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RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 3

Original Application No. 110 of 2012

Friday, the 17th day of January, 2014

“Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member

Hon’ble Lt. Gen. K Surendra Nath, Administrative Member”

IC-50797A Lt Col Laxmi Kant Yadav, s/o Late Shri Indra Pal Yadav, R/O
9/215, Indira Nagar, Lucknow.

- **Applicant**

Versus

1. Union of India through The Secretary, Ministry of Defence ,
South Block, DHQ PO New Delhi-110 011
2. The Chief of the Army Staff, Integrated HQ of Ministry of Defence
(Army) DHQ PO New Delhi-110011.
3. Military Secretary’s Branch, Integrated HQ of Ministry of Defence
(Army) DHQ PO, New Delhi-110 011

- **Respondents**

By Lt. Col. Laxmi Kant Yadav

- **Applicant in person.**

**Ld. Counsel appeared for the
respondents**

**-Shri D.K. Pandey,
Advocate,
Central Govt. Counsel
assisted by Lt. Col
Sachidamand Prabhu,
AMS (Legal) of M.S.
Branch.**

ORDER
(Per Hon'ble Mr. Justice Virendra Kumar DIXIT, Member (J))

1. This Original Application has been filed under section 14 of the Armed Forces Tribunal Act, 2007, whereby the petitioner has sought following reliefs:-

- (a) *Quash the orders dated 12.05.2009, 14.12.2011 and dated 02.09.2009 passed by Respondent No 1 and 2 in the statutory as well as non statutory complaint of the applicant.*
- (b) *Direct the Respondents to remove the assessment of IO/RO/SRO in the CR for the period Jun 2000 to May 2001 in its entirety due to its subjectivity and inconsistency and further direct the Respondents to consider the applicant for promotion by the first available appropriate selection board by treating him a special review (fresh) after removing the impugned assessment of IO/RO/SRO in the CR for the period mentioned above from the reckonable profile of the applicant.*
- (c) *Issue such other order/direction as may be deemed appropriate in the facts and circumstances of the case.*

2. In brief, the facts of the case are that the applicant was granted permanent commission in the Army on 14.12.1991 in the Army Service Corps. He was promoted to various ranks from time to time and later to Lieutenant Colonel in November 2002. During 1991 to 2011, the applicant was posted to various appointments in peace, field, high altitude, Counter Insurgency areas including 'OP VIJAY', 'OP RAKSHAK', OP PARAKRAM and foreign assignments. He was selected in September 1997 for parachute duties and performed the duties of second in command of a parachute unit and in Mar 2000, the Officer was posted to a Rashtriya Rifle Unit deployed in Counter Insurgency area/ High Altitude Area. He

was also posted to Border Road Organisation deployed in Bhutan as Officer Commanding and in December 2006 he was posted to 523 Army Service Corps Battalion .

3. The applicant was considered for promotion by No 3 Selection Board held in April - May 2008 for promotion to the rank of Colonel but was not empanelled for such promotion. The applicant submitted a Non Statutory Complaint dated 09.05.2008 which was rejected vide order dated 02 .09. 2008. Aggrieved by rejection of Non statutory complaint, the applicant filed Statutory Complaint dated 01.01.2009 which was rejected by the Central Government vide order dated 12.05.2009. Applicant filed again a Statutory Complaint dated 03.08.2011 against non empanelment by No. 3 Selection Board which was rejected on 14.12.2011. Being aggrieved, the applicant has filed this Writ Petition.

4. Heard Lt. Colonel Laxmi Kant Yadav, the applicant in person and Shri D.K. Pandey, Learned Central Government Counsel assisted by Lt Col Sachidanand Prabhu, Assistant Military Secretary (Legal) of Military Secretary Branch, Army Headquarters and perused all the relevant records including impugned CR.

