

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

Original Application No. 391 of 2017

Thursday, this the 22nd day of November 2018

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

MR-06068X Col (TS) Sunil Jain, Command Hospital (Central Command), Lucknow.

.....Applicant

Counsel for the Applicant: **Shri K.K. Mishra, Advocate**

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi
2. Chief of the Army Staff, Army Headquarters, New Delhi
3. Director General Armed Forces Medical Services, New Delhi.
4. Col V. Chandra (Retd) Flat NO. 1681, Sector 29, Arun Vihar, NOIDA (UP) 201303.
5. Col P C Sharma (Retd), 189 Jagannath Puri, Kalwar Road (Near Kata) Jhotwara, Jaipur (Rajasthan) 302012.
6. Brij M.K. Ghosh (Retd), Flat No.W2, H-30, Baishnaghata, Patule Township Kolkata, 700094.

.....Respondents

Ld. Counsel for the Respondents: **Shri Namit Sharma**

Addl. Central Govt. Counsel

ORDER

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

1. This application under Section 14 of the Armed Forces Tribunal Act, 2007 has been filed by the applicant for the following prayers:-

- (i) *To quash DGAFMS, MOD letter Nos.*
- *18836/PB/No3/Col/AMC/2012/DGAFMS/DG-1(x) dt 01 Feb 2011(Annexure A-3), and*
 - *18836/PB(M)/No3/Col/AMC/2012/DGAFMS/DG-1(X) dt 09 Feb 2012 (Annexure A-4), and*
 - *18836/PB(M)/No3)Col/AMC/2013/DGAFMS/DG-1(X) dt 08 March 2013 (Annexure A-5)*
- (ii) *To quash Govt of India, Min of Defence letter No. 15(187)/2016/(Medical) dt 19 January 2017 as contained in Annexure A-8 to this O.A.*
- (iii) *To call for the ACRs for the period 01 May 2000 to 15 February 2001 and 01 June 2001 to 31 May 2002 and quash the adverse entries in these Annexure A-1 and A-2.*
- (iv) *to Call for the entire selection records of Selection Board No. 3 held in respect of the applicant on 23 December, 2010, 15 December, 2011 and 17 December 2012 and quash the same.*
- (v) *To call for the entire record of the applicants ACRs during the period of consideration and any aberration therein may be removed.*
- (vi) *To direct the respondents to hold selection board for the rank of Colonel in respect of the applicant afresh without any loss of seniority.*
- (vii) *Any other relief which the Hon'ble Tribunal may think just and proper may be granted to the applicant.*
- (viii) *Cost of the case may be awarded in favour of the applicant.*

2. The factual matrix on record is that the applicant was commissioned in the Army Medical Corps (AMC) as a Medical Officer on 26.12.1989 and upon acquiring requisite qualification, he was appointed as Graded Specialist in Pediatrics with effect from 19.11.1997 and thereafter as Classified Specialist in Pediatrics. The applicant was promoted to the rank of Lt Colonel on 01.12.2003.

3. While the applicant was posted in the rank of Major at Military Hospital (MH) Chennai, he was given adverse remarks by the Initiating Officer (IO)/First Technical Officer (FTO) in the Confidential Report for the period 01 May 2000 to 15 Feb 2001. Yet on another occasion, while the applicant was posted to MH Babina he was again given adverse remark by the IO and the Reviewing Officer (RO) in his Confidential Report from 01 Jun 2001 to 31 May 2002. Both the adverse remarks were duly communicated to the applicant as per the policy in vogue. Meanwhile the applicant was promoted to the rank of Lt Colonel. The applicant was considered for promotion to the rank of Colonel in consonance with the Promotion Policy on three occasions wherein he was graded Not Selected (NS).

4. In the Promotion Board (Medical) No. 3 (Special) held on 23 Dec 2010 (1st chance) out of 270 Officers, 193 Officers having higher merit when compared with the applicant, were not empanelled. The merit position of the last empanelled officer was 69 while merit position of the applicant was 262.

5. Similarly, in the Promotion Board held on 15 Dec 2011 (2nd chance), out of 256 Officers, 185 officers were having higher merit than the applicant. The merit position of the last empanelled officer was 59 whereas the applicant's merit position was 244.

