

(2021) 04 AFT CK 0015
In the Armed Forces Tribunal
Case No : Original Application No. 921 Of 2020

Joydeep Sarkar

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 08-04-2021

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14
Army Act, 1950 — Section 27

Citation : (2021) 04 AFT CK 0015

Hon'ble Judges : Rajendra Menon, J; P.M. Hariz, Member (A)

Bench : Division Bench

Advocate : S.M Dalai, Karan Singh Bhati

Final Decision : Dismissed

Judgement

1. This application has been filed under Section 14 of the Armed Forces Tribunal Act 2007 by a serving Lt Col of the Indian Army, who is aggrieved by Unon- empanelment to the rank of Colonel by No. 3 Selection Board (SB) held in 2019 and 2020.

Brief Facts of the Case:

2. According to the applicant, he was commissioned into the Regiment of Olt on 14.06.2003. Based on his professional performance, he was chosen to undergo training with the first batch of pilots to be trained on Heron Remotely Piloted Aircrafts (RPA) by Israeli Aerospace Industries. Being one of the only four officers certified as an operational external pilot, he formed the nucleus of Indian Army's first Heron RPA crew. The applicant was part of the pioneering team of Heron RPAs and played a pivotal role in the planning, establishment and operationalisation of key RPA bases in Northern and Eastern Commands between June 2006 and September 2012. The applicant was awarded the GOC-in-C Eastern Command Commendation Card for this professional excellence and contribution. The applicant has also furnished the details of the Initiating officer's

box grading in his Confidential Reports for the period 13.09.2012 to 31.05.2020. It is the applicant's case that the CR details furnished here are an indication of the applicant's sustained hard work and the fact that he was an achiever.

3. The applicant was considered the No. 3 SB for the first time in March 2019 and was not empaneled. 'e then filed a Non-Statutory Complaint with a plea that his CRs for the years 2012 and 2013 be set aside. However, his Non-Statutory Complaint was rejected by the respondents, being bereft of any merit. The applicant was subsequently considered as a first Review Case' by No. 3 SB held in March 2020 and remained non-empaneled. Hence this O.A, in which he has sought the followin liefs:

- (a) Call for the relevant records pertaining to the applicant's Selection Board No. 3 held in March 2019 and March 2020, peruse it, and set aside the same being inconsistent with the applicant's overall profile;
- (b) Quash the impugned order dated 25.11.2019 being arbitrary, non-speaking and couched in standard language;
- (c) Expunge the Annual Confidential Report for the period 01.10.2012 to 31.12.2012 for not being objective and not in sync with applicant's overall profile;
- (d) Expunge the Annual Confidential Report for the period 01.01.2013 to 30.06.2013 being biased, unfair and not commensurate with the achievements of the applicant during the reporting period;
- (e) Expunge the assessment of the Reviewing Officer (RO) in the Annual Confidential Report of the applicant from 01.01.2014 to 30.06.2014 because the RO was not entitled to endorse the CR in terms of Para 29, read with Para 27 of Army Order 02/2016/MS; and
- (f) Direct the respondents to hold a Special Promotion Board and consider the applicant as a fresh case and if he makes the grade, promote him to the rank of Colonel with all consequential benefits, including original seniority with his batch mates.

Arguments by the Counsel for the Applicant:

4. The learned counsel for the applicant initially explained the overall service profile of the officer and highlighted his professional achievements and contributions in the field of RPAs in the country and said that in spite of such excellence, the applicant had not been empaneled for promotion to the rank of Colonel in two consecutive No 3 SB held in 2019 and 2020. He then went on to explain the details of the impugned CRs which the applicant has prayed to be set aside.

5. Referring to the first impugned CR covering the period 30.09.12 to 31.1.2012, the learned counsel stated that this was a report covering a very short period of three months, during which, perhaps, the applicant was unable to exhibit his full potential owing to lack of opportunities and also that there had been no

opportunity to be known by the RO since the applicant was located at Jodhpur whilst the RO was located at Nasirabad. While the JO rated the applicant as 'Above Average', with a box rating of '8', the applicant was apprehensive that the RO may have maintained the same box rating or reduced it.

6. Explaining the second impugned CR covering the period 31.01.2013 to 30.06.2013, the learned counsel said that during this period, the performance of the applicant had been exceptional, both professionally and administratively and cited various achievements to support this. He then said that the IO had rated the applicant as 'Above Average' with a box rating of '8' while the JO had rated three similarly placed officers as 'Outstanding' even though their professional performance was below the applicant. The learned counsel then added that both the JO and RO had a bias towards the applicant which stemmed from certain difference of opinion on professional matters and that this had shaped their assessment. Moreover, the RO himself was under from initiating/ reviewing CRs of his subordinates. However, this was not done and has been detrimental to the applicant.

7. Explaining the third impugned CR covering the period 01.01.2014 to 30.06.2014, the learned counsel explained that although the IO had rated the applicant 'Outstanding', he had failed to inform the RO three months in advance that the JO intended to rate the applicant as 'Outstanding', as required by the policy on the subject. The learned counsel then added that this had been done deliberately by the JO because of his bias towards the applicant and, therefore, the RO's assessment of the applicant could not have been objective. Thus, due to the low assessment by both the JO and RO in these three reports, the applicant was not empaneled.

