

A F R

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Original Application No. 38 of 2010

Tuesday this the 29th day of March, 2011

“Hon’ble Mr. Justice Janardan Sahai, Member (J)
Hon’ble Lt. Gen. P.R.Gangadharan, Member (A)”

Ashok Kumar Dwivedi (No.13972554 L Havildar/
X-ray Assistant), son of Shri Vindheshwary
Prasad Dwivedi, aged about 44 years, 310 Fields
Hospital, C/O 56 APO
By Legal Practitioner Shri K.C.Ghildiyal,
Advocate

.....Applicant

Versus

1. Union of India through the Secretary,
Ministry of Defence, Government of
India, New Delhi.
2. Chief of the Army Staff, Army
Headquarters, DHQ Post Office, New
Delhi.
3. The Officer-In-Charge, Army Medical
Corps, Records, Lucknow (U.P).
4. Col. Hemchandra Agrawal, Ex.
Commanding Officer, 412, Fields
Hospital, C/o 56 APO Presently,
Registrar, Military Hospital, Allahabad
(U.P).

.....Respondents

By Legal Practitioner Sri K.D.Nag, Sr.Standing Counsel for the
Central Government.

ORDER

“Hon’ble Mr. Justice Janardan Sahai”

1. Applicant Ashok Kumar Dwivedi was enrolled in the Indian Army on 18.03.1987. He was promoted as ^{e-Naik} Nayak in the year 1995 and as Havildar on 27.12.2002. The next promotion for which he was eligible was to the rank of Naib Subedar. The grievance of the applicant is that he was not given promotion to the rank of Naib Subedar and in this OA he has prayed for a direction to the respondents to consider his case for promotion to the rank of Naib Subedar ignoring the assessment of the Review ^{Officer} Officer in the ACR for the year 2006, 2007 and 2008 and grant him promotion to the rank of Naib Subedar with effect from 01.11.2008. He has also prayed for quashing assessment of the Review ^{Officer} Officer in the ACRs for the year 2006, 2007 and 2008.
2. Apart from the statutory authorities impleaded by the applicant as Respondents 1 to 3, the applicant has also impleaded Col. Hemchandra Agrawal, Commanding Officer of the applicant, who was Review ^{Officer} Officer for the relevant years 2006, 2007 and 2008.
3. A counter affidavit has been filed by the respondents, in para 5 of which the respondents have given a chart indicating ACR gradings given to the applicant in the last 10 years from 2000 to 2009. The said chart is reproduced below.

Year	ACR grading by	Rec (R)/ Non Rec (NR) for	Annual Confidential
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			Prom. by		Report initiated By Unit
	IO	RO	IO	RO	
2000	04 (Above Average)	04 (Above Average)	R	R	4004 Fd. Hosp.
2001	04 (Above Average)	04 (Above Average)	R	R	HQ IMTRAT
2002	09 (Out Standing)	08 (Above Average)	R	R	HQ IMTRAT
2003	08 (Above Average)	08 (Above Average)	R	R	MH Gaya
2004	08 (Above Average)	08 (Above Average)	R	R	MH Gaya
2005	08 (Above Average)	-	R	R	MH Gaya
2006	08 (Above Average)	06 (High Average)	R	R	412 Fd Hosp.
2007	06 (High Average)	05 (High Average)	R	R	412 Fd Hosp.
2008	06 (High Average)	05 (High Average)	R	R	412 Fd Hosp.
2009	08 (Above Average)	08 (Above Average)	R	R	310 Fd Hosp.

