

(2005) 05 DEL CK 0199

In the Delhi High Court

Case No : Writ Petition (C) No. 6575 of 2002

Lt. Col. (Time Scale) D.S. Pandey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-05-2005

Acts Referred:

Citation : (2005) 121 DLT 177

Hon'ble Judges : B.A. Khan, J;Anil Kumar, J

Bench : Division Bench

Advocate : P.D.P. Deo and M.S. Boora, for the Appellant; Capt. J.S. Manhas, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner was commissioned in the Indian Army in June 1982 into 4/A Gorkha Regiment. Since his commissioning, petitioner attended various professional courses and according to him, he did consistently well and achieved highest possible grading. Despite petitioner achieving high grading because of his hard work and successfully completing the course, he was found unfit even for first rank of Lt. Colonel by Selection Boards held in year 1998, 1999 and 2000.

2. Petitioner contended that while gleaning through the possible reasons for his supersession, he has come to know that his supersession to the rank of Lt. Colonel was due to his subjective recording of ACR/ICR for the period 1993-95. Petitioner's plea is that he was never warned verbally or in writing by any of his superiors for any shortcomings nor was he charged of any indiscipline at any stage. He has all along been obedient, sincere and an honest officer. He feels that his supersession was based on the ACRs of June, 1993 to June, 1995 which emanated from bias and vindictiveness. According to him, unnatural variance between pen picture and the points given in personal/demonstrative qualities in his ACRs for those years was indicative of bias requiring no further proof.

3. To substantiate and support the allegation of bias and prejudice, petitioner contended that on his posting after September, 1993 on Indo-China border in inhospitable terrain, he was asked to re-write standing order for war which was last written in 1971. Though writing or updating standing order for war was a momentous task, however, no material was supplied to him to carry out this momentous task and the demand of the petitioner to avail him the facility of library and other material relevant and necessary for updating standing order for war, was not liked by his initiating officer and this was construed as not obeying the order by him. He had raised the point of equitable distribution of workload and hardship caused to persons under him in a company Commander conference, as this had made some of the Army personnel vocal and restless which was not at all liked by his initiating officer. The petitioner also imputed bias to his initiating officer on account of his questioning the professional competence of Capt. Tapan Singh (Adjutant) of the battalion who subsequently deserted the service and who was surprisingly rated as outstanding by both respondents no.3 and 4. He also attributed malafide to respondent no.3 who had required to manage a false certificate pertaining to the wife and children of respondent no.3 which was categorically demanded by him.

4. The claim of the petitioner was refuted by the respondents contending that while considering an officer for the promotion to a selection rank, the Selection Board takes into consideration a number of factors such as war/operational reports, course reports, ACRs, performance in command and staff, honors and awards, disciplinary background and not bare gradings in the ACRs. They relied on selection policy dated 6th May, 1987 and contended that the selection/rejection of the petitioner was based upon his overall profile and comparative batch merit and communicated to him in compliance with the instructions. He did not represent against the ACRs within the stipulated period of 90 days and now the allegations made regarding the ACRs for 1993-1995 in the writ petition filed on 8th October, 2002 suffers from latches.

5. The Respondents also denied that petitioner was graded "outstanding" in Junior Staff Officer's course in 1998 when he was graded "above average". It is also explained by respondents that the grading in course reflects the performance of the officer during the course, whereas assessment in confidential reports are based on actual performance of the officer during the reporting period. They assert that the petitioner was graded "above average" in the qualities of "knowledge", "expression", in the impugned ACRs and not "average" as claimed by him. It is also pointed out by them that he had not leveled any allegation of bias, prejudice and mala fide against Respondent No.3 and 4 in his statutory complaint but now he had turned round to do so in the writ petition.

6. The Respondents produced the professional profile of the petitioner reflecting various parameters before us during the course of the hearing. The petitioner's allegations that his ACRs for the period 1993-95 were the only stumbling block in his non-selection to the Rank of Lt. Colonel and that his pen picture does not

correspond to the points given in personal/demonstrative qualities is not born out from his profile. Points/grading as given during 1993-1995 are not confined to these years only but such grading/points had been given to petitioner for other years also and his matching pen picture viz-a-viz figurative assessment varies from "High Average" to "Above Average".