5. Applicant has submitted that he is aggrieved by the actions of the respondents of taking into account the subjective, motivated, and inconsistent assessments made by the Initiating Officer (IO), Reviewing Officer (RO) and Senior Reviewing Officer (SRO) in the Annual Confidential Report for the period from Jun 2000 to May 2001 while considering the Applicant for promotion to the rank of Colonel which was otherwise ought not to have been taken into consideration as the said assessments in the ACR was subjective and inconsistent with the reckonable

profile of the Applicant. The assessment of the Applicant was unduly harsh and subjective as the IO was under prejudice because of Applicant's relatively short physical service under the said IO (103 days excluding 46 days under pre-induction training at 15 Corps Battle School, Rajouri) and the fact that he was an ASC officer. No consideration was given to him for the fact that despite being an Officer from Services posted as Mechanical Transport Officer, the applicant was asked to perform the duties of a Rifle Company Commander in an active Counter Insurgency environment without any formal training on company level tactics and company support weapons. The appointment of Company Commander as per laid down Qualitative Requirements (QR) issued by the Military Secretary Branch is tenable by Officers from Arms. There has never been any instance where the Applicant's reporting officers had ever found a reason to question the Applicant's performance, integrity, loyalty or commitment to the organisation and he was never counseled either verbally or in writing for the performance or potential for growth. The report by Colonel (now Brigadier) S K Jha, SM as IO from Jun 2000 to May 2001 was underrated and unduly harsh, in comparison to the Applicant's performance and also with other reports in the Applicant's reckonable profile including a report under the same IO, in the subsequent year. He apprehends, and has reason to believe, that RO and the SRO too would have underrated him. The applicant claimed that he had a very limited interaction/exposure with the IO during that period due to leave/pre induction training as follows:-

<u>Ser</u>	<u>Event</u>	<u>From</u>	<u>To</u>
(a)	Applicant was on leave/ Pre-Training at 15 Corps	06.07.2000	20.08.2000
(b)	Applicant's 30 days leave and IO's leave together	25.08.2000	24.09.2000

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|-----|---|------------|------------|
| (c) | Applicant's leave | 06.11.2000 | 19.11.2000 |
| (d) | Applicant's leave
followed by IO's leave | 06.12.2000 | 19.01.2001 |
| (e) | IO's leave followed by
Applicant's JC Course | 02.02.2001 | 09.06.2001 |

6. Applicant further submitted that at the time of writing the report, the IO was under prejudice because of the limited interaction/exposure to the applicant in a unit actively involved in Counter Insurgency operations. He further claimed that no consideration was given to the fact that despite being an ASC Officer, the applicant was made to perform the duties of a Rifle Company Commander without any formal training on company level tactics and company support weapons. The IO initiated the ACRs with undue caution and strict approach, under the impression that reports earned during Rashtriya Rifles carry additional weightage against peace time reports and are at par with any above average report. Due to above facts, eight Officers rated by Colonel (now Brigadier) S.K. Jha were not empanelled by No 3 Selection Board/had not made to next rank whereas the unit got Chief of Army Staff Citation and IO himself was awarded the Sena Medal for distinguished service. This would not have been possible if the unit had a large number of officers whose performance was below par in a Counter Insurgency environment.

7. The applicant further submitted that the same IO, i.e. Colonel (now Brigadier) S.K. Jha, SM awarded him a grade higher in the ensuing year i.e. 01.06.2001 to 31.05.2002 (much closer and longer interaction compared with previous year) and mentioned to the applicant that while initiating the previous report, he was under the impression that the earlier reports earned

in Rashtriya Rifles shall carry additional weightage against normal peace time.

8. He also averred that the assessment of RO and SRO may have been inadvertently downwardly moderated in tune with the assessment of IO due to lack of interaction and inadequate knowledge about the applicant, he being located at an isolated company operation base with no communication/interaction with the said superior officers. Further, a reporting officer who had no personal knowledge of the performance of the officer on ground and if he happened to be an officer in the reporting channel, it was obvious that ratee officer's report would be based on the assessment of other initiating/reporting officers in the chain. Hence, any assessment made by RO/SRO which was dittoed by the assessment of other reporting officers especially in view of lack of any interaction with the applicant would be nothing but subjective, and, totally against the spirit of aim and objective for which ACR system was being followed in Army. In the present case, the IO had unjustly underrated the performance of the applicant and had awarded the applicant with a large number of 7's in figurative assessment in PQ/DPVs 7'S which was subjective and inconsistent with other reports earned by the applicant in reckonable profile. He apprehends that the RO and SRO would have followed similar figurative assessment pattern. The assessment of the IO and reporting officers in the chain in the ACR in question has adversely affected and brought down his overall reckonable profile and damaged his promotional prospects as evidenced by his non-empement in the No. 3 Selection Board