4. It is common ground that promotion of the applicant was considered by the DPC in the year 2008. The criteria for promotion from the rank of Havildar to Naib Subedar is governed by the policy of the Army Headquarter letter No.B/33513/AG/PS2(c) dated 10.10.1997. The copy of the policy letter has also been annexed by the respondents as Annexure CR-1. The policy stipulates that last five reports before promotion exercise would be considered, out of which minimum three reports must be in the rank of Havildar and in case of shortfall rest may be in the rank of Naik and at least

three out of last five reports should be 'above average' with a minimum of two in the rank of Havildar and remaining should be not less than 'high average'. The relevant period for consideration in the present case, therefore, are the entries for the years 2004,2005,2006,2007 and 2008. In this period, the applicant has been awarded three 'high average' entries and two 'above average' entries and consequently the applicant did not meet the required laid down criteria.

5. Sri K.C.Ghildiyal, learned counsel for the applicant submitted that the applicant had an above average record, as is evident from the ACR gradings given in the chart in para 5 of the counter affidavit and it is only in the years 2006 ,2007 and 2008 that the applicant has been awarded 'high average' entry and even in this period in the year 2006, the applicant had been rated 'above average' by the I.O. who had give n him box grading of 8 points. But he was given 6 points by the R.O. who has rated him 'high average'. The submission of the learned counsel for the applicant is that the R.O *mala fide* has graded him less. In support of his contention that grading given by the R.O. was *mala fide*, reliance has been placed by the learned counsel for the applicant on paras 4.5, 4.6 and 4.8 of the OA. In para 4.5 it has been averred that the applicant might have been damaged in the ACRs written by respondent no.4 in the capacity of R.O., as respondent no.4 had expressed his unhappiness to the applicant only for the reason that the applicant was placed in low medical category due to Bronchial Asthma and due to the above medical category, the applicant

was excused from strenuous exercises and certain other duties which were not liked by respondent no.4 and that the applicant was subsequently upgraded to SHAPE-I in the year 2007. In para 4.6 it has been alleged that in order to stop the applicant from attending the promotion course commencing from 01.07.2007, the respondent no.4 awarded punishment of severe reprimand to the applicant by holding a summary trial for an offence under section 63 of the Army Act and that false allegation was leveled against the applicant. The applicant, however, attended the course and completed the same successfully. The anger and *mala fide* of respondent no.4 got into shape when he damaged all the three ACRs reviewed by him. In para 4.8 it has been stated that the R.O. has not only lowered his assessment in the year 2006,2007 and 2008 but has also down graded the applicant in the said ACRs and has brought down the applicant from the assessment of the I.O. and that it was well within the knowledge of respondent no.4 that the applicant was within the zone of consideration for promotion to the rank of Naib Subedar and in case he was given less than 'above average' grading in consecutive three years, it will deprive him of promotion.

6. A counter affidavit has been filed by respondent no.4. In para 4.5 of the counter affidavit it is stated that the applicant was already in low medical category when he came to 412 Field Hospital on permanent posting in 2006. Respondent no.4 was neither unhappy nor expressed unhappiness about his low medical category nor was the applicant ever spited by

respondent no.4 in regard to applicant's low medical category and on the contrary he was given sheltered appointments commensurate with his medical category. As regards the punishment of severe reprimand for the offence under section 63 of the Army Act, it has been stated that proper procedure for summary disposal was followed. It has also been stated that there was no representation against the punishment at any stage from the applicant and that the punishment has attained finality. About the ACR gradings it has been stated that as a Commanding Officer he has made objective consideration of his overall performance. The averments regarding *mala fides* have thus been denied.

7. It is well settled that while it is easy to allege ^{ad} *mala fides* but difficult to prove them and, in our opinion, the said dictum is well applicable to the facts of the present case. The applicant has not given any material to corroborate the averment of *mala fides*. The allegations referred to are insufficient to prove *mala fides* and also fall short of standard of proof required.

