

(2025) 01 DEL CK 1745

In the Delhi High Court

Case No : Writ Petition (C) No. 6720 Of 2020

Kausthuba Nand Pant

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 07-01-2025

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2025) 01 DEL CK 1745

Hon'ble Judges : Navin Chawla, J;Shalinder Kaur, J

Bench : Division Bench

Advocate : Dinesh Agnani, Pradeep Mathur, Chiranjeev Johri, Ishita Kadyan, Ruchir Mishra, Mukesh Kr. Tiwari, Reba Jena Mishra

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. By way of the present petition filed under Article 226 of the Constitution of India, the petitioner prays for the following reliefs: -

"a. issue an appropriate writ, order or direction in the nature of Mandamus directing the respondents to consider the petitioner for regular promotion and posting as Commandant in the ITBP force from the date of such promotion of his juniors with all consequential benefits ignoring the adverse remarks in the APAR 2016-17; and

b. expunge the adverse remarks recorded in pen picture in the APAR 2016-17 of the petitioner."

Case of the Petitioner:

2. It is the case of the petitioner that the petitioner was inducted into the Indo-Tibetan Border Police (ITBP), a paramilitary organization, in 1988, as a direct-entry Sub-Inspector (GD), and has had a smooth and commendable career progression. The petitioner was promoted to the post of Inspector in 1991,

Assistant Commandant in 2003, Deputy Commandant in 2009, and Second-in-Command (2IC) in 2012. Since then, the petitioner has been serving as 2IC with seniority at Serial No. 6 in the cadre, maintaining an excellent service record throughout.

3. It is the case of the petitioner that the petitioner has been overlooked for promotion from the post of 2IC to the post of Commandant by the regular Departmental Promotion Committee (DPC), despite officers junior to him being granted promotion through the same process.

4. It is the case of the petitioner that the following grades/marks were received in his Annual Performance Appraisal Report (APARs) for the past five years, which are to be considered by the DPC for promotion: -

Year

Marks

Grading

2013-14

7

Very Good

2014-15

9

Outstanding

2015-2016

7.3

Very Good

2016-17

7

Very Good

2017-18

7

Very Good

2018-19

8

Very Good

5. It is also the case of the petitioner that the then Reporting Officer made adverse remarks in the Pen Picture in the petitioner's APAR for 2016-17, based on an unsubstantiated and anonymous complaint. Despite this, the petitioner was awarded overall marks of 7, with a grading of "Very Good" and integrity marked as "Beyond Doubt", by both the Reporting and also the Reviewing Officers.

6. The petitioner claims that his representation dated 20.08.2017 against the adverse remarks was, however, summarily rejected without due consideration vide Order No. 1-1702/(11)APAR Cell/2017:4-3 dated 04.04.2018.

7. It is the case of the petitioner that a second representation/appeal was submitted on 17.05.2018, requesting for the adverse remarks to be expunged, however, this appeal was also not entertained vide the Order dated 22.05.2018.

8. It is the case of the petitioner that still aggrieved, the petitioner requested and was granted a personal hearing by the Service Court of the ADG to address his grievance. The petitioner appeared before the Service Court of the ADG on the scheduled date, that is, 29.03.2019, where his grievances were heard in the presence of officers from the Directorate General, ITBP, New Delhi. The Service Court directed the DIG to submit a complete inquiry report along with the relevant documents. Even though more than ten months passed thereafter, nothing was heard from the Service Court.

9. As a DPC was soon to be held, the petitioner submitted an application on 30.01.2020, requesting for a decision on his appeal and the adverse remarks to be expunged.

10. However, to the petitioner's utter surprise, in response to the said application, the DIG, through an OM dated 13.02.2020, informed the petitioner that the Service Court had ceased to exist by way of the Circular dated 23.08.2019.