9. To put forth his contention, the applicant has relied upon the following judgements :-

- (a) Hon'ble the Apex Court Judgement in **MA Rajasekar vs State of Karnataka** reported in 1996 (10) SCC 369.
- (b) Hon'ble Apex Court Judgement in **Sukhdev vs Commissioner Amaravati Division** reported in 1996 (5) SCC 103.
- (c) Hon'ble Apex Court Judgement in **Swatantar Singh vs State of Haryana** reported in AIR 1997SC 2015.
- (d) Hon'ble Apex Court Judgement in **State of UP vs Yamuna Shankar Misra** reported in 1997 (4) SCC 7.
- (h) Hon'ble Apex Court Judgement in **ST Ramesh vs State of Karnataka** reported in 2007(9) SCC 436.

10. Applicant has also submitted that directions be issued to the respondents to consider the applicant for promotion by the first available appropriate selection board by treating him a special review (fresh) after removing the impugned assessment of IO/RO/SRO in the CR for the period mentioned above from the reckonable profile of the applicant.

11. On the other hand, learned standing counsel for the respondents Shri D.K. Pandey has submitted that the applicant and the complainant, Lieutenant Colonel Laxmi Kant Yadav had filed this Original Application as barred on account of delay and laches as well as statutory provisions of limitation contained in Section 22 of the Armed Forces Tribunal Act, 2007. The applicant had impugned the Confidential Report covering the period June 2000 to May 2001, which was communicated to the applicant on 15 June 2001. The applicant did not have any grievance against this report at the time of its initiation and allowed it to remain in his records without any objection till his non empanelment by No 3 Selection Board held during April-May 2008. The cause of action/grievance of the applicant arose on 15.06.2001. The applicant had submitted a Non Statutory Complaint dated 09.05.2008 for the first time after seven years of the initiation of the

impugned Confidential Report. Therefore this Original Application is barred under statutory provisions of limitation contained in Armed Forces Tribunal Act Section 22 (1) (a).

12. Ld Counsel for the respondents further submitted that the applicant, in para 4 and 5 of part III of Statutory Complaint dated 03.08.2011, addressed to the Central Government, raised relevant issues which are reproduced below :-

“ It had emerged from the above that I had not made the grade because of my overall profile and comparative merit when I was considered as a fresh case along with my batch i.e. 1991. However keeping in view the apparent profile and performance of my batch (1991) and the Officers of the 1992 batch in various parameters including courses, postings etc. I had reconciled to the logic that I had not made the grade because of my overall profile and comparative merit as compared to the Officers of 1991 and 1992 batches who were promoted to the rank of Colonel.

However, considering the apparent profile and performance of the Officers of 1993 batch, I feel that my overall profile is better than the Officers who have been empanelled for promotion to the rank of Colonel. It is more so because the Officers with comparatively lower apparent profile have made the grade. I, being lower in merit in my original batch i.e. 1991 and following batch i.e. 1992, which had more officers qualified in DSSC/TSOC, definitely had a chance while being considered with the officers of 1993 batch of ASC who apparently have a lower profile as compared to the 1991 and 1992 batches.”

13. Ld Counsel for the respondents submitted that the applicant had not challenged the impugned report in his aforesaid statutory complaint and had himself accepted that he could not make the grade because of overall profile and comparative merit. The applicant had challenged the impugned report on grounds of subjectivity and inconsistency and not on ground of technical validity. He further contended that the applicant had earned two more ACRs for the period from June 2001 to May 2002 and July 2002 to November 2002 in the same appointment but he had no grievance in respect of other two CRs which clearly indicated that challenging the validity of impugned CR is an afterthought. The applicant had himself shown his appointment as Rifle Company Commander and had given a certificate regarding his physical service for initiation/endorsement of CR in accordance with the order on the subject. At para 6 of the said CR form, the applicant has categorically authenticated correctness of details filled by the applicant. Therefore, this Original Application is liable to be dismissed on grounds of delay and also being devoid of merit.

14. We have heard arguments of both sides and perused relevant documents including Master Data Sheet and original impugned CR in question.