8. The next submission of the learned counsel for the applicant is that grading of 6 points given by the R.O. is inconsistent with the career profile of the applicant. It also submitted that the R.O. had not only given 'high average' entry to the applicant but on his direction the I.O. has also given him 'high average' entry in the succeeding years, namely, 2007 and 2008. The submission is that entry given by the R.O. in the year 2006 and those given by the I.O. and R.O. in the years 2007 and 2008 are inconsistent with the career profile of the applicant

and hence are liable to be quashed. It is also submitted that the R.O. has not given any reasons in the pen picture in the entry for the year 2006 which may justify the award of 'high average' or for bringing him down from the 'above average' entry given by the I.O. It appears that the entries in the year 2001 and 2002 were given to the applicant in the rank of Nayak and entries for the succeeding years 2003 to 2008 were given to him in the rank of Havildar. It also appears that the entries for the year 2006, 2007 and 2008 were given by different I.Os. In the year 2006 the I.O. was Maj.Abha Sharma while in the year 2007 the I.O. was Maj.S.Routh and I.O. in the year 2008 was Maj.Naveen Agrawal. It thus appears that the I.Os had assessed the performance of the applicant as 'high average' in the years 2007 and 2008. The contention of the learned counsel for the applicant, therefore, that 'high average' given by the R.O. in the year 2006 is inconsistent with his career profile is not quite correct because for the period 2003 when he was promoted to the rank of Havildar up to the year 2008, the applicant was given two 'high average' entries by different I.Os. The performance of the ratee is best judged by the officer who had the occasion to see his performance and by the very nature of the exercise which they are required to perform, it is obvious that the court is hardly the proper authority to assess the performance of the officer, especially when the allegations of *mala fides* have not been proved. In this case, it is important to note that although the applicant has impleaded the R.O. as respondent, he has not impleaded the I.Os, namely,

Maj.S.Routh and Maj.Naveen Agrawal, I.Os in the year 2007 and 2008. The submission of the learned counsel for the applicant that the I.O. had graded him as 'high average' in the year 2007 and 2008 on account of any direction given by the R.O. Respondent no.4, cannot, therefore, be accepted.

9. Learned counsel for the applicant relied upon a decision of the Apex Court in *S.T.Ramesh vs. State of Karnataka and another*, (2007) (SCC 436 . In that case the career profile of the officer indicated that his performance had been graded very high except for a short period of 150 days in which he was given adverse remarks. The contrast in the gradings was apparent in the career profile of the officer and it was in the peculiar facts of the case that ^{the} Supreme Court found it difficult to accept the award of adverse remarks to the officer for this short period. In the present case, the applicant has been brought down only one step by the R.O. in the year 2006. Moreover, the applicant was graded as 'high average' by different I.Os in the years 2007 and 2008. The decision in *S.T.Ramesh's* case (supra) is not applicable to the facts of this case.

10. Learned counsel for the applicant then contended that the entry given by the R.O. in the year 2006 was ^a down grading entry in the sense that while the applicant was graded 'above average', the R.O. had graded him 'high average'. The submission of the learned counsel for the applicant is that the R.O. should have justified the down grading from 'above average' rating given by the I.O. to the 'high average' given by him in the pen picture and down grading entry should also have

been communicated to the applicant by the R.O. It is also submitted that the I.O. should also have communicated the 'high average' entry given to the applicant for the year 2007 and 2008. In support of his contention, learned counsel for the applicant placed reliance upon the decision of the Apex Court in *U.P.Jal Nigam and others vs. Prabhat Chandra Jain and others*, (1996) 2 SCC 363, *State of U.P. vs. Yamuna Shanker Misra and another*, (1997) 4 SCC 7, *Swatantar Singh vs. State of Haryana and others*, (1997) 4 SCC 14 and *Dev Dutt vs. Union of India and others*, (2008) 8 SCC 725. This last case of Dev Dutt has been relied upon both by the learned counsel for the applicant as also by the Sr.Standing Counsel Sri K.D.Nag. The decisions of the Apex Court in *U.P.Jal Nigam*(supra) and *Yamuna Shanker Misra*(supra) have been considered in *Dev Dutt's* case. Learned counsel for the applicant relied upon para 17 and 19 of *Dev Dutt's* case. These paragraphs are quoted below:

*"17. In our opinion, every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways: (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi v. Union of India* that arbitrariness violates Article 14 of the Constitution."*

"19. Learned counsel for the respondent has relied on the decision of this Court in U.P.Jal Nigam v. Prabhat Chandra Jain. We have perused the said decision, which is cryptic and does not go into details. Moreover it has not noticed the Constitution Bench decision of this Court in Maneka Gandhi v. Union of India which has held that all State action must be non-arbitrary, otherwise Article 14 of the Constitution will be violated. In our opinion the decision in U.P.Jal Nigam cannot be said to have laid down any legal principle that entries need not be communicated. As observed in Bharat Petroleum Corpn. Ltd. V. N.R.Vairamani(vide AIR para 9) (SCC p.584)

"9.....Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context."

11. The contention of Sri K.D.Nag, Sr. Standing Counsel is that the decisions in the case of *U.P.Jal Nigam, Yamuna Shanker Misra and Swatantar Singh* and other cases relied upon the learned counsel for the applicant are not applicable to Military jurisprudence and that the Apex Court itself in *Dev Dutt's* case has held in para 38 as follows:

"38. We, however, make it clear that the above directions will not apply to military officers because the position for them is different as clarified by this Court in Union of India v. Major Bahadur Singh. But they will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State (in addition to government servants)."

In view of the observations of the Apex Court in *Dev Dutt's* case in para 38, the decisions in *U.P.Jal Nigam* case and *Yamuna Shanker Misra* relied upon by the learned counsel for the applicant are not applicable to the present case. In *Maj.A.V.Sukumaran vs. Union of India and others*, (Mil LJ 2009 Del 30) it was held in para 11 as follows:

"11. Likewise, in the case of Lt.Col D.S.Pandey v. Union of India(2005) 121 DLT 177, the Division Bench dismissed the writ petition and refused to quash the ACR recorded in similar manner categorically holding that U.P.Jal Nigam(supra) was a case relating to civil service rules and was distinguishable. It is clear from the following observations in the said judgment:

"12. Reliance by counsel for the petitioner on the Supreme Court judgments in U.P.Jal Nigam and Ors v Prabhat Chandra Jain, 1996(1) JT(SC) 1201 are related to civil service rules and are distinguishable. The propositions laid down in these does not advance his case at all. The legal position applicable regarding the communication of an adverse ACR relatable to the civil services would not be attracted to the Army Service Rules. Similarly the considerations which apply to other Government servants in the manner of promotion and selection may not, as a matter of course be applied to defence personnel of the petitioner's category and rank. Reliance for this can be placed on Lt.Colonel K.D.Gupta v Union of India, AIR 1989 SC 1392 and Lt Col Krishann Chand v Union of India and Ors LPA. 23 of 1995 decided on 11-10-1996 by a Division Bench of this Court. The ratio of these cases was followed by a Division Bench of this Court in (2005) II AD(Delhi) 53 MPS Gill v Union of India.

13. In view of all this, petitioner has failed to make out any case for quashing the impugned ACR. His claim for promotion also fails and this petition is accordingly dismissed."

12. As regards the requirement to justify the down grading entry given by the R.O., the manner of recording entries in respect of PBOR has been laid down in Army Order 1/2002/MP. Para 44 of the Army Order relates to communication of 'average' grading. In the present case the applicant was awarded 'high average' entries in the relevant years, 2006, 2007 and 2008 and there is no provision in the Army Order for communication of 'high average' entries.

Learned counsel for the applicant placed reliance upon a decision of the Madhya Pradesh High Court in *Shivanand Prasad vs. Union of India and four others*: Misc.Petition No.4066 of 1989, decided on 23.09.1991. From the facts stated in the judgment of the Division Bench it appears that in that case Naib Subedar concerned was given the following remark by the R.O.

