

AFR
RESERVED
Court No.2

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

ORIGINAL APPLICATION NO 202 of 2015

Thursday, this the 17th day of March 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Brig H.S.Ratnaparkhi (IC-40000H), son of Late Brig S.B. Ratnaparkhi, Brigadier Administration, Headquarters Madhya Bharat Area, Jabalpur (M.P.)

.....Applicant

Ld. Counsel for the: **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, Integrated Headquarters of Ministry of Defence (Army), DHQ Post Office New Delhi.
3. The Military Secretary, Military Secretary's Branch, Integrated Headquarters of Ministry of Defence (Army), DHQ Post Office, New Delhi.

Respondents

Ld. Counsel for the : **Shri D.K. Pandey, Central**
Respondents. **Govt Counsel assisted by**
Lt Col Subodh Verma, OIC, Legal
Cell.

(Per Justice D.P. Singh)

ORDER

1. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved on account of non-empanelment for promotion to the rank of Major General by No. 1 Selection Board. According to Ld. Counsel for the applicant, the Annual Report (in short, ACR) for the period 01.01.2013 to 30.06.2013 was placed before the Selection Board though the ACR was illegal without following the mandatory provision as contained in the relevant policy. It is submitted that the previous ACR of the applicant was 'outstanding entry' with 9 points in figurative assessment and with very good pen picture.

2. We have heard Shri K.C. Ghildiyal, Ld counsel appearing for the applicant and Shri D.K.Pandey, Ld Counsel for the respondents assisted by Col N.K. Ohri, Representative MS Branch, IHQ of Mod (Army and Lt Col Subodh Verma, OIC Legal Cell.

3. It has been pleaded by Ld. Counsel for the applicant that vide letter dated 28.05.2013, the Initiating Officer (IO) had informed the superiors that he is likely to assess the applicant as 'outstanding', but later on given 'above average' with 8 points in block-assessment. Ld. Counsel for the applicant

invited attention of the Tribunal to Policy Letter dated 31.10.2011 issued by the Ministry of Defence, Government of India which provides that before granting 'outstanding' grade in CR, intimation of such entry shall be communicated to the higher tier to enable him to gauge the performance of the ratee. It is submitted that once intimation has been communicated, then the I.O. may not down grade the entry without assigning reason with due prior intimation to the higher tier. It is also submitted that though the entry has been down graded, but there is no change in the pen picture, which is still outstanding.

4. In rebuttal, Ld. Counsel for the respondents argued that communication in pursuance to para 3 (a) of Policy Letter dated 31.10.2011 of the Government (supra) is directory and the IO has a right to change his view before awarding entry and such communication to higher tier is not necessary.

5. Before proceeding further, we feel it necessary to reproduce Policy Letter dated 31.10.2011, which is as under:

"Tele: 35630

*Military Secretary's Branch
IHQ of Mod (Army)
DHQ PO. New Delhi – 110011*

A/17151/MS 4 Coord

31 Oct 2011

*HQ Southern Command (MS)
HQ Eastern Command (MS)
HQ Western Command (MS)
HQ Central Command (MS)
HQ Northern Command (MS)
Army Training Command (MS)
HQ Southern Western Command (MS)*

IDS (SM & SD)
SFC ANC

ADVANCE INTIMATION OF OUTSTANDING GRADING

Refer following:

- (a) A/17151/MS 4 Coord dt 19 Nov 07
- (b) A/17151/MS 4 Coord dt 17 Nov 08
- (c) A/17151/MS 4 Coord dt 20 Jul 10

2. Frequent queries are being received at MS Branch regarding advance intimation to higher tier reporting officer for 'Outstanding' assessments. In order to provide clarity on the subject, issues related to advance intimation for "Outstanding" assessment are explained in succeeding paras.

3 It is mandatory of the IO and RO to intimate the higher tier reporting officer in case they intend to grade the ratee as 'Outstanding'. The modalities for advance intimation and endorsement in CR form will henceforth be as follows: -

(a) Any reporting officer intending to give 'Outstanding' grade in CR will assess ratee's performance over a prolonged period, not less than 90 days and give advance notice of 90 days to higher tier reporting officer to enable them to gauge the performance of ratee. In this case the CR period will be more than 180 days.

(b) Where it is not feasible to give prior notice of clear 90 days, i.e. when the CR is due and the period is less than 180 days, then the IO will observe the ratee for a minimum period of 50 days and give adequate advance notice of at least 30 days to the higher tier report officer.