11. It is the case of the petitioner that the above response indicates deliberate inaction by the respondents, causing the petitioner to suffer. Such inaction in responding to or deciding the appeal, which was within the jurisdiction of the Service Court when it was functional, is not expected from a model employer in a welfare State. The petitioner further claims that he personally appeared before the Service Court of the ADG on 29.03.2019, when it was functional, and it was expected that the case would be decided within a reasonable time frame, especially since it pertains to promotion. The petitioner claims that even according to the respondents, the Service Court ceased to exist on 23.08.2019, meaning thereby that it was functional for about five more months after the petitioner was heard. The failure to decide the grievance during this period ultimately adversely affected the petitioner's career progression.

12. It is the case of the petitioner that he was entitled to a posting as Commandant on a Current Charge of Duties (CCD) basis and to promotion as

Commandant through a regular DPC, along with his juniors. He had an excellent service record, with performance entries over the last five years rated as 'Very Good' and 'Outstanding'. Despite his seniority over some officers, who were granted postings and subsequently promoted to Commandant through the DPC, the petitioner was overlooked. Upon receiving the response dated 13.02.2020, and learning about the status of the Service Court and its proceedings, the petitioner submitted a representation dated 03.03.2020 to the Respondent No.2. In this representation, he highlighted that his juniors and batchmates had been posted as Commandants on a CCD basis as per the Order dated 15.01.2020. He, therefore, requested that he be granted a similar posting and promotion on par with them.

13. As no response was received, the petitioner submitted another representation dated 04.05.2020. The same was, however, rejected vide the Office Memorandum dated 21.05.2020.

14. The petitioner has, therefore, approached this Court seeking a direction to the respondents to consider him for regular promotion and posting as Commandant in the ITBP Force from the date of promotion of his juniors, along with all consequential benefits, while disregarding the adverse remarks in the APAR for the year 2016-17. Additionally, the petitioner seeks a direction for the respondents to expunge the adverse remarks recorded in the pen picture of his APAR for 2016-17.

Submissions of the learned senior counsel for the Petitioner:

15. The learned senior counsel for the petitioner submits that the petitioner's juniors were promoted to the post of Commandant on a CCD basis, via an Order dated 15.01.2020, and subsequently, on a regular basis through the DPC, vide Order dated 27.05.2020, despite the petitioner being within the zone of consideration. He submits that there was no valid reason to exclude the petitioner from promotion, as he has maintained an excellent service record throughout his career. Furthermore, the respondents failed to provide any justification for disregarding the petitioner's name for promotion from 2IC to Commandant through the regular DPC process. He submits that the respondents also did not offer the petitioner an opportunity to be heard, which constitutes a violation of the principles of natural justice.

16. He further submits that the denial of promotion is based on adverse remarks in the petitioner's APAR for the year 2016-2017. He submits that the petitioner's performance ratings for the years 2013-2014, 2014-2015, and 2015-2016 were 'Very Good', 'Outstanding', and 'Very Good', respectively. Similarly, for the years 2017-2018 and 2018-2019, he was also graded as 'Very Good.' Although the Reporting Authority made a passing remark in the pen picture of the petitioner's APAR for 2016-2017 regarding the issuance of a Memorandum, the petitioner was still awarded 7 marks, received an overall grading of 'Very Good', and was assessed as having integrity 'Beyond Doubt.' He submits that the petitioner was

recommended for all mandatory promotional courses. Additionally, the Reporting Authority also provided highly positive remarks regarding the petitioner's essential attributes as a Commanding Officer, such as shooting skills. He submits that the petitioner received appreciation letters for commendable work and effective management in the Naxalite-affected area under adverse conditions. The representations dated 20.08.2017 and 17.05.2018, seeking the expungement of adverse remarks, were rejected by the respondent-department without appreciation of the above.

17. He further submits that the petitioner was cautioned via a Memo dated 23.09.2016 regarding visits and overnight stays at the COB, which were to be conducted in accordance with the rules. The Memo further stated that any recurrence of such violations would result in an entry being made in the APAR. It is submitted that, as per the Memo, the 'warning' was non-recordable unless the violation reoccurred, in which case it would be entered in the APAR. Since the warning was non-recordable and did not affect the petitioner's future prospects, the petitioner chose not to challenge it.