"Overrated by the I.O. High average NCO"

The Division Bench held that the respondents could not produce any material or circumstance justifying the above remark of the R.O. and thereby down grading the petitioner from 'above average' to 'high average'. The learned Judges went on to hold that the contention on behalf of the respondents that the remark 'high average' is not adverse and, therefore, was not required to be communicated to the employee concerned, on the face of it is highly unreasonable and that it was hard to accept that the remark in the service career of a person which is likely to render him non-suitable for promotion, is not an adverse remark and that the remark which has seriously marred the chance of promotion of the petitioner is undoubtedly an adverse remark and non-communication of the same to the petitioner so as to give him an opportunity to represent against the same, appears to be a serious breach of the principles of natural justice. The facts stated in the judgment of the Madhya Pradesh High Court do not indicate ^{the} ~~that~~ entries for the preceding or subsequent years ^{that} were given in that case. The policy letter of the Army Headquarter applicable in this case

indicates that out of last five years entries, the officer ought to have earned at least three 'above average' and not less than two 'high average' entries. When in the year 2006 the Reviewing Officer was down grading the applicant from the 'above average' assessment made by the I.O. to 'high average' it cannot be said that the chances of promotion of the applicant were being taken away. The reason is that the applicant could still have been promoted had he earned 'above average' entries in any of the two subsequent years, 2007 and 2008. Apart from this distinction which exists on facts, we also find that the Madhya Pradesh High Court was considering a different policy. Moreover, the Madhya Pradesh High Court has not considered the cases referred to above which hold that it is not necessary in the context of Military service law to communicate down grading entries and that *U.P. Jal Nigam* case and others taking that view is not applicable to Military service. We have already referred to the requirement of communication of entries in Army Order 1/2002/MP, which requires communication of only 'average' entries.

13. Another decision upon which reliance has been placed by the learned counsel for the applicant is a decision of the Single Judge of the Madhya Pradesh High Court in *Hav. Gambhir Singh Chahar vs. Union of India and others*, 2007(2) MPHT 238. In that case it was held that award of 'average' entry to an officer was required to be communicated. The rationale of the decision is that even one 'average' entry earned by an officer would be fatal to his career/promotion in view of the terms of

the policy. We do not see how this decision advances the case of the applicant who has been awarded 'high average' entry and award of 'high average' entry *ipso facto* would not result in non-promotion of the applicant.

14. We shall now deal with the contention that the RO has not given any reasons to justify the downgrading. Para 45 of the Army Order 1/2002/MP deals with variation in the assessment of I.O. and R.O. The said para is being quoted below:

"45. In case assessment of the RO is widely at variance with the assessment of the IO, difference of more than three points in the figurative assessment and more than two steps in overall grading, the RO will elaborate the variation and endorse full justification for his assessment, in the pen picture. If the assessment is "Average/NR or lower", full justification supported by periodical warning(s)/performance counselling(s) given to the JCO/NCO will be recorded in the CR."

A plain reading of this paragraph indicates that it is only in such case where the over all grading has been reduced by more than two points, is it necessary for the R.O. to record reasons. In the present case the R.O. has down graded the applicant by two points only and hence requirement of recording reasons is not applicable.

15. It was contended that the applicant was not given any warning or performance counselling, hence the rating given by the I.O. for the year 2007 and 2008 and by the R.O. for the years 2006,2007 and 2008 should not be accepted. However, the learned counsel for the applicant was unable to refer to any Army Order or policy, which may render an ACR to be vitiated

for this reason. It is to be noted in this case that grading which have been given to the applicant were not 'average' or 'below average' or adverse but they were 'high average' gradings. The requirement to give performance counselling or warning to justify a high average grading has not been demonstrated on the basis of any policy placed before us. The work of the applicant had been assessed by the I.O. and R.O. and if they have graded him 'high average', it is difficult for a Tribunal or a court to take a different view, as it is the reporting officers, who are having first hand information about the performance of an officer and are in a better position to assess it.

16. In the result, we do not find any merit in this OA and it is dismissed.

(Lt. Gen. P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

RPS/-