6. In the Promotion Board held on 17 Dec 2012 (3rd chance) total number of officers considered for empanelment was 191 and 147 officers stood higher in merit compared to the applicant. In the third

Medical Board the merit position of the last officer empanelled was 38 whereas the applicant's merit was at 185.

7. The applicant preferred successive statutory representations dated 23.04.2011 and 24.01.2013 against his non-empanelment for rank of Colonel by Promotion Boards which were rejected by the competent authority vide orders dated 14.05.2012 and 05.09.2013. Feeling aggrieved with his non-empanelment by Selection Board and rejection of his statutory representations, the applicant preferred Original Application No. 4 of 2014 which was dismissed as withdrawn with liberty to file afresh. The applicant thereafter filed Original Application No. 343 of 2015 which was decided on 15 March 2016. In its judgment dated 15 March 2016, this Tribunal had excerpted the adverse remarks given to the applicant for the period 01 May 2000 to 15 Feb 2001 and 01 June 2001 to 31 May 2002 and had observed as under:

“5. A plain reading of the aforesaid ACR entry shows that applicant's work and duty has been appreciated and found to be paying sufficient attention to his bearing and turnout and conducts himself in an acceptable manner. The ACR entry awarded by the Initiating Officer. However the Reviewing Officer has found that the applicant has not been able to give his full potential primarily due to his marital disharmony. It is not borne out from the record as to on what grounds the applicant was suffering from domestic problems. Neither in the O.A. nor the in the counter affidavit anything has been pointed out with regard to applicant's domestic problems which came in the way of his discharging duties.

6. The remarks of the Initiating Officer and the Reviewing Officer seem to be quite personal and relating to applicant's personal family life. While making such remark with regard to family life of an individual, the Army authorities should be cautious since any remark made pointing out some problem in the family life may spoil the family relationship. It must be found on some material evidence disclosing how and in what manner the same is affecting the service career. Merely because a person does not mix with others, but discharges his duties properly to his full potential, we fail to understand that

disharmony, if any, in the family life of an individual may be a ground to award adverse remarks.

10. A perusal of decision taken by the competent authority while disposing of the representation does not contain a whisper with regard to adverse remark dealing with the domestic problems of the applicant. It was incumbent on the statutory authority or the authority concerned to deal with the matter and adjudicate the controversy while deciding the representation against the ACR entry of the years in question after taking into account the adverse remarks and then appropriate opinion should have been formed while rejecting or accepting the representation. In the present case, while deciding the representation, the authority concerned has not dealt with the factual position with regard to the domestic problem, which according to the reviewing authority caused depression on account of which opinion was formed that he is unable to give his full potential in discharge of his duties. At least such remarks should have been founded on some material and placed on record.

11. It is well settled proposition of law that while adjudicating controversy whereby a person's right to livelihood, dignity and quality of life is affected, then a reasoned and speaking order should be passed after discussing the material on record. Moreover, when an authority is discharging appellate jurisdiction, deciding statutory or non-statutory complaint, it shall be incumbent upon such authority to look into the record and find out whether the entry granted by the Initiating Officer and confirmed by the Reviewing Officer is based on some material on record. ACR entry is the back bone of service career of an individual and cannot be granted casually without any material on record. Not even a single instance has been brought on record which may indicate that the applicant was suffering from some domestic problem or was in depression resulting in failure to give his full potential while discharging his duties. In the absence of any material on record or in the counter affidavit, we feel that the ACR entries have been granted with regard to domestic problems of the applicant which is not based on any foundation and is perverse. However, keeping in view the fact that the decision on the statutory complaint is non-speaking and without unearthing the factual position, we leave it to the authority concerned to decide the statutory complaint of the applicant afresh keeping in view the observations made hereinabove. So far as order dated 08.03.2013 and 05.09.2013 are concerned, since they are unreasoned and have been passed without looking into the material on record justifying the adverse entries, we are of the view that they suffer from the vice of arbitrariness and are hit by Article 14 of the Constitution of India and are liable to be set aside.

