

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

Original Application No. 430 of 2017

Friday, this the 10th day of August, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No. 1487586Y, Hav (Artisan Construction) Hira Singh, 59 Engineer Regiment, C/O 56 APO.

.....Applicant

Ld. Counsel for the Applicant: **Shri Lalit Kumar, Advocate**

Versus

1. Union of India, Through Secretary, Ministry of Defence, South Block, New Delhi
2. Commandant, Bengal Engineer Group and Centre, Roorkee,(Uttarakhand).
3. The Officer-in-Charge (Records) Bengal Engineer Group and Centre, Roorkee (Uttarakhand)
4. The Commanding Officer, 59 Engineer Regiment, C/O 56 APO.

...Respondents

Ld. Counsel for the Respondents: **Shri R.C. Shukla,**
Addl Central Govt Counsel

ORDER

“Per Hon'ble Air Marshal BBP Sinha, Member (A)”

1. The applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 with the following prayers:

“ (i) To direct the respondents, particularly respondent Nos. 2 and 3 to promote the applicant to the rank of Naib Subedar with effect from the date his immediate junior was promoted to the said

rank of Naib Subedar and grant all consequential benefits accordingly.

(ii) To disclose the reason for applicant's non-selection for his promotion in the said rank of Naib Subedar in case the applicant was considered but was found 'unfit' for the said promotion."

2. The applicant was enrolled in the Bengal Engineer Group (BEG) of the Regular Army as a Sapper (Sepoy) on 27.10.1992. The applicant was diagnosed suffering from 'Alcohol Dependence Syndrome' and 'Alcohol Induced Psychotic Disorder' and was placed in low medical category S-3 (T-24). On 20.05.2015 the applicant was nominated for requisite Promotion Cadre Course for promotion to the rank of Naib Subedar. However, his nomination was cancelled due to his low medical category. On 22.09.2016 the applicant was again nominated for the Promotion Cadre Course in which he was declared successful. In February 2017, a Department Promotion Committee (DPC) for promotion to the rank of Naib Subedar was held in which the applicant was superseded. Subsequently, in May, 2017 another DPC was held in which again the applicant was superseded.

3. The short question raised by Ld. Counsel for the petitioner relates to supersession of the petitioner for promotion to the rank of Naib Subedar due to rating given to him as 'Average' for the year 2014. Submission of the Ld. Counsel for the applicant is that the rating given to him for the year 2014 which played a vital role in non-consideration of his right to promotion to the rank of Naib Subedar, was never communicated to him so as to provide him an opportunity to get said grading expunged and earn a higher grading and for reconsideration of his promotion to the rank of Naib Subedar. It is submitted by learned counsel for the applicant that the applicant was having all the basic

criterion for promotion to the rank of Naib Subedar and had also successfully completed the Promotion Cadre Course, as such, he was entitled for promotion to the rank of Naib Subedar. Learned counsel for the applicant vehemently argued that the applicant was never informed the ground for non-consideration of his promotion to the rank of Naib Subedar and only through the counter affidavit he has come to know that he has been denied promotion due to lacking ACR profile.

4. Per contra, learned counsel for the respondents submitted that the applicant was screened for nomination for Promotional Cadre Course to be conducted with effect from 06.07.2015 to 24.10.2016 and was nominated conditionally being low in medical category S-3 (T24) with condition of producing fitness certificate from the medical authority but he did not attend said course due to low medical category. Subsequently, he was again nominated to under Promotion Cadre Course conducted with effect from 10.10.2016 to 28.01.2017 and he successfully completed the promotion cadre. Learned counsel for the respondents emphatically submitted that the applicant lacked the required ACR entries for promotion to the rank of Naib Subedar. It is submitted that as per norms fixed for promotion, last five ACR reports have to be considered. Atleast three reports among them should be 'Above Average' and the residual two reports should not be less than 'High Average'. Since the applicant was not fulfilling the ACR grading criteria, thus, he was not recommended by the Board of Officers and was superseded by his eligible and qualified juniors. It is further submitted by learned counsel for the respondents that the applicant was aware that he has been granted 'Average' Report during 2014 as signature of the

applicant was obtained in the ACR Form after endorsement by the reporting/reviewing officers. In para-5 of the counter affidavit, the respondents have mentioned the last five years ACR grading given to the applicant as under:-

<u>“Year</u>	<u>Grading</u>
2012	<i>Above average.</i>
2013	<i>Above average.</i>
2014	<i>Average.</i>
2015	<i>High average.</i>
2016	<i>High average.”</i>

5. We have heard learned counsel for the parties and perused the record.

6. Essentially, the challenge against denial of promotion to the applicant is based on non-communication of the ‘Average’ grading given to the applicant for the assessment year 2014 which covers the period of five years reckoned for considering the ACR ratings for promotion. We find no substance in the arguments canvassed by learned counsel for the respondents that Para 42 of the Army Order 1/2002/MP does not mandate communicating grading of average to the ratee. Rather, Para 42 (supra) directs for communication of only weak points/adverse remarks/advisory remarks and low average/below average to the ratee. For convenience sake, Para 42 is reproduced as under:

“42. The following aspects, whether endorsed in the pen picture, figurative assessment or overall grading, will be communicated to the Ratee by the IO-

- (a) Weak points.*
- (b) Adverse remarks.*
- (c) Advisory remarks.*
- (d) “Low Average” or “Below Average” assessment whether in figurative assessment or overall grading.*

7. Para 44 of the Army Order 1 of 2002/MP mandates that ‘Average’ grading awarded affecting promotion is required to be communicated to the individual, the breach of which denies the individual his chance for promotion, inasmuch as, the individual is deprived of an opportunity of preferring a representation for expunging said grading. For convenience sake, relevant para 44 of Army Order 1/2002/MP is reproduced as under:

“44. “Average” assessment in any personal; quality or demonstrated performance or in overall grading is not an adverse grading, thus, needs no justification in the pen picture. However, since “Average” grading adversely affects promotion prospects of a JCO/NCO including grant of honorary commission/rank, it will be communicated. However, where a Ratee has though been granted “Average” but “Not Recommended” for promotion the same will be justified in the pen picture by the Reporting Officer(s) and the grading including pen picture will be communicated to the Ratee.”

8. Learned counsel for the applicant has cited the case of O.A. No. 61 of 2015 Havildar (MP) Bopaiah G.P vs. The Union of India and ors decided on 28.01.2015 wherein the co-ordinate Bench of Armed Forces Tribunal, Regional Bench, Kochi in similar circumstances, has held:

“..... Where the grading given in the ACR has an adverse impact over promotional prospects of the ratee, natural justice demands communication of such grading to him to enable him to improve his work and conduct and also to explain the circumstances leading to such grading. Extending such an opportunity to the ratee is not an empty formality and it serves a two fold purpose viz. providing an opportunity to the ratee a right of hearing to offer his explanation and the superior authority to consider the explanation offered by him and then determine whether the adverse remark is justified.”

9. In arriving to said opinion, the co-ordinate Bench aforesaid has cited the Apex Court decision in ***Union of India & ors vs. E.G.Nambudiri***, (1991) 3 SCC 38 wherein their Lordships of the Apex Court have held, to quote:-

“Entries made in the character roll and confidential record of a Government servant are confidential and those do not by

themselves affect any right of the Government servant, but those entries assume importance and play vital role in the matter relating to confirmation, crossing of efficiency bar, promotion and retention in service. Once an adverse report is recorded, the principles of natural justice require the reporting authority to communicate the same to the Government servant to enable him to improve his work and conduct and also to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. The superior authority competent to decide the representation is required to consider the explanation offered by the Government servant before taking a decision in the matter. Any adverse report which is not communicated to the Government servant, or if he is denied the opportunity of making representation to the superior authority cannot be considered against him. See: Gurdial Singh Fijji v. State of Punjab & Ors., [1979] 3 SCR”

10. The co-ordinate Bench (supra) also took into notice the fact that similar view has been taken by the Armed Forces Tribunal, Principal Bench, New Delhi in T.A. No. 297 of 2010 in the matter of non-communication of a grading given in the ACR to the ratee, which affected his promotion opportunity.

11. Learned counsel for the respondents had vehemently submitted that signature of the applicant was obtained in the ACR Form after endorsement by the reporting/reviewing officers, as such, the lacuna, if any, of not communicating the ‘Average’ entry for the year 2014 will be deemed to have been cured. We do not find any force in this submission of learned counsel for the respondents. Mere obtaining signature would not amount to communication of ACR grading. We are of the considered opinion that signing below the ACR by the ratee is not the proper way to communicate an ‘Average’ report which has an adverse impact on promotion. The ‘Average’ report of 2014 was not communicated to the applicant properly. Therefore, the ‘Average’ report of 2014 has to be ignored while considering his promotion of the applicant to the rank of Naib Subedar.

12. We have been informed that since promotion has not been given to the applicant to the rank of Naib Subedar, he is due to retire in October, 2018 on completion of his term in the rank of Havildar.

13. We, therefore, expunge the 'Average' grading given to the applicant in the year 2014 and direct the respondents to reconsider the eligibility of the applicant for promotion ignoring the grading of 'Average' given to him for the year 2014 on the basis of remaining four ACRs for the relevant period and such other norms under the Army Order applicable. In case the applicant satisfies the eligibility criteria at par or above his next junior who has been promoted, then the applicant should also be granted promotion from the date when his next junior was provided with monetary benefits. Applicant shall be treated at his original seniority along with his batch mates while doing so. In case the applicant fails to satisfy the criteria fixed subject to observations made hereinabove for promotion, his discharge on completion of term of engagement in the present rank shall be treated as final.

14. The original application is accordingly allowed with direction to the respondents to complete the exercise with regard to claim for promotion of the applicant within a period of two months from the date of this order.

No order as to costs.

Copy of the order be supplied to learned counsel for the parties free of costs within 24 hours.

(Air Marshal BBP Sinha)
Member (A)

Dated: August ,2018
anb

(Justice SVS Rathore)
Member (J)