7. Petitioner's apprehension that the Reviewing Officer/Senior Reviewing Officer had also been misguided by the alleged subjective ACR of Initiating Officer is also unfounded. A Reviewing Authority may grade the performance/conduct, etc., higher than the Initiating Authority or vice versa but all this is a part of the process. So long as a Reviewing Authority enjoys the power to vary/review the grading/rating, it cannot be said or held that he must have been misguided by the allegedly subjective ACR. I may be a different matter where it is proved that even the Reviewing Officer had acted with malafide or his grading was perverse for some reason. To presume that the Reviewing Authority must have signed on the dotted line and must have been misguided by the alleged subjectivity in the ACRs, would be stretching the argument of the petitioner a bit too far and would fall within the realm of surmise. A reviewing officer is also entrusted with an onerous duty to review the ACR recorded by the Initiating Authority. His responsibility is, Therefore, more and he is presumed to have discharged it unless contrary is proved. The petitioner's pleas are rather assumptive lacking in material substance. His claim that it was only during the years 1993 to 1995 that his grading did not correspond to his pen picture is also not borne out from his overall profile produced by the respondent before us. The grading as given in 1993 to 1995 is not confined to those years but even during earlier years also he had been awarded similar grading by Initiating Officer and the Reviewing Officer.

8. There can not be any dispute that ACR of an officer is the figurative assessment of relevant variables of personnel qualities and demonstrative performance and is related to the nature of performance by him during the specific period. A fortiori, a credible performance reflected in the ACRs of immediate following year may not necessarily need to lead to conclusion that the performance would have been equally good during the period of impugned ACRs as well. Unless the petitioner is able to show that his performance was under rated due to malice, bias or on account of some extraneous reasons during a particular year, mere citing of better ACRs rating during the preceding or subsequent years would not constitute a valid ground to upset the recorded ACR. The petitioner has failed to show any clear infraction of the rules, orders and regulations, instructions in the recording of the impugned ACR.

9. The promotion up to the Rank of Major in the Army is by time scale and from Major to Lt. Colonel and above are through Selection Board. In terms of the promotion policy, an officer is entitled for three considerations only for promotion to the Selection Rank, i.e., from Major to Lt. Colonel and above, as fresh case, first review case and final review case. It is also not understandable that if the petitioner's perception about his performance was "outstanding" why after non

selection in 1998, as a fresh case, no such complaint was raised by the petitioner. Petitioner has drawn his conclusion about his supersession and blaming it to the alleged subjective ACRs for the period 1993-1995 only after being not approved after his first review and final review also does not augur in support of his pleas.

10. The allegations by petitioner alleging bias and malafides to Respondent nos.3 and 4, also seem to be an after thought as they were not raised in statutory complaint. On closer scrutiny of these allegations of bias and prejudice, it is apparent that the same cannot be perceived and constituted as bias and prejudices of the respondents no. 3 and 4.

11. Petitioner's other contention is that he was never warned verbally or in writing by any of his superior for any shortcomings and that in view of his performance being graded `7" as compared to previous years better grading, on drop of his performance, the ACRs ought to have been communicated to him. The allegations of grading of `7" during the years 1993-1995 only and not in other years is factually not borne out from the record produced before us. Regarding communication of ACRs the respondents have categorically contended that the ACRs impugned by the petitioners pertaining to 6/1993-6/94; 6/94-11/94-11/94-6/95 were communicated to him as per the instructions, but he failed to represent against the same within the stipulated period of 90 days.

12. Reliance by counsel for the petitioner on the Supreme Court judgments in U.P. Jal Nigam and Ors. v. Prabhat Chandra Jain JT 1996 (1) SC 41 and State of Haryana v. P.C. Wadhwa AIR 1987 SCC 1201 are related to civil service rules and are distinguishable. The propositions laid down in these does not advance his case at all. The legal position applicable regarding the communication of an adverse ACR relatable to the civil services would not be attracted to the Army Service rules. Similarly the considerations which apply to other Government servants in the matter of promotion and selection may not, as a matter of course be applied to defense personnel of the petitioner's category and rank. Reliance for this can be placed on Lt. Colonel K.D. Gupta v. Union of India AIR 1989 SC 1393 and Lt. Col. Krishan Chand v. Union of India and ors LPA 23 of 1995 decided on 11.10.1996 by a division bench of this Court. The ratio of these cases was followed by a division bench of this Court in 2005 II AD (DELHI) 53 M.P.S. Gill v. Union of India.

13. In view of all this, petitioner has failed to make out any case for quashing the impugned ACR. His claim for promotion also fails and this petition is accordingly dismissed.