15. Submission of Ld. Counsel for the respondents is that the Original Application is time barred. We have perused the record. Statutory Complaint dated 03.01.2011 against non-empanelment of the applicant by No. 3 Selection Board was rejected on 14.12.2011 and the instant Original Application has been filed on 27.03.2012. Thus, the Original Application is not time barred as contended by the respondents. On the issue of maintainability, the matter was considered on 18.10.2012 and the order to this effect was passed by this Tribunal as under:-

Order dated 18.10.2012

“We have gone through clause (i) Rule 6 of the AFT (Procedure) Rules. We are sure that the jurisdiction lies before the Tribunal by taking the last posting of the applicant. In the present case, it is pointed out that the applicant was posted at Gwalior when her was communicated about impugned ACR and thereafter he filed statutory complaints. This Tribunal has jurisdiction to consider this matter as the last posting of the applicant was at Gwalior.

Considering this fact, we allow the R.A. and modify the order dated 04.10.2012 passed by us and hold that this Tribunal has jurisdiction to hear the case of the applicant.”

16. From perusal of record it transpires that the applicant was considered for promotion to the rank of Colonel by No. 3 Selection Board held in April 2008 as a fresh case, in Dec 2009 as First Review case and in May 2011 as Final Review case. The results of the said No. 3 Selection Board supra were declared and the applicant was ‘Not Empanelled’ for the rank of Colonel. The applicant is non psc/SC qualified officer with ‘C’ grading in Junior Command (JC) Course. The overall profile of the applicant is predominantly ‘Above Average’ with a few “Outstanding” assessments. The applicant has a balanced profile in postings both within his Corps as well as outside the Corps and has served on a foreign assignment with IMTRAT, Bhutan as a Major. In view of the pleadings of both sides, facts and circumstances of the case, we have to consider whether the impugned Confidential Report for the period from June 2000 to May 2001

was subjective and inconsistent which had affected the applicant's empanelment in No. 3 Selection Board for promotion to the rank of Colonel.

17. As we understand, the Army has a three tier reporting system. Part V of the Army Order (AO) 45 of 2001 provides for checks and balances to ensure objectivity. In this context para 118 and para 119 of AO 45/2001 are reproduced for ready reference as under:-

“118. In accordance with the aim as defined at Paragraph 5 above, the assessment contained in a CR will be restricted strictly to the performance and potential as observed during the period covered by the report.

Consistency in Reporting

119. On receipt in the MS Branch, a CR will be scrutinized for consistency in reporting. Criteria for the same is defined below:-

*(a) **Outstanding Assessment.** Award of 9 marks in the box grading has been explicitly justified in the pen picture, indicating achievement by the rate beyond the call of normal duty.*

*(b) **Wide Variations** : Variations of three or more grades in PQs, DPVs, QsAP, Technical Qualities and two points in box grading by the various reporting officers, need to be explicitly elaborated by the reporting officer(s).*

18. It is well settled law that any ACR which had adversely affected the chances of promotion was to be treated as an adverse ACR. The aim of the confidential reports is to objectively assess the performance of the officer

reported upon by the reporting officers as noticed by them during the reporting period.

19. The reporting assessments of the RO/SRO is normally based on the assessments of Initiating Officer who has occasion to assess the performance of the officer. We have perused the entire service records of the applicant and upon perusal of the same, we find that remarks of the RO for the period in question were contrary to the consistence performance. The applicant in his reckonable CRs for promotion was always graded in the figurative assessments of eight and nine. Therefore award of large number of sevens and a variation of two points in Box grading between the IO/RO and SRO prima facie, appeals to be an aberration. Such an aberration, being an inconsistent reflection of his performance and which had affected the career of the applicant adversely and subsequent non empanelment in the Selection Board. Further, we find that the SRO should have explicitly elaborated wide variation of two points in Box Grading as envisaged in sub para 119 (b) of Army Order 45/2001. Therefore we find the impugned CR fit for being set aside for inconsistency. In fact the Controlling Branch itself should have vetted the CR during its examination and set it aside on the ground of inconsistency.