12. Accordingly, the O.A. deserves to be allowed; hence allowed. Impugned orders dated 14.05.2012 and 05.09.2013 are set aside. We remit the matter to the appropriate authority who shall decide applicant's statutory complaint by a speaking and reasoned order in the light of observations made here in above and in accordance with law, expeditiously, say within three months from the date a certified copy of this order along with a fresh copy of the representation made by the applicant. It shall be open to the applicant to make representation within one month from today. The decision taken by the appropriate authority shall be communicated to the applicant forthwith."

8. The applicant thereafter preferred statutory representation dated 14 April 2016. In the representation, the applicant had prayed for expunction of CR for the period 01 May 2000 to 15 Feb 2001 and 01 June 2001 to 31 May 2002. It was also prayed that all the reckonable CRs considered by the Promotion Boards be reviewed and inconsistency/aberrations, if any, be set aside and the applicant be considered afresh for promotion to the rank of Colonel by holding Review Promotion Board. The representation was considered and rejected by the competent authority vide order dated 19 Jan 2017, a copy of which has been annexed by the applicant as Annexure A-8 along with the Original Application. We feel it appropriate to excerpt the grounds for rejection of applicant's representation (surpa):-

“6. And whereas, the Statutory Complaint dated 14.4.2016 along with the complete records of the case has been duly re-analysed. It is stated that Impugned ACR 200-01 was earned in the rank of Major at MH Chennai and has been box graded as 5.30 (IO), 5.35 (RO), 5.70 (FTO) & 6.75 (PCR Adv). The assessment of the reporting officers is well corroborated within the CR and is in sync with the profile of the officer. The officer's pen picture has adverse remarks by IO related to him not shouldering additional responsibilities & lacking in inter personal relations. The officer has earned three CRs. i.e. CR 1998-99, CR 1999-00 & CR 2000-01 while being posted at MH Chennai from two sets of reporting officers and all these CRs have similar adverse remarks. CR 2000-01 was initiated by the IO on 30.3.2001 and the extract of the pen picture had been signed by the ratee on separate sheet dated 18.6.2001 and hence provisions of DGMS letter NO.15013/ACR Policy/00/DGMS-1A dt 22.3.2000 have been complied with. Impugned ACR 2001-02 was earned in the rank of Major at MH Babina and has been box graded as 6.70 (IO), 6.80 (RO), 6.60(FTO) & 8.50 (PCR Adv). The figurative assessment of the reporting officers is well corroborated figurative within the CR and is sync with the profile of the officer. The officer's pen picture has adverse remarks by IO & RO about him not mixing with others due to his domestic problems, being reticent in nature, depressive due to domestic problems and unable to given his full potential. The officer has similar adverse remarks in earlier CRs i.e. CR 1998-99 & CR 1999-00 while being posted at MH Chennai from two different sets of reporting officers, as already discussed above. Thus, it is evident that the adverse remarks of the IO/RO in the impugned CRs 2000-01 &

2001-02 were communicated to the officer. Similar adverse remarks have also been endorsed by other reporting officers in other CRs earned in preceding years and officer was also given performance counseling in November 1999. He did not prefer any representation against these remarks within 60 days as per Para 80 of SAO 8/S/91. Since the reporting officers have been retired, hence their comments is dispensed with under provision of Para 8.16.1 of AO 01/2010/DGMS. It has been clarified that the officer was verbally communicated about his short comings by a number of IOs in CRs for the period ACR 2000-01, ACR 2001-02, ACR 2005, ICR 2005, ACR 2006 and ACR 2008.

7. And whereas the assessments by all the reporting officers in these CRs are consistent and found to be in sync with the profile of the officer, hence the impugned CRs 200001 & 2001-02 including the adverse remarks do not merit any interference. The assessment by all the reporting officers in all the CRs in the entire reckonable period are fair, objective, performance based, well corroborated and bled with the overall profile of the complainant officer. There being no sign of any bias or subjectivity, none of the CRs merit any interference. The officer has not been empanelled for promotion to the rank of Col (& equi) by the Promotion Board (Med) NO. 3 held on 23.12.2010 (1st chance), 20.12.2011 (2nd chance) & 17.12.2012 (3rd chance) due to his overall profile and comparative merit as assessed by these Promotion Boards. He could not make it to the grade due to comparative merit in the face of limited number of vacancies due to the steep pyramid hierarchy in the AFMS.