18. He submits that when the contents of the Memo were recorded in the Pen Picture by the Reporting Authority in the petitioner's APAR for 2016-17, albeit as a passing remark, the petitioner submitted representations seeking their expungement. Upon the arbitrary rejection of these representations, the petitioner approached the 'Service Court' of the ADG to address grievances related to service matters, promotions, etc., constituted under the ITBP Circular dated 06.07.2018. The petitioner was granted a personal hearing on 29.03.2019, however, decision thereon was not communicated to the petitioner. He submits that it was only later revealed that the Service Court abruptly ceased functioning approximately five months after the hearing, as per Circular dated 23.08.2019, without providing any resolution to the petitioner's case. This left the matter in a state of uncertainty, despite the Service Court remaining operational for five months after the hearing. He further submits that the respondents are deliberately avoiding providing a satisfactory explanation for their failure to conclude the Service Court proceedings.

19. He submits that though the petitioner has subsequently been granted promotion, vide Order dated 03.01.2022, the claim for retrospective seniority and consequential benefits still subsists and has not been addressed by the respondents.

Submissions of the learned counsel for the Respondents:

20. On the other hand, the learned counsel for the respondents submits that the petitioner's APAR for the year 2016-17 contains adverse entries, which is an admitted fact. The petitioner availed of the departmental remedy against the adverse remarks in the APAR for 2016-17 by submitting a representation dated 20.08.2017. The same was duly considered and subsequently rejected by the competent authority via an Order dated 04.04.2018, which was communicated to

the petitioner through a letter dated 27.04.2018. The petitioner has not challenged the decision of the competent authority rejecting his representation.

21. He submits that the petitioner's second representation on the same issue was not maintainable under the Department of Personnel and Training (DoPT) OM dated 14.05.2019, and Ministry of Home Affairs (MHA) U.O. Note dated 02.09.2014. Accordingly, the petitioner was informed through OM dated 23.05.2018 that his second representation dated 17.05.2018 could not be entertained, as the first representation had already been considered and rejected.

22. He further submitted that the facts and circumstances leading to the recording of adverse remarks in the petitioner's APAR for 2016-17, cannot be examined by this Court in the exercise of its writ jurisdiction. Moreover, the petitioner's APAR for 2016-17, which was recorded by the Reporting Authority, Reviewing Authority, and Accepting Authority, in accordance with the relevant guidelines, cannot be interfered with, especially at this belated stage.

23. He submits that with regard to the petitioner's claim for promotion to the rank of Commandant, the Order dated 25.11.1988 lays down the guidelines for promotion. He submits that the 1988 guidelines stipulate that the merit and attributes of the officer must be reflected in at least 4 out of the last 5 ACRs, and there should be no adverse entries in the ACRs for the other years. The benchmark for promotion to the rank of Commandant and above is "Very Good" or higher. He submits that the Guidelines of 1988 were modified by the Order dated 06/08.02.1991, which, inter alia, stipulated that instead of 4 ACRs, 3 out of the last 5 ACRs should be rated as "Very Good" or above, and there should be no adverse entries in any of the 5 ACRs being considered for promotion.

24. He submits that the petitioner was within the zone of consideration for promotion to the rank of Commandant. He submits that the DPC considered the case of the petitioner for promotion, however, the petitioner was declared "Unfit" for promotion as he did not meet the prescribed benchmark. Having participated in the selection process and been assessed as "Unfit", the petitioner cannot subsequently challenge the APAR for the year 2016-17.

25. He submits that the petitioner is not entitled to seek promotion to the rank of Commandant by disregarding the adverse remarks in the APAR for 2016-17, as this would violate the guidelines and criteria for promotion. Moreover, the petitioner cannot seek the expunging of the adverse remarks in the APAR for 2016-17, as this would amount to rewriting the APAR, which has already attained finality.

26. In response to the petitioner's grievance that some of his juniors in the rank of 2IC were detailed as CCDs by Order dated 15.01.2020, while he was overlooked, the learned counsel for the respondents submits that the petitioner raised this issue through his representation dated 03.03.2020, but the same was rejected via OM dated 21.05.2020. The petitioner has not specifically sought relief regarding the detailing of certain 2ICs as CCDs.