Arguments by the Counsel for the Respondents:

8. The Learned Counsel for the Respondents raised certain preliminary objections on the application, in that the application suffered from lack of jurisdiction as the officer was not from Delhi, and that the application had been filed at the Principal Bench only based on the fact that the Non-Statutory Complaint had been rejected by the COAS located at Delhi. He further added that the applicant had not availed of the statutory remedy available under Section 27 of the Army Act prior to invoking the judicial review function of this Tribunal under Section 14 of the AFT Act. Moreover, although the applicant had made allegations of personal bias against various reporting officers, he had not impleaded any of them and the application was thus bad for non-joinder of necessary parties.

9. The learned counsel then briefly explained the pyramidal structure of the Army and the selection process for promotions at various ranks. He then explained that the assessment of officers in the Annual Confidential Report and mentioned that it was regulated by Army Order 45/2001/MS, which had since been replaced by Army Order 02/2016/MS.

The learned counsel then explained the conduct of the Promotion Selection Board

and added that the Selection Board made its recommendations which were then required to be approved by the competent authority, which could either be the COAS or the Government of India based on the rank for which the Selection Board was held. Placing reliance on the undermentioned decisions, the learned counsel then added that the Courts/ Tribunals are not to replace the finding of the Selection Boards by their own judgement:

(a) Union of India and others v. Lt Gen Rajendra Singh Kadyan (2000) 6 SCC 698. 41,. A

(b) IPS Dewan v. Union o India and Others(1995) 3 SCC 383.

(c) Si Chabbra Vs UoI and others (1993) Supp (4) SCC 441.

(d) Dalpat Abasaheb Solunke v. B.S Mahajan (1990) 1 SCC 305.

(e) Surfrider Shukla v. Union of India and others (2008) 2 SCC 649.

10. The learned counsel then explained that the Non -Statutory Complaint filed by the applicant against his non-empanelment and certain CRs had been examined in detail and that it was seen that the assessment by various reporting officers were fair, objective, well corroborated, consistent, performance based and technically valid. Thus, there being no evidence of any bias or subjectivity, the CRs did not merit any interference and, therefore, the complaint was rejected. The applicant had not been empaneled due to his comparative merit.

11. The learned counsel for the respondents then produced the files connected to the case and handed them over for perusal of the Tribunal. It included the CR Dossier of the applicant, Selection Board proceedings and files pertaining to the examination of the Non Statutory Complaint.

Consideration of the Case:

12. Having carefully considered the rival arguments made by the learned counsel for the parties, we find that the primary issue before us is, whether the Selection Board assessed the applicant correctly based on his records and whether the applicant's non-statutory was examined correctly?

13. Having perused the Dossier of the applicant, files pertaining to No-3 SB/2019, No-3 SB/2020 and the examination of the Non-Statutory Complaint submitted to the Tribunal by the second respondent after the final hearing on 24.03.2021, the facts, as given in subsequent paragraphs have been established.

14. All CRs of the applicant, covering the period from January 2010 to March 2018 have been examined. In his reckonable profile, the applicant had earned a total of ten CRs, seven in the rank of Major and three in the rank of Lt Col. All these CRs are 'Above Average' to 'Outstanding' assessments with complementary pen pictures, positive recommendations for promotion and employment, and no figurative assessment of '77 weak/ adverse remarks. All the CRs have a fair mix of figurative grades of '9s' and '8s' in all sections of the CRs by all the reporting

officers. Contrary to the applicant's apprehension, all the reporting officers have reflected and acknowledged the good work done by the applicant and his pioneering contribution in setting up various RPA facilities. Contrary to the applicant's assertion that the JO while initiating the CR covering the period 01.01.2014 to 30.06.2014 had not deliberately intimated the RO that it was intended to rate the applicant as 'Outstanding' is also misplaced, as the records show that he had intimated the same vide his letter dated 15.07.2014 and the CR was initiated on 04.11.2014.

15. No 3 SB/ 2019 to consider the officers of various Arms/ Services for promotion to the rank of Colonel was held from 05.03.2019 130 officers being considered for the first time, 175 officers being considered as Review cases including the applicant and 27 officers being considered as Deferred/ Withdrawn/ Special Review cases. In the overall merit of Artillery officers considered, the first 58 officers were recommended for promotion. The applicant was at 23rd position amongst the officers not recommended for promotion. Thus the applicant was not empanelled for promotion purely based on his overall profile and comparative merit amongst the batch of officers assessed by the Promotion Board.

16. The Non-Statutory Complaint 08.04.2019 was examined by the Complaint and Advisory Board (CAB) with inputs from the MS Branch. The applicant has impugned two CRs covering the periods, Jan - Dec 2012 and Jan - Dec 13; and sought redressal to the extent that his 'Adequately Exercised' period CRs covering these periods be set aside for the reasons carved out in the Non Statutory Complaint at para 1%. Annexure 2; reports covering his entire adequately exercised period be reviewed for any subjectivity, inconsistency and aberrations, and that they be expunged; on being granted the redressal sought, be considered as a fresh case in the next No-3 SB. The CRs of the officer in the reckonable period were examined and determined that all the CRs in the reckonable profile were well corroborated, consistent with the officers' profile and performance, and technically valid. The COAS, the competent authority, thus saw no reason to interfere with the impugned CRs, concluded that the applicant had not been empanelled based on his comparative merit, and therefore rejected the complaint.

17. In the result, we find that the impugned CRs have been rendered objectively and that all the CRs in the reckonable profile are well corroborated, consistent with the officers' profile and performance, and technically valid. The applicant has not been empanelled by the No 3 SB based on comparative merit and the Non-Statutory Complaint too has been examined correctly. Viewed thus, we do not find any merit in the O.A and it is dismissed. No order as to costs.

18. The original records submitted by the first respondent be returned in a sealed cover.

Pronounced in open Court on this the 8th day of April, 2021.