ser No. (a) –(k) – XXX*

*Ser No. (l)*

*Personal No: DS-12310X*

*Name : Capt Amit Kumar*

*Date of Commission: 17 July 2008*

*Date of Completion: 16 Jul 2013 (AN)*

*Date of Release: 16 Jul 2013 (AN)*

*2. The officers will be granted annual leave if due, which may be combined with 28 days of terminal leave which will be granted only from the day next to the last working day of the officer. However Annual Leave may be granted to the officer(s) before or after the date of his/her release as required,*

*3*

*3. The officer(s) will carry a reserve liability for a period of five years from the duties relinquishment of commission. Officer(s) may please be instructed to intimate their present address to this office as well as to AMC Centre and College. Any change in their home address during their reserve period will also be intimated.*

*4. Attention of the officer(s) may please be drawn to the following :-*

1. *AO 42/81 regarding Medical Examination/Documentation.*
2. *SAI 2/S/74 and AI 61/84 regarding acceptance of employment under foreign agencies, after release.*
3. *Para 105(c) of DSR RA regarding submission of No Demand Certificate.*
4. *AO 320/73 regarding use of rank after release.*
5. *Appendix II to AO 394/66 regarding use of identity card*

 *5. For rehabilitation in civil life, the officer(s) may please be advised to submit their data/bio data to the Dte Gen of Resettlement, Ministry of Defence RK Puram, New Delhi.*

*6. Units may be instructed to ensure that ACR/ICR as due are initiated before the officer(s) are SOS.*

*7. As per records held in this office, it is notified that there are no disciplinary/vigilance case pending/contemplated against any officer(s).*

*8. The officer(s) may please be informed accordingly.*

*9. Please acknowledge.*

 *(Satish R Iyer)*

 *Brig*

 *DDGDS*

 *For DGAFMS”*

5. Subsequently, while the stay was in effect and pleadings continued, the statutory complaint was disposed off vide Govt. of India, Ministry of Defence letter dated 10.7.2013 which was communicated to the applicant on 17.7.2013. The order dated 10.7.2013 dismissing his statutory complaint is reproduced as under:

  ***“CONFIDENTIAL***

 *No.15(92)/2013/D(Medical)*

 *Government of India*

 *Ministry of Defence*

 *New Delhi, the 10th July 2013.*

***ORDER***

 *The Central Government after considering the Statutory Complaint, dated 28.2.2013 submitted by (DS-12310X) Maj Amit Kumar, ADC, against non-grant of extension of service, hereby rejects the same being devoid of merit. Assessments in all the CRs in the reckonable profile, including the impugned CR, are fair, objective, well corroborated and performance based. There being no evidence of any bias or subjectivity, none of the CRs merit any interference. The officer has not been granted extension of Short Service Commission on account of not fulfilling the*

*4*

*requisite eligibility criteria as per extant policy. No injustice has been done to the complainant officer.*

 *By Order and in the name of the President of India*

 ***( Ajay Saxena)***

*Under Secretary to the Government of India*

***CAB****: For communication to the officer through proper channel as per laid down rules.*

 ***CONFIDENTIAL”***

6. Based on rejection of the statutory complaint the applicant’s counsel was permitted to make an amendment petition while the stay continued. In the amended application, the main ground for relief sought by the counsel for the applicant was that the applicant should have been placed under notice for 60 calendar days for improvement in his short comings and only after 60 calendar days should there still not have been any conspicuous substantial improvement, he could have been placed under adverse ACR and that in the absence of compliance of this mandatory requirement procedure as per the Army Order on the subject, the impugned ACR becomes non est on the very face of it and is legally not sustainable. He also stated that this ACR if compared to the other CRs if found discriminatory and is in aberration to his service profile, then the ACR needs to be quashed and set aside.

