

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO. 2

O.A. No. 84 of 2015

Tuesday, this the day of 12th July , 2016

"Hon'ble Mr. Justice D.P.Singh, Judicial Member
Hon'ble Air Marshal Anil Chopra, Administrative Member"

No. IC- 55282K Lt. Col. Rohit Mishra, aged about 42 years,
Unit 130 Ecological Battalion (Territorial Army) Kumaon,
PIN – 966130, C/O 56 APO

----Applicant

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi.
2. The Chief of Army Staff, Integrated Headquarters (Army) Ministry of Defence, New Delhi.
3. Lt. Gen. BS Negi, GOC, 14 Corps C/o 56 APO.

...Respondents

Ld. Counsel appeared for the - Shri K.K. Mishra
Applicant Advocates

Ld. Counsel appeared for the -Shri Yogesh Kesarwani
Respondents C.G.S.C

Assisted by Maj Alifa Akbar, MS(Legal)

ORDER (ORAL)

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act 2007, being aggrieved with a portion of the Annual Confidential Report awarded for the period between 1st June 2003 to 31st May 2004.
2. We have heard Shri K.K.Mishra, learned counsel for the Applicant and also Shri Yogesh Kesharwani and Smt Appoli Srivastava assisted by Maj Alifa Akbar, MS Legal Cell.
3. Short question agitated by the learned counsel for the Applicant is that portion of the observation made by the Reviewing officer in the pen picture vis a vis the ACR recorded by the Initiating officer of the aforesaid period is adverse in nature and go beyond the purview of rules regulating Annual confidential reports (In short "ACRs") envisaged in the Army Order 45 of 2001. The relevant portion of the observation made by the Reviewing officer by which the Applicant is aggrieved is reproduced below.

"A slim, tall officer with good bearing. Stylish in nature, prefers to bear long hair and has quasi military etiquettes, which over a period of time with grooming can be fine-tuned.

The officer generally carries out all tasks assigned to him with reasonable dedication. Has adequate aptitude for hard work and over the years is likely to strive diligently as the responsibilities increase. The officer during the period was beset with domestic problems for adjusting his wife in separated condition due to which he had to go on leave including furlough quite often. He with time is likely to groom the lady in overcoming conditions of separation. He should be placed in area where he can adjust his family."

4. While coming to grips with the controversy involved, it shall be appropriate if the pen-picture drawn by the Initiating officer being relevant is reproduced below.

"Captain Rohit Mishra was posted as the GS03 (Ops) of the largest Division in May 2003. A diligent officer, he got down to the intricate complexities of the job while handling more than 40 major units and 25 minor units. During Op PARAKRAM, he coordinated and synchronised the capabilities of all the units in the Div Sector, with consummate ease. Working through very late hours, he toiled under exacting situations with elan. He officiated as the GS02 (Ops) 'A' as well as GS02 (Ops) 'B' on different occasions and was able to deliver in such capacity. He is skilled at computers and is capable of exploiting his skills for the organisational interest. He is forthright in his expression and steadfast in his approach. Perseverant and painstaking in the completion of assigned tasks, he is focussed and resolute. He meticulously organised the sitrep section and the Ops room functioning, paying attention to detail.

He is happily married and well adjusted."

5. From a plain reading of the ACR awarded by the Initiating officer, it would appear that the Applicant was happily married and well adjusted in life. By this reckoning, it seems that the finding recorded by the Reviewing officer runs counter to the finding recorded by the Initiating officer that too without bringing out any material or pointing out anything on record for the basis of his observation. Even there is not an iota of whisper that on account of some family problem, the duty assigned to the Applicant was not properly discharged. If at all, the Reviewing officer was to record the finding touching on the family life of the Applicant, without there being anything

pointing to any such problem bedevilling the officer, at least he should have placed on record the materials or things noted by him during the course of service. The observations touching on family life of the Applicant made by the Reviewing officer, in our considered view, have also not been corroborated by the remarks and observations made by the Senior Reviewing officer. The observation made by the S.R.O. being germane to the controversy is reproduced below.

"A tall trim and well built officer mentally alert and physically fit. Professionally competent for his age and service, he is motivated, enthusiastic and keen to learn more. A keen sportsman he also displays an aptitude for computers. He conducts himself well, shoulders responsibility willingly and retains his composure under stress."