(c) If the CR has to be initiated due to sudden / unforeseen posting of ratee or IO, maximum possible advance notice will be given to the higher tier reporting officer.

(d) It will be obligatory for the reporting officer to certify alongside outstanding assessment endorsed by him in the CR that he had given prior intimation to the higher tier reporting officer quoting the letter ref intimating the same, as per letter mentioned at Para 1(b) above.

4. *The provisions made at Para 3 above will be effective from the date of issue of this letter. MS Branch Letter No. A/17151/MS 4 Coord dt 20 Jul 10 is hereby superseded.*

Sd/-
(MH Bhurka)
Brig
Dy MS (C)
For Military Secretary”

(Emphasis supplied)

6. A plain reading of the aforesaid Policy Letter shows that if the next reporting officer or the initiating officer intends to give ‘outstanding’ grade in CR., then he or she shall assess the ratee’s performance over a prolonged period not less than 90 days and communicate his or her intention to the higher tier to enable him to gauge the performance of the ratee. It further provides that the initiating officer will observe the ratee for a minimum 50 days and give adequate advance notice of at least 30 days to the next higher tier

7. The letter intending to grant ‘outstanding’ entry was sent by the initiating officer to the next higher tier on 28.05.2013. The downgraded entry was granted on 22.07.2014. The pen picture filed with the OA shows that the initiating officer informed the higher tier with regard to ‘outstanding’ entry with 9 points, but he has not intimated with regard to his decision to down grade the merit points. Neither in the pen picture nor through subsequent communication, the initiating officer has informed the higher tier with regard to change of mind.

8. A question cropped out whether the Policy Letter dated 31.10.2011 is mandatory or directory; and whether it was incumbent on the initiating officer to communicate decision with regard to change of mind to grant lesser entry than outstanding one to the higher tier? Whether reasoning should have been given in the pen picture or CR profile with regard to change of mind to grant lesser point 8, i.e. high average than 9.

9. The question whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or directory came up before Their Lordships of the Judicial Committee in ***Montreal Street Railway Co. vs. Normandin***, 1917 AC 170 (PC), where the Board observed:

“The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The case on the subject will be found collected in Maxwell, 5th Edn. At p. 596 and the following pages

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

Thus, a mandatory provision in a statute is one which must be observed as distinct from a directory provision which is

one which leaves it optional with the department or the officer to which it is addressed to obey it or not as he may feel fit. It is the duty of the Court to try to get at the real intention of the Legislature or the authority by carefully attending to the whole scope of the statute to be construed (Vide ***H.N. Risahbud vs. State of Delhi***, AIR 1955 SC 196.

10. In the most celebrated treatise "*Principles of Statutory Interpretation*" 13th Edition by Justice G.P. Singh, the learned author has observed with regard to mandatory or directory nature of a statute as follows:

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone must often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage LORD CAMPBELL said: "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered"¹. As approved by the Supreme Court: "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other"²."

(1) ***Liverpool Borough Bank vs. Turner***, (1861) 30 LJ CH 379 , pp 380, 381

(2) *Passage from CRAFORD: Statutory Construction*, p. 516

11. In catena of Judgments, their Lordships of Hon'ble Supreme Court have held that if a provision is mandatory, any breach thereof will be invalid, but if it is directory, the act will be valid although non-compliance may give rise to some other penalty if provided by the statute (Vide ***Drigraj Kuer (Rani) vs. Amar Krishna Narain Singh (Raja)***, AIR 1960 SC 444, pp 449, 451, ***Bhikraj Jaipuria vs. Union of India***, AIR 1962 SC 113, p.119, ***Union of India vs. Tulsiram Patel***, (1985) 3 SCC 398, p 484, ***Rubber House vs. Excelsior Industries Pvt Ltd***, AIR 1989 SC 1160, p. 1165 and ***Ram Deen Maurya vs. State of U.P.***, (2009) 6 SCC 735).