7. The respondents, on the other hand, denied this contention. They reiterated the provisions contained in paragraph 4 of Army Instructions 15 of 1979 which denotes as under :

 *“ Commission will be granted for a period of 5 years in the first instance and will be extended by another 5 years as the DGAFMS may decide subject to the condition that the total Short Service Commission service does not exceed 10 yrs provided further that the authorized establishment is not exceeded thereby. On being granted a commission, the officer will be subject to the Army Act 1950 (XLIV of 1950) under section 2(i)(a) thereof”*

8. Moreover, the respondents reiterated vide para 2 of the GOI letter dated 02 Nov 2007 which denotes as under :

 *“extension of service upto 14 years would be subject to fulfilling all laid down eligibility criteria thereby implying that the same is not automatic”*

9. The respondents have highlighted that the criteria followed for extension of SSC officers is governed by item 7 of Medical Services Advisory Committee (MSAC), chaired

5

by the DGAFMS, which is the Apex decision body of the Armed Forces Medical Service (AFMS) vide the meeting held on 25.4.1990 amended vide the note dated 3.1.2005. The respondents stated that the applicant was considered for grant of extension vide a duly constituted board of officers under the chairmanship of DGDS (Director General of Dental Services) but he could not qualify for grant of extension due to the fact that he was not fulfilling the criteria contained in the letter dated 27.9.2011. Relevant extract of the letter dated 27.9.2011 is reproduced below :

 *“03748/DGAFMS/Dental-1* *27 Sep 2011*

 ***OFFICE OF THE DGAFMS*** ***(DG/DENTAL-1)***

1. *Reference this office note of even number dated 21 Jun 2001.*
2. *Under the terms and conditions of service for officers granted SSC in AD Corps laid down in AI 15/79, as amended, commissions to Civilian Dental Surgeons are granted for a period of 5 years in the first instance and are extended another 9 years in two spells, first of 5 years and second of four years as the DGAFMS would decide subject to the condition that the total SSC service of the officer would not exceed 14 years.*
3. *The following criteria, duly approved by the MSAC has been laid down for screening of the cases of willing SSC officers for grant of extension of service beyond the initial contractual period of service and this has been made applicable with immediate effect :-*
4. *Minimum numerical average of considered ACRS acceptable will be 7 Ratings.*
5. *In star qualities viz., Integrity, loyalty, sense of duty, moral courage, physical fitness, effectiveness in stress and attitude towards service should not be less than 6.*
6. *For extension from 5 to 10 years last* ***three (03)*** *available ACRs incl NIR will be considered.*
7. *For extension from 10 to 14 years last (* ***five (05)*** *available ACRs incl NIR will be considered.*
8. *There should not be an adverse remark in any ACR.*
9. *The officer should have passed MOBC.*
10. *Officers must be in Medical classification* ***SHAPE-1****. Officers in permanent low medical category will not be granted extension of tenure. Officers in temporary low medical classification to be considered for extension of service with the condition that they are upgraded to Medical classification SHAPE-1 within a period of 06 months. The result of the Extension Board to be deferred accordingly.*

1. *This office note under reference may please be treated as cancelled.*
2. *The above criteria may please be brought to the notice of all concerned.*

 *Sd-*

 *(Mahesh Chander)*

 *Maj Gen ADGDS*

***Dte General of Dental Services***

***Dte General of Medical Services(Navy)***

***Dte General of Medical Services (Air)”***

*6*

10. It is seen from the impugned ACR, viz., the ACR 2009-10 that it contained adverse remarks which was communicated to the applicant in writing and he has acknowledged the same. The relevant portions of the adverse remarks are as follows :

*“ An average officer with an obese built. The officer lacks in motivation and enthusiasm. Because of his poor physical fitness, he lacks in self confidence as well. However, his social conduct has been good. The Offr has been periodically counseled for his weakness in BPET & PPT as he has repeated(ly) failed”.*

11. It is seen that the IO had corroborated the adverse remarks in the pen picture with low numerical assessment . This was substantiated by the RO. The applicant, therefore, was well aware of the fact that adverse remarks had been endorsed of ACR 2009-10 since he was communicated the same. The fact that the applicant did not represent against this policy is indicative of his having accepted the said remarks.