27. He submits that the detailing of officers/2ICs as CCD is unrelated to promotion or seniority, as it is solely based on operational and administrative considerations or requirements. The 2ICs detailed as CCD do not exercise any statutory powers associated with the rank of Commandant. Instead, in addition to their current duties, they exercise the administrative and financial powers of the rank of Commandant solely for administrative and operational purposes.

28. He submits that the reasons for the adverse remarks in the APAR of the petitioner were that he had made inadequate number of visits to and night halts at the forward posts/COBs in violation of the Standing Operating Procedure (SOP) No. 4/15. For the said default, the petitioner had been issued Memo No. 158 dated 23.09.2016. He submits that district Narayanpur is naxal affected area and on account of petitioner's non-compliance with the instructions to visit and night halt at forward posts/COBs, the operational and security aspects were compromised.

29. He submits that the petitioner was also found involved in the illegal selling and distribution of liquor at THQ/COBs and at TC Nandini. An inquiry was ordered into the incident and the petitioner was found involved in bringing liquor from 38th Bn (Kharora, Raipur) to 46th Bn. THQ Narayanpur, which is a naxal affected area where consumption of liquor is completely restricted in the interest of operational and security aspects. Therefore, vide Memo No. 162 dated 12.10.2016, clarification was sought from the petitioner. The petitioner submitted his clarification vide letter No. 7942 dated 03.11.2016, wherein he accepted bringing/arranging liquor at THQ Naryanapur, a naxal affected area. The petitioner was, therefore, issued "severe warning" vide Memo No. 291-95 dated 29.11.2016. The same was accepted by the petitioner.

30. As far as the 'Service Court' is concerned, he submits that the same was merely a Grievance Redressal Mechanism of the Force personnel established by Circular dated 06.07.2018. The same had no statutory basis and has been abolished on 27.08.2019.

31. He prays that, therefore, the petition be dismissed.

Analysis and Findings:

32. We have considered the submissions made by the learned counsels for the parties.

33. From the above, it would be apparent that the primary claim of the petitioner which needs to be decided by this Court is the challenge to his APAR for the year 2016-17. For appreciating this challenge, it would be first apposite to reproduce the assessment in the form of numerical grading and the pen picture recorded by the Reporting Authority and the Reviewing Authority for the petitioner in the impugned APAR, as under: -

"PART -IV

ASSESSMENT BY REPORTING OFFICER Numerical grading is to be awarded by reporting and reviewing authority which should be on a scale of 1-10 where 1 refers to the lower grade and 10 to the highest.

(Please read carefully the guidelines before filing the entries)

(A) Assessment of work output (Weightage to this section would be 40%)

Reporting Authority

Reviewing Authority

Initial of Reviewing

Authority

1. Accomplishment of planes work/work allotted as per subjects
allotted

6.0

7

ii. Quality of output

6.0

7

iii. Analytical Ability

6.0

7

iv Accomplishment of exceptional work/unforeseen tasks performed

6.0

7

Overall Grading on

Work output (Total score/4 x 0.4)

2.4

2.8

(B) Assessment of personal attributes (weightage of this section would be 30%)

Reporting

Reviewing Authority

Initial of

Reviewing Authority

i. Attitude to
work

6.0

7

ii. Sense of
responsibility

6.0

7

iii. Maintenance
of discipline

6.0

7

iv. Communication
skills

6.0

7

v. Leadership
qualities

6.0

7

vi. Capacity to work in team
sprit

6.0

7

vii. Capacity to work in time
limit

6.0

7

viii. Inter

personal relations

6.0

7

overall grading on personal

attributes=(Total score/8x0.3)

1.8

2.1

(C) Assessment of Functional competency (weightage to this section would be 30%)

Reporting Authority

Reviewing Authority

Initial of

Reviewing Authority

i. knowledge of Rules/regulations/Procedures in the area of function and ability to apply them correctly

6.0

7

SD/-

ii. Strategic Planning Ability

6.0

7

iii. Decision making ability

6.0

7

iv. Coordination ability

6.0

7

v. Ability to motivate and develop subordinates

6.0

7

Overall grading on functional competency

=(Total score 5X0.3

1.8

2.1

2. Training

(Please give recommendation for training with a view to further improving the effectiveness and capabilities of the official)

Recommended for al Promotional mandatory courses

3. State of Health

Obese

4. Pen Picture by reporting officer (in about 100 words) on the overall qualities of the officer including area of strengths and lesser strength, extraordinary achievement, significant failures and attitude towards weaker sections.