12. Hon'ble Supreme Court in the case of ***M.Y. Ghorpade vs. Shivaji Rao M. Poal***, AIR 2002 SC 3105 held that a directory provision may be distinguished from a discretionary power. The former gives no discretion and is intended to be obeyed, but a failure to obey it does not render a thing duly done in disobedience of it is a nullity. The latter, i.e. a discretionary power leaves the donee of the power free to use or not to use it as his discretion. The two exceptions to the mandatory requirement is held by Hon'ble Supreme Court as; firstly, when performance of requirement is impossible, then performance is excused (Vide ***London and Clydeside Estates Ltd vs. Aberdeen District Council***, (1979) 3 All ER 876) and, secondly; the second exception is of waiver, If certain requirement or conditions are provided by a statute in the interest of a particular person, the requirement or conditions although

mandatory, may be waived by the person who is affected by it if no public interest is involved, and in such case the act done will be valid one even if requirement or condition has not been performed (Vide ***Dhirendra Nath Ghorai vs. Sudhir Chandra Ghosh***, AIR 1964 SC 1300). Hon'ble Supreme Court further held that while considering non-compliance with the procedure required, it is to be kept in view that such a requirement is designed to facilitate justice and further its ends and, therefore, if it causes no injustice it may be directory, but incase it originates injustice, then it may be mandatory, each depending on the facts of the case.

13. Hon'ble Supreme Court in the case of ***Indian Administrative Service (SCS) Ass, U.P vs. Union of India***, 1993 Supp (1) SCC 730 has culled down six propositions with regard to mandatory and directory nature of an order, which may be reproduced as under:-

“(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

*(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action **ultra vires** or void.*

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) *When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.*

(5) *When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action 'after consultation'.*

(6) *No hard-and-fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the court to determine in each case in the light of facts and circumstances whether the action is 'after consultation'; 'was in fact consulted' or was it a 'sufficient consultation'.*

14. The policy (supra) provides that prior to 90 days the higher tier shall be communicated with regard to grant of outstanding grade in CR. The provision in clause (b) of the Guidelines for rendering confidential reports published by the Military Secretaries Branch it has been provided that in case it is not possible to give the clear notice of 90 days, then it may be given at least before 30 days to the higher tier with minimum observation of 50 days. In clause (c) in case CR is to be initiated all of a sudden for unforeseen posting of ratee or Initiating Officer, maximum possible advance notice shall be given to higher tier. It means in any case the Initiating Officer is not exempted from sending prior notice with regard to outstanding entry to the higher tier. This makes policy dated 31.10.2011 mandatory

(supra). It has been provided to grant reasonable time to higher tier to make up mind for outstanding entry and do justice to the ratee.

15. Once a letter in advance is sent in terms of above guidelines (supra) but the Initiating Officer does not intend to give outstanding entry then under the pyramidal structure of the Army prior information must be communicated with regard to withdrawal of intimation or change of mind and reasons must be recorded with regard to change of mind. Otherwise it may be inferred that the action of the Initiating Officer suffer from vice of arbitrariness.

16. It is well settled proposition of law that a thing should be done in the manner provided by the Act or the statute and not otherwise vide ***Nazir Ahmed vs. King Emperor***, AIR 1936 PC 253; ***Deep Chand vs. State of Rajasthan***, AIR 1961 SC 1527, ***Patna Improvement Trust vs. Smt. Lakshmi Devi and ors***, AIR 1963 SC 1077; ***State of U.P. vs. Singhara Singh and others***, AIR 1964 SC 358; ***Barium Chemicals Ltd vs. Company Law Board***, AIR 1967 SC 295; ***Chandra Kishore Jha vs. Mahavir Prasad and others***, 1999 (8) SCC 266; ***Delhi Administration vs. Gurdip Singh Uban and others***, 2000 (7) SCC 296; ***Dhananjay Reddy vs. State of Karnataka***, AIR 2001 SC 1512; ***Commissioner of Income Tax, Mumbai vs. Anjum M.H. Ghaswala and others***, 2002 (1) SCC 633; ***Prabha Shankar Dubey vs. State of M.P.***, AIR 2004 SC 486 and ***Ramphal Kundu vs. Kamal Sharma***, AIR 2004 SC 1657.

17. Hon'ble Supreme Court in the case reported in ***Jaisinghani vs. Union of India and others***, AIR 1967 SC 1427 ruled that decision should be made by the application of known principles and rules and in general such decision should be predictable and a citizen should know where he is.