12. As per AO 1/2010/DGMS it is seen that the respondents have followed the instructions laid down with regard to adverse report and guidance for improvement. Paragraphs 7.8.6 to para. 7.11 are reproduced herein below :

*“7.8.6 Adverse Remarks and Guidance for improvement. For these to be consistent and acceptable, it will be essential that the remarks endorsed by the reporting officer(s) be supported by figurative assessment in the relevant variables of personal and professional qualities. The intention of report writing is to be factual and must convey the correct impressions. This will help the organization place the correct man in the correct post. While factual reporting is necessary, IOs must differentiate clearly between a tentative adverse remarks like ‘often’, ‘sometimes’, ‘usually’, ‘generally’ etc. and unconditional remarks/comments which are adverse remarks like “He lacks initiative and drive”, “ He does not take decision”, “ He fails to comply with orders”, “ He misbehaves with others after consuming alcohol” etc. Remarks in the pen picture such as “of retiring nature”, mixes with a few”, “should have done better”, though not adverse should be brought to the notice of the officer for overcoming such shortcomings. These observations are not to be recorded as a matter of course, but only in case where they affect the officer’s performance of his duties or his potential for growth. The IO must resort to performance counseling during the reporting period and only if the officer fails to improve upon these shortcomings, these will be reflected in the ACR.*

*7.9 Whenever the variations in figurative assessments between various reporting officer(s) are not adequately justified in the pen picture or the figurative grading of the reporting officer (s) is not in consonance with their pen picture, the concerned reporting officer(s) may be queried by Integrated HQ of MoD (Army)/ Dte Gen Med Services (DGMS-1A)/DGAFMS/DG-1X (CRD Cell). It will thereafter be mandatory upon the reporting officer(s) to provide the requisite justification. During this process, the following will not be accepted: -*

1. *Revision of figurative assessment to avoid explicit justification.*
2. *Exclusion of Adverse remarks or Advisory remarks to avoid communication to the ratee.*
3. *Any change of figurative assessment/ pen picture endorsed by a reporting officer after the subsequent reporting officer has endorsed his remarks, will make*

*7*

1. *such an amendment null and void*

*7.10 Adverse/ Advisory Remarks. Adverse traits are those, which affect an officer’s good conduct or performance and may eventually harm the service. It is duty of the reporting officers to take note of adverse traits in officers serving under them, and to try to remove than rather than have to report on them. The aim should be to help an officer to overcome his shortcomings by timely action. This can be achieved through frequent advice or warning, well in advance of initiating a report. Should an officer fail to show improvement in spite of the advice or warning given to him, the reporting officer must enter the adverse traits in his confidential report. If in a previous report the same reporting officer had reported any shortcomings, which have since been overcome, this fact should be made clear in the latest report especially where an officer has made a distinct effort to improve.*

*7.10.1 Adverse Remarks. These remarks are essential to place on records the weaknesses of the ratee and will be endorsed in the pen picture of the ratee. All weaknesses in the pen picture will be treated as adverse remarks.*

*7.10.2 Advisory Remarks. These remarks are endorsed by reporting officers to bring in further improvement in the ratee's performance and overall development, though per-se they may not reflect any adverse trait of the ratee. Advisory remarks are not construed as weak/adverse. These will be endorsed on a separate detachable sheet after communication to the ratee and pasted below the pen picture.*

1. *Communication of Adverse/Advisory Remarks. Both adverse and*

*advisory remarks by any reporting officer(s) are required to be communicated to the ratee. The ratee is required to acknowledge these remarks by his full signature and date.*

*7.11 In case the reporting officer fails to communicate the Adverse / Advisory remarks, the requirement will be executed by appropriate Fmn HQ or by Dte General Medical Service (DGMS-1A). When intimated to the ratee, he will sign on the extract, which is the forwarded to DGAFMS/DG-1X/CRD Cell for record. Information by the present IO regarding refusal by the ratee to sign the extract, will also be taken as the same having been communicated to the ratee under this AO”.*