The officer is middle aged, smart, mentally sound and disciplined. As per Dte. Gen (OPs) standing order No.-4/2015 dt. 09.06.2015, during the period under report, the officer was to make night halt at each COB, during his stay at THQ Narayanpur (CG) and there has been shortfall in night halt officer at each COB during his stay at THQ Narayanpur CG. The officer was involved in illegal selling and distributing of Liquor to COB's & TC Nandni, without prior permission of Comdt.46Bn, thereby compromising the operational and security aspects, for which officer has been issued without Memo of Comdt. 46 bn, DIG(LKO) and DIG BBSR. However, the officer is polite, soft spoken, sheers from responsibilities and seeds to take interest and initiative in unit activities and to impose his office administration working professional knowledge and competency.

Fair & Just

5 Specific comments on the attitude of the officer reported upon towards scheduled castes/scheduled tribes/Weaker sections of the society, his understanding and his willingness to deal with them.

6 Integrity

(Please comments on the integrity of the official

Beyond Doubt

6

7 Overall numerical grading on the basis of weightage given in part-4 of the

report(A+B+C)

Signature of reporting officer

Name in Block Letter R.N

GANGULI

Designation COMMANDANT

PART-V

REMARKS OF THE REVIEWING OFFICER

1. Length of service under the reviewing officer 27.04.2016 to 31.03.2017.

2. Pen Picture by reviewing officer. Please comment (in about 100 words in the overall qualities of the officer including area of strength and lesser strength and his attitude towards weaker sections.)

Officer is sincere & hardworking but physically need to reduce his weight to look smart in uniform. He is polite and soft spoken having good liaison with civil administration. Attitude towards weaker section is fair and just.

3. Remarks by the reviewing officer to indicate specially the different, if any, with the assessment made by the reporting officer and the reasons therefore.

I agree with remarks of reporting officer

34. From the above, it can be seen that while the Reviewing Authority upgraded the numerical grading of the petitioner in his APAR from 6 to 7 for all the attributes, it also agreed with the remarks made by the Reporting Authority in the pen picture of the petitioner.

35. In the pen picture of the petitioner, recorded by the Reporting Authority, the Reporting Authority has made mention of the fact that the petitioner had made inadequate night halts at each Command Outpost (COB). The Reporting Authority further highlighted that the petitioner was involved in the illegal sale and distribution of liquor to COB's and T.C. Nandi without prior permission from the Commandant, for which a memo has been issued to the petitioner.

36. While the learned senior counsel for the petitioner has submitted that the allegation of illegal sale and distribution of liquor was completely false, we find that there is no challenge to the Memo issued to the petitioner for the said indiscretion/act of indiscipline. The respondents, in the counter affidavit, have highlighted that the DIG, SHQ (Lucknow), had ordered an inquiry into the said act vide Memo no.178 dated 03.08.2016. The petitioner in such inquiry was found to have been involved in bringing liquor from the 38th Battalion (Kharora, Raipur) to the 46th Battalion THQ Narayanpur (Chhattisgarh), where, being a Naxal-affected area, the consumption of liquor is strictly prohibited in the interest of operational and security aspects. For this act of indiscipline, the DIG,

SHQ Lucknow, issued Memo no.162 dated 12.10.2016, calling for a clarification from the petitioner. The clarification submitted by the petitioner, which included an admission of guilt, was duly considered. Consequently, the petitioner was found guilty and was issued a 'Severe Warning' vide Memo no.291-95 dated 29.11.2016.