18. Apart from above a perusal of pen picture of period from 01 Jan to 30 June 2013 shows that outstanding entry has been granted with almost same quality and performance of the ratee, i.e. the applicant. Then reason to change entry inspite of communication dated 28.05.2013 for the period 01 Jan to 30 June 2013 is not understandable. Comparing pen picture of two consecutive years (supra) whereby in one pen picture outstanding entry has been granted and in the other inspite of notice expressing intention to grant outstanding entry, granting eight points, i.e. lower than what the Initiating Officer has proposed, shows arbitrary exercise of power and action amounts to suffer from vice of arbitrariness for unforeseen reasons.

19. There is no doubt that Initiating Officer could have changed his view while making CR entry but reason to change his view must be reflected from the record and based on relevant material. Hon'ble Supreme Court in the case of ***M/s Ram Kanhai Jamini Ranjan Pal Pvt Ltd vs. Member of***

Board of Revenue, West Bengal AIR 1976 SC 1545 while considering the right of Tax Collector in tax matters to revise the tax held that it may be done for the reasons to be recorded with reasonable opportunity to the affected persons.

20. In the present case there is no statutory provision or policy enabling the Initiating Officer to withdraw or change his view, but being ministerial communication he seems to have got right to change his view but for justness and fairness it shall be incumbent upon him to communicate the decision to the higher tier revising his earlier opinion and reason should be recorded so that in the event of judicial review of the matter, the Court or the Tribunal may come to know his/her views while adjudicating the controversy.

21. The pen picture written by the initiating officer is part of Annexure A-14 to the O.A. and the same, for convenience sake, is reproduced as under: -

“CONFIDENTIAL

C.R. 01 Jan to 30Jun 13

IAFI-1123-A2-Revised (Amendment)
(for Brigadiers)

No. Rank and Name of the Officer IC-4000H Brig HS Ratnaparkhi Initials
--

PART III – BREIF COMMENTS ON THE OFFICER (OBLIGATORY)

In para 14, 15, 16, 17 and 18, mark your assessment out of 9 in the block provided at the top centre as follows : Outstanding 9, Above Average 8 or 7, High Average 6 or 5, Average-4, Low Average 3 or 2, Below Average 1.

14. **IQ**

<i>Brig Ratnaparkhi is a matured, balanced officer with a very positive and supportive attitude. Professionally sound, and administratively brilliant, the officer has developed an enthusiastic team. The performance of the Bde during various discussions and competitions has been</i>
--

very good. The Bde has carried out several (sic) on op issues commendably.

The offr has initiated several welfare schemes for the devp of soldiers and their families and for their empowerment

A welfare conscious offr who takes his team forward and has earned their respect.

Happily married, the couple complement each other

I have intimated UGOC 12 CoRPS (R)O/SRO/ vide letter no. 3354/1009/A2 dt 28 May 13 tghat the ratee is likely to be assessed 'Outstanding' (if applicable)

*Signature of the officer Reported upon and
Date*

*Signature Sd/-
Date 22 Jul 13*

*If communicated by Post, which should be an exception
Indicate Registered Letter No. and date
3354/10/Brig/A2(i) dt 29 Jul 13"*

22. A plain reading of the above quoted pen picture shows that the initiating officer found the applicant's profile sound and administratively brilliant and his performance on different posts has been very good. He also initiated several welfare schemes with team spirit. It appears that because of applicant's overall profile, the initiating officer sent letter dated 28.05.2013 (supra) to the higher tier intending to grant outstanding entry. Though in the format provided for pen picture, it is provided "likely to be assessed" but the Government Order uses the word "intend to grant the ratee as "Outstanding" While making mind before sending letter to higher tier for outstanding entry, the initiating officer must have considered with due deliberation and thinking to award outstanding grade in CR in the light of contents of pen picture and thereafter communicate the higher tier.

23. It has been argued by Ld. Counsel for the respondents that the Army has got pyramidal rank structure. In Ajay Vikram Singh Committee-1 (AVC-1) recommendations promotions up to Lieutenant Colonel are by time scale. All officers of a particular