13. The respondents also argued that this report was not an adverse report as brought out by the counsel for the applicant. Initiation of an adverse report is an entirely different aspect as can be seen from the instructions of the Army Order (supra). Paragraphs 6.4 to 6.8 are reproduced as under :

**“*Adverse Report***

1. *The authority to initiate an Adverse Report is solely vested in IO (or RO when initiating CR). The purpose of the Adverse Report is to record cases in which an officer’s service is considered unsatisfactory, viz., when it is desired to recommend release of an officer from service, or removal from an appointment, for reasons of professional incompetence, inefficiency or inherent traits of character, which makes his utility to his present appointment doubtful.*
	1. *Before an Adverse Report is initiated, the following will be ensured:*
	2. *The officer will be warned in writing of all his shortcomings, which are intended to be reflected in the Adverse Report/Drop in performance.*
	3. *The written warning as in sub Paragraph 6.5.1 above will specifically*

*8*

* 1. *mention that the same has been issued for the purpose of initiating an Adverse Report/Drop in performance.*
	2. *The next higher Headquarters, DGAFMS/CRD Cell and Integrated Headquarters MoD (Army)/ DGMS/DG-1A, as applicable will be informed of the fact that the officer has been warned. A copy of the warning letter will also accompany the Adverse Report, if and when initiated.*
	3. *The officer will be given a period of 60 days to show improvement. However, this period of 60 days may be waived by the SRO not below the rank of Divisional or Area Commander or a PSO at Integrated HQ of MoD(Army) / DGMS (Army) /DGAFMS.*
	4. *The period of 90 days physical Service under the IO/RO (where*

*RO is initiating the report), can also be waived under exceptional circumstances (due to organizational interest or in case of gross*

*professional inefficiency or when the retention of the officer in his unit / appointment is considered inadvisable in the larger interests of the unit and the formation) by the SRO as at sub paragraph 6.5.4 above, with information to Integrated HQ of MoD(Army)/ DGMS (Army) DGMS-1/ DGAFMS as applicable. The sanction letter for waiver of 90 days physical service must specifically mention this aspect****.***

* 1. *The officer may be debarred from initiating CR of officers serving under him, if such officers are directly connected with the case, and the CRs become due for initiation during the period he remains on Adverse Report.*
	2. *All other provisions of channels of reporting as per the appointment to which the officer is posted to and being reported upon will continue to remain operative and cannot be waived.*
	3. *It will be ensured that issue of warning, waivers if any granted and initiation of adverse report is chronologically in the same sequence and practiced in the same spirit.*
1. *The warning period of 60 days prescribed in sub Paragraphs 6.5.4 above may be waived by the SRO rank/appointment specified in sub paragraphs 6.5.4 above, in case of gross professional inefficiency or when the retention of the officer in his unit / appointment is considered inadvisable in the larger interests of the service. Such sanction will be accorded in writing before the Adverse Report is initiated and a copy thereof will accompany the report. The officer (ratee) in such cases can only be posted out after acceptance of Adverse Report by the office of DGAFMS and while being placed on Review report with a change in environment. The following procedure will be adopted in cases where the warning period of 60 days for initiation of adverse CRs has been waived: -*
	1. *Immediate initiation of Adverse CRs.*
	2. *Information to DGAFMS/DG-1X/ (CRD Cell)/ Int HQ of MoD/DGMS (Army)/ DGMS-1A by telephone and signal as applicable.*
	3. *Processing the adverse Reports through fastest means, for endorsement by the higher reporting officers and further dispatch to DGAFMS/DG-1X/CRD Cell.*
	4. *Reporting officers will ensure that the Adverse Report is endorsed and dispatched to the higher reporting officer /DGMS-1A/ DGAFMS/DG-1X (CRD cell) as applicable expeditiously, through a special courier. The same will not be kept in any headquarters for more than three days****.***
2. *Dte General Medical Services (Army) will be informed by signal as soon as an officer is warned for initiation of an Adverse Report. The report will be*

*9*

*marked “Adverse” in red ink and must reach Integrated Headquarters of MoD (Army)/Dte General Medical Services (DGMS-1A), within 30 days of its initiation.*