37. As far as the allegation of not making sufficient number of night halts at the forward post is concerned, the petitioner had been issued an 'advisory' vide Memo no. 158 dated 23.09.2016. There was no challenge to the same by the petitioner. Therefore, as far as the factual recording in the impugned ACR is concerned, there is no dispute.

38. The only ground of challenge which is raised by the learned senior counsel for the petitioner against the adverse entry is that a warning and an advisory issued cannot form the basis of an adverse entry in the ACR. In this regard, the learned senior counsel for the petitioner has placed reliance on the guidelines for the promotion of officer in Paramilitary Forces issued by the MHA, dated 08.02.1991, which inter alia, state as under: -

"c) Minor adverse or advisory remark an officer holding important/difficult assignments may not be given undue importance. Similarly highly favourable reports on officer holding unimportant/routine type of posts may have to be turned down for purposes of assessment."

39. He has also placed reliance on the general instructions issued by the DoPT vide OM No. 11012/6/2008-Estt. (A) dated 07.07.2008, which also state as under: -

"(ii) Warnings, letters of caution, reprimands or advisories administered to Government servants do not amount to a penalty, and, therefore, will not constitute a bar for consideration of such Government servants for promotion."

40. While the above referred general instructions and the guidelines do indicate that the warnings or the advisories do not amount to a penalty and, therefore, will not constitute a bar of consideration of a Government Servant for promotion, at the same time, there can be no embargo on these being reported by the Reporting Authority in the ACR of the Government Servant, in case such Reporting Authority considers them important to reflect the true performance of the Government Officer. In case the Reporting Authority does so reflect the warning or the advisory, the same shall be considered as an adverse remark, which would need to be communicated to the officer and his representation against the same to be considered. The same is also evident from a reading of Clause (i) of the GI dated 07.07.2008, which reads as under: -

"(i) There is no objection to the continuance of the practice of issuing oral or written warnings. However, where a copy of the warning is also kept on the Confidential Report dossier, it will be taken to constitute an adverse entry and the officer so warned will have the right to represent against the same in

accordance with the existing instructions relating to communication of adverse remarks and consideration of representations against them.”

41. In the present case, the petitioner duly represented against the adverse remarks, which were considered by the Competent Authority and the representation was rejected vide Order dated 04.04.2018. Though there is no specific challenge to this order, we, even otherwise, do not find any case to be made out against the adverse remarks given by the Reporting Authority in the impugned ACR of the petitioner. As noted hereinabove, these remarks are factual in nature and pertain to very significant aspects of the performance of the petitioner during the relevant years.

42. The importance of the night halts can be gauged from the fact that in the APAR specific emphasis is made to the frequency of visits to COBs/post/sub-units under the officer’s command, as mentioned in paragraph 7 in part III thereof. Similarly, the supply of liquor in a Naxalite-affected area, where consumption of liquor is restricted for security reasons, is, in our opinion, a critical issue that the Reporting Authority appropriately highlighted in the APAR.

43. There is no allegation of mala fide against the Reporting Authority. As noted hereinabove, there is also no specific challenge to the advisory and the warning issued to the petitioner. In absence of any mala fide being attributed, merely because the Reviewing Authority upgraded the numerical grading of the petitioner, it cannot be said that the pen picture of the petitioner recorded by the Reporting Authority, though the same has been accepted by the Reviewing Authority in spite of upgrading the numerical grading of the petitioner, is no longer sustainable. The two elements are independent, though not completely divorced from each other. We do not find any inconsistency between the two, as the pen picture is merely to highlight two specific incidences against the petitioner.

44. As far as the denial of promotion to the petitioner by the DPC is concerned, in terms of the guidelines dated 08.02.1991, referred to hereinabove, promotion to the rank of Commandant requires that at least three out of five ACRs should be graded as ‘Very Good’, and none of the five ACRs under consideration should contain an adverse entry. Since the adverse entry has been upheld by this Court, the decision of the DCP to deny promotion to the petitioner to the post of the Commandant cannot be faulted.

45. In view of the above, we do not find any merit in the present petition. The same is accordingly dismissed.