batch are considered together with same cut off Annual Confidential Report and inputs and on the basis of individual profile of the officer and the comparative batch merit, they are approved/not approved. Seniority in itself is not a consideration before the Selection Board for approval or non-approval in case any officer gets any relief through complaint etc in any Confidential Report after the Selection Board has been held he is entitled to a special corresponding consideration by Selection Board with his changed profile and in case he is approved by special consideration his original seniority remains protected. According to applicable policy each officer is entitled to only three normal considerations for promotion to the select ranks i.e. Fresh Consideration. First Review and Final Review. In case an officer is not approved as a Fresh Case, but approved as First Review or Final Review case, he loses seniority accordingly vis-à-vis his original batch. After three considerations, if an officer is not approved he is deemed to be finally superseded. The assessment of officer in Annual Confidential Report is regulated by Army Order 45/2001/MS and other relevant policies applicable at any given time. The gradings are numerical from 1 to 9 (Overall as well as in Personal Qualities and Performance Variables in different qualities) and in the form of pen picture. The entire assessment of an officer in any Annual Confidential Report consists of assessment by three different main-line reporting officers, i.e. Initiating Officer, Reviewing Officer

and Senior Reviewing Officer whose assessment are independent of each other.

24. It appears that after supersession, the applicant has submitted non-statutory complaints which were rejected by orders dated 09.01.2014 and 19.05.2015. Before complying order dated 31.10.2011, it is condition precedent for the initiating officer to assess the profile of an incumbent and only thereafter make up mind and send his recommendation to the higher tier with regard to outstanding entry. An objective assessment is required under Para-II of the guidelines framed by the Army. The guidelines seem to be condition precedent to fill-up CR while forming opinion with regard to profile of an incumbent.

25. Part-II of the objective assessment by Reporting Officer as contained in Guidelines for rendering confidential reports published by the Military Secretaries Branch is reproduced as under:-

“RESTRICTED

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PART 11 : OBJECTIVE ASSESSMENT BY REPORTING

OFFICER

31. **General.** *Once the technical aspects of the CR have been covered, it is important to understand the nuances of rendering an objective assessment. The aim of a good appraisal system is to record the personal characteristics, demonstrated performance and potential on an offer with a view to nurturing professional development of the ratee on the one hand and assist the org in finding the “right man for the right job” on the other.*

32. **Objective Assessment.** *The term “objective” literally means ‘real’, ‘based on facts’ and “free from personal*

bias". An objective assessment should reflect the **actual performance** of a ratee during the period of report.

33. The assessment parameters are mostly intangibles and **linking figurative awards directly to performance objective may not be feasible**. Our appraisal mechanism, therefore, requires a reporting offr to base figurative awards on **relative performance of the ratee amongst his peers ('Outstanding' (9) down to 'Below Average' (1))**.

Rendering an Objective Assessment

34. Factors to be Considered while Rendering Objective Assessment. Certain factors which should bekept in mind while assessing a ratee are listed below:

(a) **Service of the Offr.** The performance of the ratee should be commensurate to the service of the ratee. It should form an important consideration while analyzing and assessing his performance. This factor enables distinguishing the offr of various service brackets and allows the report offr to assess them independent of each other.

(b) **Courses.** The courses done by the ratee and his performance in these courses is an important input. The knowledge and expertise gained by virtue of attending courses, especially career courses, should reflect in his performance and special consideration may be given to this aspect while assessing his performance.

(c) **Appointments Held.** Appointments tenanted by the ratee in past and exposure gained will have a direct effect on his demonstrated performance. Consideration of this factor will enable reporting offr to render a more objective assessment.

(d) **Peformance in Appointment.** The ratee is assessed primarily for the appointment tenanted by him

during the period of report. His performance in discharge of duties can be assessed on certain parameters as listed:-

- (i) Discharge of his primary responsibilities.
- (ii) Achievement of objectives set out.
- (iii) Accountability in functioning.
- (iv) Aspects of man management / staff work / instructional abilities as applicable.
- (v) Value addition to the existing procedures / functioning.
- (vi) Equipment management / financial management / as applicable.
- (vii) Interaction with peers and subordinates.
- (viii) Social acceptance of the individual.

(e) **Relative Performance Amongst Peers** 'Peers' refers not just to contemporaries of the ratee serving reporting offr but to **all offr**s of his service bracket who are expected to **possess similar capabilities and performance levels**. For instance, while assessing a coy cdr. A CO must evaluate his performance not merely after comparison with other coy cdrs of his bn but against capabilities expected of a coy in general.

35. **Figurative Awards.** With the introduction of Quantified System, the figurative awards have assumed greater significance as they contribute to the overall merit of an offr. It is the moral responsibility of all reporting offr

s to render an objective assessment to ensure that only deserving and professionally competent offrs are promoted to senior ranks to tenant crucial command and staff appointments.