6. Subject to aforesaid backdrop, our attention has been drawn to Rule regulating the Annual Confidential reports. Part 6 of the Army Order 45 of 2001 envisages that the assessment contained in ACR will be restricted strictly to the performance and potential as observed during the period covered by the report. Needless to say that the observations made by the Reviewing officer seem not to be covered by the parameters provided by Para 118 of the Army Order 45 of 2001. The observations made by the Reviewing officer go beyond the performance and potential as observed during the period covered by the report.

7. Para 119 of the Army Order 45 of 2001 envisages to observe consistency in reporting. Para 120 of the Army Order provides that whenever the variations in figurative assessments

between various reporting officers are not adequately justified in the pen picture or the figurative grading of the reporting officers is not in consonance with their pen picture the concerning reporting officers may be queried by the MS Branch. It will be thereafter mandatory upon the reporting officer to provide the requisite justification. Paras 118,119,120 and 121 of the Army Order 45 of 2001 being relevant are produced below.

"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 scrutinised 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 ratee 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).

(c) **Inconsistent Recommendations for Promotion and Employment.** The Recommendation for Promotion will be primarily based on the QsAP. No reason is required to be endorsed by the reporting officers for endorsing a particular shade of Recommendation for Promotion including NOT YET and NOT. However, variation of three points or more in figurative grading of QsAP and/ or three grades in Recommendation for promotion will be communicated the same by the

concerned reporting officer(s) and extracts duly signed by the ratee will be forwarded to the MS Branch.

(d) **Average Assessment.** Award of Average grading (4 marks or C plus in UAC) as specified below has been adequately and explicitly justified in the pen picture:-

(i) **Officers from three to eight years service.** C Plus in box grading in UAC.

(ii) **Officers from ninth year service to Cols.** Four marks or below in mandatory PQs which have been designated by an asterisk (*) in the CR form and box grading.

(iii) **Brigs and Maj Gens.** Four marks or below in all PQs, DPVs, QsAP and box grading.

(e) **Low and Below Average Assessment.** When an officer is awarded Low or Below Average (i.e. 3 or less) marks in any PQ, DPV, QAP, Technical Quality and box grading in the CR, the same will be adequately justified in the pen picture.

(f) **Adverse Remarks and Guidance for Improvement.** For these to be consistent and acceptable, it will be essential that the remarks endorsed by the reporting officer(s) are supported by figurative assessment in the relevant variables of PQs and/or the DPVs.

120. Whenever the variations in figurative assessments between various reporting officer(s) are not adequately justified in the pen picture or the figurative gradings of the reporting officer (s) is not in consonance with their pen picture, the concerned reporting officer(s) may be queried by the MS Branch. It will thereafter be mandatory upon the reporting officer (s) to provide the requisite justification. During this process, the following will not be accepted:-

(a) *Revision of figurative assessment to avoid explicit justification.*

(b) *Exclusion of Adverse remarks or Guidance for Improvement to avoid communication to the ratee.*

121. **Adverse/Advisory Remarks.**

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

(b) **Advisory Remarks.** *These remarks are endorsed by reporting officers to bring in further improvement in the ratee's performance and overall development, though per-se-they may not reflect any adverse trait of the ratee. Advisory remarks are not construed as weak/adverse. These will be endorsed separately in the space provided for the pen picture. In CR forms, which do not have space specifically for endorsing advisory remarks, these will be written on a separate sheet and will be pasted below the pen picture.*

(c) **Communication of Adverse/Advisory Remarks.** *Both adverse and advisory remarks by any reporting officer(s) are required to be communicated to the ratee.*

8. A combined reading of the aforesaid paras of the Army Order 45 of 2001 on the face of the record shows that whatever assessment is done should ordinarily be in tune with the pen picture and in case there is variation or inconsistency then they shall be justified by some materials on record. In the present case, while awarding entry in the manner reproduced herein above, the Reviewing officer retained the box grading (8) given by the Initiating officer but commented upon domestic problems for adjusting his wife in separated conditions, a subject on which the initiating officer had made no comment whatsoever nor had the SRO who reported subsequently.