20. From the averment made by the applicant in his O.A., it is evident that he had very a short period of interaction with the IO as brought out above. We note that in the ensuing CR by the same Initiating Officer (IO), the applicant was graded near outstanding with no 7s in either PQs/DPVs or QsAP. Indeed, there are no 7s, awarded to the Officer by any of the IO/RO/SRO in the balance reckonable profile. Any 7 in any of the attributes forming part of CR and figurative grading of 6 by the SRO would definitely

amount to downgrading because 7 in the Confidential Report form, though above average definitely works to the detriment of the officer reported upon in the Quantified System in vogue in the Army, by bringing his merit down.

21. The fact is that the applicant is an officer from Services and primarily posted to perform duties of Mechanical Transport Officer (MTO), at Battalion Headquarters/Base or as Headquarters Company Commander. We note that the Applicant was appointed a Rifle Company Commander in active Counter Insurgency Operations in Operation RAKSHAK without any formal post commission training on company level tactics and company support weapons. In so doing, we are of the view that the Commanding Officer had placed the Applicant at a distinct disadvantage in comparison to more qualified and experienced officers in command of other Rifle Companies. In volunteering to take up the challenge, the Applicant had accepted a responsibility beyond the normal call of duty. The Court is also acutely conscious of the constraints and difficult conditions under which Commanding Officers in Rashtriya Rifle Battalions perform their tasks. However, we are of the opinion that having appointed a Services Officer (in this case the Applicant) to command a Rifle Company, normally tenable by an Officer from the Arms, it was his duty to nurture, encourage and motivate his "raw" Company Commander to excel. There is no record of any verbal/written advisories/warnings administered to the applicant by IO/RO/SRO during the period Supra. Further, we further note that the Battalion has been awarded Chief of Army Staff Unit Citation and the Commanding Officer was awarded "Sena Medal" for Distinguished services. This would have not been possible without excellent performance of his Platoon and Company Commanders, especially in a Counter Insurgency environment wherein the operations are mostly at

Platoon/Company level. We also note that the same Commanding Officer had graded the Officer very high in all qualities and figurative assessment in CR for the following year. Further, we note that the Applicant's performance has been consistent in all his subsequent CRs in the reckonable profile and no aberrations have been noted. Even though the respondents may have taken a stand that the impugned CRs are not adverse in nature as the 7 is said to be an above average report. However, the moot point meriting consideration is that once record shows that the assessment in impugned CRs the applicant was way ahead in the merit, any report which prejudices or minimizes the chance of selection to the promoted post when same is wholly inconsistent with the reckonable profile definitely would amount to adverse in nature.

22. In the case of S T Ramesh vs. State of Karnataka (Supra) , the Hon'ble Apex Court has observed that the Confidential Report is an important document as it provides the basic and vital inputs for assessing the performance of an officer and further achievements in his career. It has been further observed that the performance appraisal through CRs should be used as a tool for human resource development and are not to be used as a fault - finding process but a developmental one.

23. In view of the foregoing, we are of the considered view that while initiating the impugned CR, the IO as well as the RO and SRO, were unduly strict, harsh, biased and unjust. The IO/RO/SRO should have given due consideration to the fact that the ratee was an Officer from the services discharging duties which are not normal to his training and experience. Rather they should have been more encouraging, and considerate, while reporting on the officer, considering the challenging assignment given to the

officer in a difficult and unfamiliar environment. When an officer had always been awarded excellent remarks in his Confidential Reports, both before and after the adverse remarks - so considered and having regard to unblemished and outstanding career of the officer, the adverse remark/report can not stand and deserved to be expunged.

24. Therefore, the assessment of IO/RO/SRO in the CR for the period June 2000 to May 2001 is liable to be expunged in its entirety due to its subjectivity and inconsistency. As regards applicant's prayer for direction to promote him by the first available appropriate selection board by treating him a special review (fresh), it may be considered by the respondents after consideration of prayer for promotion in accordance with rules/regulations and law. This would serve the ends of justice.

25. Thus, in the result, Original Application is partly allowed. The impugned Confidential Report of the applicant for the period June 2000 to May 2001 is hereby expunged and the respondents are directed to consider the prayer for promotion to the rank of Colonel in accordance with rules/regulations and law within four months from the date a certified copy of this order is served.

26. No order as to costs.

(Lt Gen K. Surendra Nath)
Administrative Member

(Justice V. K. DIXIT)
Judicial Member

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