(a) Figurative assessment in Box Grading, Personal Qualities (PQs), Demonstrated Performance Variables (DPVs) and Qualities to Assess Potential (QsAP) should be awarded objectively.

(b) **Box Grading.**

- (i) Box grading represents overall assessment of performance as well as potential for promotion.
- (ii) Reporting offfr must clearly differentiate between truly outstanding offfr and others. Grading all offfrs outstanding would defeat the very purpose of appraisal system. Box grading reflects the **quality of interplay amongst indl characteristics being assessed.** It also reflects the **performance and potential which are not being separately assessed but hold value for the org.**
- (iii) Box grading is **not meant to be a mathematical average** of the awards in indl qualities. However, a **total mismatch between awards in box grade and indl qualities is also not in order.** For instance, award of predominantly '9's in PQs/DPVs/QsAP with an award of '8' in box, may not be in order.
- (iv) Award of '9' in box grading should be explicitly justified in the pen-picture, indicating specific achievements by the ratee.

(c) **OsAP.** The assessment of **performance is de-linked from potential** based on the rationale that it is **not necessary that an offfr who performs well in the present rank has the capability to do well in higher ranks also.** While assessing QsAP, however, the following aspects should be kept in mind:-

- (i) ***Low awards ibn QsAP affect the promotion prospects significantly more as compared to similar awards in PQs / DPVs".***

(Emphasis supplied)

26. Needless to say that while sending letter (supra) to higher tier, it shall be obligatory for the initiating officer to form opinion in the light of guidelines referred to herein above and once the initiating officer arrived to a conclusion that the officer is entitled to outstanding entry, and he or she intends to give it, recommendation is communicated to the higher tier in advance before specified time (supra).

With the same analogy, once mind is made up and intendment is communicated to higher tier, then reverting back or granting lower the entry must be based on some cogent and trust worthy reasons. In the case in hand, it seems to be unfair and unjust while lowering down the entry than what had been proposed and communicated to the high tier. While lowering down the entry, it shall always be incumbent upon the initiating officer to record reasons in the ACR profile with due communication to the higher tier. In case it is not done, then it shall frustrate the very object of Policy (supra) which seems to be not the intention. The higher tier must know the grounds on account of which the initiating officer has changed his mind so that he may apply his own mind taking into account the earlier

recommendation and opinion gathered by him after receipt of the original letter.

27. In case reported in **State of West Bengal vs. Anwar Ali Sarkar**, 1952 SCR, 284 their Lordships of Hon'ble Supreme Court have deprecated the exercise of discretionary power without following reasonable and proper standards and limits; unguided and uncontrolled. To quote the relevant paras :-

*“24. Hon'ble Supreme Court in the case of **State of U.P. vs. Mohd Nooh**, reported in 1958 SC 86, **Pratap Singh vs. State of Punjab**, reported in AIR 1964 SC 72, **Fasih Chaudhary vs. D.G. Doordarshan**, reported in 1989 (1) SCC 189 held that if the act complained of is without jurisdiction or is in excess of authority conferred by statute or there is abuse or misuse of power, a Court can interfere. In such an eventuality, mere fact that there is denial of allegation of malafide or oblique motive or of its having taken into consideration improper or irrelevant matter does not preclude the Court from enquiring into the truth of allegations leveled against the authority and granting appropriate relief to the aggrieved party.*

*25. In number of cases of Apex Court ruled that any arbitrary action, whether in the nature of legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of Article 14 of the Constitution of India vide AIR 1974 SC 555; **E.P. Royappa vs. State of Tamil Nadu**, 1979 (3) SCC 489; **R.D. Shetty vs. International Airport Authority**, 1978 (1) SCC 248; **Maneka Gandhi vs. Union of India**, 1981 (1) SCC 722; **Ajay Hasia vs. Khalid Mujib**, 1990 (3) SCC 223; **Shri Sitaram Sugar Co. Ltd. Vs. Union of India**.*

*29. In **M.I. Builders Pvt Ltd vs. Radhey Shyam**, reported in (1999) 6 SCC 464, the Apex Court ruled that the*

decision is unlawful if it is one to which no reasonable authority could have come.