9. It is vehemently argued by learned counsel for the respondents as well as by the OIC MS Branch that the family disturbance and problem with wife may affect the service condition and in disturbed state of mind, the Applicant may not be able to discharge his duties. In our opinion, the argument advanced seems to be misconceived inasmuch as disturbed state of mind is based on variety of factors and mind set and it varies from person to person. Firstly it should be demonstrated that there are problems affecting the family life of the applicant and secondly such things could affect the service career of the Applicant. In case inspite of all odds stacked against him in life, the Applicant has been able to discharge his duty fairly and honestly and upto the mark as observed by the Reviewing officer and later-on by the S.R.O., then there was no justification to have made such observation, which he clarified was apparently a recommendation with regard to posting of the Applicant to appropriate place expecting separation of husband and wife. Such observation instead of helping the Applicant could have adverse consequences for the Applicant. Unless some complaint is received or something has been noticed personally by the Initiating officer or by the Reviewing officer, such remarks cannot be justified. Any recommendation of posting could have been made on administrative channels through a letter to concerned authorities.

10. Further argument advanced by learned counsel for the respondents and it is also a defence set up in the counter affidavit is that the observation made by the Reviewing officer, have not been taken into account for the future career of the Applicant and the R.O. has given in writing that these are not

adverse remarks. Be that as it may, the fact remains that such observations are on record and have been made without any precise reference to any materials on record.

11. It may be noted that on receipt of ACR, the MS Branch vide letter dated 10th Feb 2005 made queries about the observations made in the ACR by the Reviewing officer apparently because they were adverse in nature. In his reply to the MS Branch, the Reviewing officer had clarified his position through his letter dated 10.02.2005 which being relevant is reproduced below.

"ACR OFFR – IC-55282 K CAPT ROHIT MISHRA

1. *Please refer to you letter No A/17801/6052/55282/MS 4 C 1 dt 14 Jan 05.*
2. *As the under signee has given the rate an above average ACR and the pen picture has been given to facilitate MS Branch in getting an input to post the officer for conducive posting to settle his domestic issues, the same have not been given as adverse comments but as normal inputs.*
3. *There is nothing adverse reflected from RO's point of view, than normal inputs on the officer. The photocopy of report, fwd vide your letter is returned herewith. It is requested that from the undersignee's point of view the pen picture is only an input on officer with no adverse connotations.*

Sd/- x x x x x

(BS Negi)

Col

Encl: Photocopy of ratee's report.

12. In the above conspectus, we are of the view that the observations made by the Reviewing officer were thus not warranted in the facts and circumstances of the case and materials on record. However, in view of letter dated 10.02.2005, observation of R.O. seems to be bonafide without any malice or ill-will.

13. An argument has also been advanced by the learned counsel for the respondents as to how the Applicant had access to the entry recorded by the Reviewing officer as well as by the Senior Reviewing officer. Learned counsel suggested that this act of the Applicant amounts to indiscipline and on this count alone, the petition is liable to be dismissed in limine. It would crystallize from a perusal of the record that the offending observations have been reproduced in the Original Application by the Applicant. We have given our thoughtful consideration to the objection raised by the learned counsel for the respondents and we are of the view that the objection raised across the bar has the complexion of disputed facts. Besides, nothing has been brought on record to show that the Applicant indulged in pilfering some document from the office of the respondents. It has also not been brought on record that any action was initiated against the Applicant for the act of some indiscipline. Learned counsel for the respondents explained that after receipt of copy of the D.O. it was known that the Applicant was aware of the observations made by the Reviewing officer and Senior Reviewing officer. We are not convinced by the explanation offered by the learned counsel for the respondents. In case if respondents feel, the Applicant obtained some material or some documents clandestinely or in a manner unbecoming of him,

they had the option to proceed against him in accordance with law. Besides, the objection being disputed facts, we are not inclined to chastise the Applicant or interfere otherwise on this ground. The crux remains that the observation made in ACR by the Reviewing officer are not supported by the facts/events inasmuch as the initiating officer has not touched upon this aspect and the SRO has not taken any notice of the offending observation made by the Review Officer.

14. As a result of foregoing discussion, the Original Application deserves to be allowed and it is allowed. The offending observations made in the pen picture of the ACR by the Reviewing officer are expunged/deleted with all consequential benefits.

15. There shall be no orders as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

MH/-