8. In view of the above, the Statutory Complaint dated 14.4.2016 submitted by (MR-06068X) Col (TS) Sunil Jain, AMC. Against supersession by Promotion Boards (Medical) NO. 3 held on 23.12.2010, 15.12.2011 and 17.12.2012 is rejected being devoid of merit.”

9. Feeling aggrieved by rejection of his Statutory Complaint and non empanelment by the Promotion Boards, the applicant has preferred this Original Application.

10. At this stage, we feel it apposite to reproduce the impugned CRs as under:

ACR FOR THE PERIOD 2000-01:

Para 13 of Page 4

“Offr is intelligent but never came forward for any additional responsibilities. Just managed to remain a part of team. Good in financial matters and managed his finances extremely well”.

Para 23 of Page 6

“Professionally competent but lacked in the interpersonal relationship with the NOK of his clientele and with the staff working in the hosp.”

“ACR FOR THE PERIOD 2001-02:Remarks of IO

An high average officer who is loyal and honest. He takes extra responsibilities cheerfully. He is systematic and logical in taking decisions. He pays just sufficient attention to his bearing and turnout and conducts himself in an acceptable manner. He does not mix with officers and families due to his domestic problems. He has performed the duties of MO i/c MI Room and MO i/c Medical Stores in addition to his professional work in satisfactory manner.”

Remarks of RO

A tall, averagely turned out specialist medical officer who is a good specialist. Reticent in nature, likes to confine himself within his own domain, Sunil looks depressive on account of his personal domestic problem. The officer is unable to give his full potential primarily because of his marital disharmony. Obedient, amenable to discipline.”

11. The main argument of learned counsel for the applicant is that the order rejecting the representation of the applicant is not a true reflection of the observations made by this Tribunal in order dated 15 March 2016; rather it contravenes the spirit of the aforesaid decision. It is submitted that the applicant was never cautioned or conveyed his shortcomings by the concerned authority before endorsing adverse remarks in the CRs for the period 01 May 2000 to 15 Feb 2001 and 01 June 2001 to 31 May 2002. It is argued that adverse remarks cannot be given on presumptions and must be based on some material evidence disclosing how and in what manner the same is affecting service career of an individual. Performance of the applicant who was a Classified Specialist in Pediatrics should have been adjudged on the

basis of his performance and not on the basis of personal issues. It was argued that the adverse remarks were given in a short and successive period which indicates that the adverse remarks were purely subjective.

12. Rebutting submissions of learned counsel for the applicant, learned counsel for the respondents argued that the statutory complaint submitted by the applicant was examined in detail in accordance with the observations of this Tribunal in Original Application No. 343 of 2015 and after re-analysing the records, the statutory complaint was rejected vide order dated 19 Jan 2017. It is further argued that the relevant CRs containing the adverse remarks were thoroughly analysed by the intermediary authorities, viz. DGMS (Army), DGAFMS, Adjutant General, Complaint Advisory Board and Ministry of Defence and the assessments of all the Reporting Officers in the reckonable period were found to be fair, objective and well corroborated and performance based. There being no evidence of any bias, none of the CRs merit any interference. The applicant could not be empanelled for promotion to the rank of Colonel on account of his overall profile and comparative merit. It was vehemently submitted that the applicant had similar adverse remarks in his earlier CRs. for the year 1998-1999 and 1999-2000 while posted at MH Chennai from two different sets of Reporting Officers. The applicant was also given performance counseling in November 1999.