1. *There is no embargo on initiation of an “Adverse Report” on an officer who is under observation vide a review report. The officers under review may therefore, be warned for initiation of Adverse report if such a course is considered necessary on the merits of the case and the prescribed procedure is followed”.*

14. From the above, we observe that the authorities have clearly laid down what constitutes adverse remarks in an ACR and what an adverse report is. We observe that the adverse remarks have been made in the impugned CR of the applicant after due counseling and it was communicated to him. No adverse report was raised on the applicant and hence the contention of the applicant’s counsel that rules were violated and adverse report was raised on his client is entirely misplaced and has no locus standi.

15. Counsel for the applicant also cited and relied on a judgment of the Principal Bench of AFT delivered on 9.5.2013 in OA No. 62 of 2013 with MA No. 88 of 2013 in the case of **Maj Ranjeet Panwar vs. Union of India & Ors.** wherein in a similar case the Bench directed that the remarks made in the ACR of Maj Ranjeet Panwar to be accepted as advisory and not adverse. It is quite true from the confidential documents and noting sheets submitted by the respondents that the remarks made in the ACR of Maj Ranjeet Panwar were indeed advisory in nature and not adverse. Relevant extract of the judgment is reproduced as under :

*“11.The petitioner’s case for extension has been rejected on the basis of certain remarks made on the ACRs for the period 1st June, 2009 to 31st May, 2010 after considering the same to be adverse. Careful scrutiny of the relevant ACRs reveals that the IO has declared them to be advisory and not adverse. It is clearly reflected in paras 17 and 25 of the ACR 2009-2010. The court while considering the ACRs is bound by the opinion framed by the Officers entrusted with the job of writing ACRs. It is always a subjective assessment of the IO under whose supervision the officer is working. The court cannot substitute their views with that of I.O in this behalf. Judicial review is limited to finding out errors in the decision making process, if any, and not merits of the order. The report of the initiating officer clearly reveals that the remarks are advisory in nature. There is no reason for the court to hold otherwise. Even while examining the report itself and applying the principles laid down in the policy, this court did not get any impression that the nature of the remarks is adverse. The contention of the learned counsel for the respondents is that the entries are adverse as the same have been reflected in the pen picture. If the remarks were otherwise construed as advisory then IO should have put them in a separate sheet. The contention is per se, misconceived. Error might have been committed by the IO by reflecting the advisory remarks in the pen picture. That by itself would not dilute the nature of the entry recorded by the IO, which clearly shows that the remarks were advisory. This is purely an administrative error and cannot become the ground for holding that the entries are adverse.”*

*10*

 However, as held earlier the remarks in the ACR of the applicant are adverse

and not advisory and, therefore, the ratio of law laid down by the Principal Bench in the aforesaid case is not applicable in the facts and circumstances of the present case and is of no help to the applicant.

16. We find that the statutory complaint has been rejected by the Govt. of India with a very clear and reasoned order and we see no reason to interfere with the said order. We have also called for subsequent ACRs earned by the applicant. We have seen eight ACRs of the applicant and we observe that it is not only in this impugned CR i.e. CR 2009-10 that he has obtained poor numerical gradings and adverse remarks. Even in the latest ACR i.e. 2014-15 it is observed that his numerical grading are not upto the mark and one advisory remark exists in the pen picture. It is, therefore evident that the impugned ACR is not inconsistent in the light of overall profile of the applicant and non-grant of extension is in accordance with the rules. We, therefore, see no reason to interfere with their decision.

17. In the result, the OA deserves to be and is hereby dismissed. Needless to mention that all the interim orders including the stay order granted by this Tribunal during the pendency of this application stand automatically vacated.

18. The OA thus stands disposed of.

19. No order as to costs.

20. The original documents be returned to the respondents after observing due formalities.

21. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be furnished to the parties after observing requisite formalities.

**(LT GEN GAUTAM MOORTHY) ( JUSTICE N. K. AGARWAL)**

 **Member (Administrative) Member (Judicial)**

**ss.**