38. In **Om Kumar vs. Union of India**, reported in 2001 (2) SCC 368, Hon'ble Supreme Court reiterated the applicability of *Wednesbury's* principle to decide whether an administrative order is arbitrary and rational, To quote:-

67. But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the *Wednesbury* test. The court would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. (In **G.B. Mahajan vs. Jalgaon Municipal Council** SCC at p.111) **Venkatachaliah, J.** (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of *Wednesbury* Rules. In **Tata Cellular vs. Union of India** (SCC at pp. 679-80), **Indian Express Newspapers Bombay (P) Ltd vs. Union of India** (SCC at p. 691), Supreme Court **Employees' Welfare Assn. vs. Union of India** (SCC at P. 241) and **U.P. Financial Corpn. Vs. Gem Cap (India) (P) Ltd** (SCC at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a *Wednesbury* review always.

39. *The Supreme Court in 2005 (5) SCC 181; **State of NCT of Delhi and Anr vs. Sanjeev alias Bittoo**, upheld the right of judicial review under Article 226 on the basis of illegality in decision making process coupled with irrationally and perversity. While holding that decision is irrational and Court may look into the material on record. (Paragraphs 16, 17 and 21).*

*Hon'ble Supreme Court further held in the case of **Sanjeev** (supra) that if the administrative or judicial power has been exercised on non-consideration or non-application of mind to relevant factors, such exercise shall stand vitiated. Relevant portion from the judgment of **Sanjeev** (supra) is reproduced as under :-*

“If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated”.

40. *In **Centre for Public Interest Litigation and Anr vs. Union of India**, reported in 2005 (8) SCC 202, the Hon'ble Supreme Court reiterated the settled proposition of law that every administrative action should be reasonable and fair. Hon'ble Supreme Court further held that the procedure adopted by the Administrative body should not be only fair but also seems to be just, fair and proper.”*

28. While considering the discretionary power exercised by High Court in the matter of allocation of chambers, the Division Bench of Allahabad High Court at Lucknow presided by one of us (Justice D.P. Singh delivering judgment of behalf of the

bench) after considering catena of judgments of Hon'ble Supreme Court including aforesaid judgment observed as under :-

“.....Advocates as a whole constitute a class and possess autonomy under Advocates' Act. It is a competitive field where everyone commands respects because of knowledge and ability. Possession of chamber is pre-requisite for the smooth functioning and discharge of duty by an advocate. In the absence of a chamber lawyer faces unlimited problems. It is a necessity to meet out the professional requirements.....”

29. In the present case admittedly Armed Forces including Army possess pyramidal structure and there is stiff competition with regard to promotion and appointment on higher posts. Little irregularity, bias or favour may affect service career of Army personnel; hence any decision or order must be clothed by fairness and justness exclusively on merit and not otherwise.

30. The Hon'ble Supreme Court in the case reported in **S.T. Ramesh vs. State of Karnataka and Anr.** (2007) 9 SCC 436 by expressing its views observed that 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. The performance appraisal through CRs should be used as a tool for human resource

development and should not be used as a fault-finding process but a developmental one.

31. Ld. Counsel for the applicant has invited attention to a case reported in ***Sukhdev Singh vs. Union of India & Ors*** (2013) 9 SCC 566 with submission that every entry should be communicated. The Hon'ble Supreme Court had considered earlier judgments including the case reported in ***Dev Dutt vs Union of India***, (2008) 8 SCC 725 as well as ***U.P. Jal Nigam vs. Prabhat Chandra Jain*** (1996) 2 SCC 363. However, we are not recording any finding on this issue and leave it open to some other case since we are allowing the O.A. on different grounds.

32. In a recent case reported in ***Rajabala vs. State of Haryana***, (2016) 1 SCC 463 their Lordships of Hon'ble Supreme Court observed that a court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature, in its wisdom, has conferred discretion on the courts (to the authorities) (***Emphasis supplied***) and the duty becomes more difficult and complex and the discretion should be exercised on reasonable and rational parameters. One cannot remain a total alien to the demand of socio cultural milieu, regard being had to the command of law and also brush aside the agony of victims.

33. In view of observations made hereinabove we are of the view that the O.A. deserved to be allowed, hence allowed.

34. O.A. is **allowed** accordingly. Impugned ACR for the period 01.01.2013 to 30.06.2013 is expunged with all consequential benefits. Respondents shall consider applicant's case for promotion to the rank of Maj Gen and subsequent post by Special Review Board ignoring the entry from 01.01.2013 to 30.06.2013, if already retired, notionally.

35. O.A. is **allowed** accordingly.

No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

anb

(Justice D.P. Singh)
Member (J)