13. We have heard learned counsel for the parties at length and have gone through the record. We have also carefully perused the dossier of the applicant containing the reckonable impugned CRs and have given our anxious thoughts to the submissions from both parties and the material on record. We find that the detailed and lengthy prayer of the applicant is primarily hinging on following aspects:

- (a) To quash official letters informing him that he has not been selected for promotion in the three Promotion Boards within the years 2010, 2011 and 2012.
- (b) To quash the entire Selection Board No. 3 for the year 2010, 2011 and 2012 in respect of the applicant.
- (c) To remove adverse remarks in his ACRs of 2001 and 2002.
- (d) To remove all aberrations in all his ACRs which have been considered in the three Selection Boards of 2010, 2011 and 2012.
- (e) To hold fresh Selection Board for the applicant for promotion to the rank of Colonel protecting his original seniority.

14. We have noted that the order of this Tribunal dated 15.03.2016 directing the respondents to decide the applicant's statutory complaint by a speaking and reasoned order. We have also noted the reasoned speaking order of Ministry of Defence. The significant aspects of the order of Ministry of Defence (supra) are as follows:

- (a) The adverse remarks by IO in 2000-01 relate to officer not shouldering additional responsibility and lacking in

inter personal relations is in sync with the profile as the officer has similar adverse remarks in his ACRs from different set of reporting officers in previous ACRs of 1998-99 and 1999-2000. Similarly, after his posting to MH Babina, the officer has again got adverse remarks of similar nature for the year 2001-02.

- (b) The officer has not been empanelled in the Promotion Board (Med) No. 3 in 2010, 2011 and 2012 (last chance) due to his overall profile and comparative merit as assessed by Promotion Boards. He could not make it due to comparative merit in the face of limited number of vacancies due to the steep pyramid hierarchy in the Armed Forces Medical Service (AFMS).

15. We have also noted the merit position of the officer in all three Promotion Boards for which he was considered, i.e.:-

Year	Total Officers considered	Merit position of last empanelled officer	Merit position of applicant.
2010	270	69	262
2011	256	59	244
2012	191	38	185

16. In view of the above mentioned observations and the fact that the applicant's main prayer is to quash his rejection by the three Promotion Boards and consider him afresh for promotion, we have framed following questions which need an answer:

- (a) Is the speaking order of Ministry of Defence dated 19.01.2017 fair and just particular in light of observations made vide Armed Forces Tribunal order dated 15.03.2017?
- (b) Has the remarks of personal nature in ACRs of 2001 and 2002 adversely and unjustly impacted the overall numerical grading in these two ACRs?

- (c) Has the three Promotion Boards held in 2010, 2011 and 2012 erred in not selecting the applicant?

17. We find that the answers to all these questions are interlinked. We have also noted that the Promotion Boards to Colonel considers last ten years' ACRs. The span of last ten years is quite large and tends to reflect the relative merit of an officer despite one or two spikes or one or two drops in the average profile. It is evident that the officer has fared quite poorly in the Promotion Boards whereby in each Board he has 150 to 200 officers higher than him in relative merit who have also not been selected for promotion due to less vacancies and pyramidal structure of Armed Forces. We, thus, find substance in the speaking order of Ministry of Defence (supra) that the ACRs of 2001 and 2002 are in sync with the average profile of the applicant and that similar nature of adverse remarks about his personal behaviour/life have also been given by a separate set of Reporting Officers in the ACRs of other years as well. We also tend to agree with the learned counsel for the respondents who had submitted during hearing that interpersonal relations are important attributes of an officer and that reporting officers can comment upon it in the ACR. Since ACRs are confidential documents, hence any reflection in the ACR as observed by the reporting officer remains confidential. We have also noted that the remarks in pen picture and numerical grading of Reporting Officers are in sync with the pen picture. It is not a case that the applicant has been rated very high in his professional attributes but his numerical grading have been lowered due to his

personal problems. We have found that the applicant has been described by his Reporting Officers as Above Average and High Average and hence his numerical grading between 5 - 7 are in sync with this description and hence no injustice has been done to the applicant in the ACRs of 2001 and 2002. Thus, considering the fact that Armed Forces have a pyramidal structure where despite having the best only a few can get selected for promotion and these few are selected based on their relative merit, we are of the considered opinion that no injustice has been done to the applicant by the Selection Boards of 2010, 2011 and 2012.

18. In view of observations made hereinabove, we find no merit in this Original Application. It is accordingly **dismissed**.

No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: November 22, 2018
anb