
(2009) 03 MP CK 0038

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5706 of 2001

Major Subodh Shukla

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Citation : (2009) 3 MPLJ 149

Hon'ble Judges : R.S. Jha, J

Bench : Single Bench

Advocate : K.P. Singh, for the Appellant; Brian D "Silva, with Mrs. Kanak Gaharwar, for the Respondent

Final Decision : Allowed

Judgement

R.S. Jha, J.

The petitioner has filed this petition praying for quashing the communications dated 8-8-2001 and 8-2-2002 by which the statutory appeal/complaint filed by the petitioner against the Confidential Report for the period June, 2000 to November, 2000 has been rejected and has also assailed the validity of communication dated 17-9-2001 by which the petitioner was informed that he has not been empanelled for promotion to the rank of Lt. Colonel.

The brief facts leading to the filing of the present petition are that while the petitioner in the year 2000 was posted at 36 Infantry Division Ordnance Unit, Sagar as a Major, a Special Confidential Report in respect of the petitioner relating to the period June, 2000 to November, 2000 was directed to be sent and accordingly the petitioner's Initiating Officer, respondent No. 5, recorded a report and gave an "outstanding" 9 point grading to the petitioner on 6-1-2001. It is submitted that thereafter the petitioner's file was forwarded to the Reviewing Officer, respondent No. 4, the General Officer Commanding, 36 Infantry Division, who graded the petitioner as an "above average" officer, but made certain advisory remarks in the pen picture column which were communicated to the

petitioner on 23-1-2001.

It is the case of the petitioner that he immediately moved a statutory complaint against the aforesaid communication on 28-2-2001 through his Commanding Officer, respondent No. 5, who also informed him that the respondent No. 4 had directed him to downgrade his report. It is further alleged that respondent No. 5 made certain amendments in his statutory complaint and forwarded the same to the competent authority and, therefore, the petitioner filed an additional statutory complaint on 30-3-2001. It is stated that the first statutory complaint filed by the petitioner was rejected on 8-8-2001 while the second one was rejected on 8-2-2002. The petitioner has also submitted that during the aforesaid period the selection board for making promotions to the rank of Lt. Colonel from Officers of the petitioner's batch was convened but in view of the advisory/adverse remarks communicated to the petitioner, he was not empanelled and was informed of the aforesaid fact by the impugned communication dated 17-9-2001. Being aggrieved by the aforesaid, the petitioner has filed the present petition.

The case of the petitioner, before this Court, is that the petitioner's Initiating Officer had given him an "excellent" grading but the Reviewing Officer, on the basis of a complaint made by one Hav. Kulwinder Singh directly to the Reviewing Officer, got personally involved and with a biased mind gave him a lower grading and also an advisory/adverse remark which resulted in adversely effecting his promotional chances. It is submitted by the Learned Counsel for the petitioner that the grading given by the Reviewing Officer is contrary to the procedure and guidelines prescribed for writing and recording of Annual Confidential Reports and being biased deserves to be set aside.

Per contra, it is submitted by the learned Senior Counsel appearing for the respondents that the Reviewing Officer has awarded an "above average" grading to the petitioner which cannot be said to be adverse and the Annual Confidential Report of the petitioner has been recorded in accordance with the procedure prescribed and in such circumstances no case for interfering in the Annual Confidential Report for the period June, 2000 to November, 2000 is made out by the petitioner. It is further submitted that the Reviewing Officer made his comments in the Annual Confidential Report after duly examining the complaint filed by Hav. Kulwinder Singh and that on the statutory complaint being filed by the petitioner, the respondent authorities have duly examined the petitioner's case after calling for comments from the Initiating Officer as well as the Reviewing Officer and on finding that the grading given by the Reviewing Officer was in conformity with the past profile performance of the officer during the period covered by the report and is corroborated and meshes with the overall profile of the officer, have rejected his representation which does not call for any interference by this Court.

I have heard the Learned Counsel for the parties at length. The Annual Confidential Report dossier of the petitioner; the record relating to the statutory

complaint; and the minutes of the Member Data Sheet, placed before the Selection Board, have been produced by the respondents for perusal of this Court. From a perusal of the averments made by the parties and the aforesaid records it is evident that the petitioner had been awarded a 9 point "outstanding" grading by the Initiating Officer for the relevant period i.e. June, 2000 to November, 2000 and that the Initiating Officer has also given detailed reasons as to why he had given him "outstanding" grade and also recommended him for promotion. From the record it is also clear that on the contrary, the Reviewing Officer gave him an "above average" 7 point grading, but at the same time stated in the pen picture that he was an over-rated officer who was not getting along with his men and appeared to be vindictive in nature and advised him to improve his inter-personal relations. The Reviewing Officer also recommended deleting certain portion of the outstanding report of the Initiating Officer wherein the Initiating Officer had stated that the petitioner had motivated the men under him to achieve a very high standard and after making the aforesaid noting, the Reviewing Officer stated that the petitioner was not yet recommended for promotion. The Superior Reviewing Officer gave the petitioner "above average" grading of 8 points and also gave him a favourable noting in the pen picture, but did not state anything about expunging any portion of the report made either by the Initiating Officer or the Reviewing Officer and blindly stated that both the reports were justified and at the same time he recommended the petitioner for promotion.

From the aforesaid it is apparent that while the Initiating Officer gave the petitioner a 9 point "outstanding" grading which matches with the pen picture profile as well as the recommendation for promotion made by him, the report of the Reviewing Officer is apparently inconsistent inasmuch as while he has given the petitioner a 7 points "above average" grading, he has stated that the petitioner is vindictive in nature and is an over-rated officer who is not able to get along well with his men and has not recommended the petitioner for promotion. It is also apparent that though the pen picture assessment of the petitioner made by the Initiating Officer and the Reviewing Officer is diametrically opposite to each other, the Superior Reviewing Officer without making any comment or giving any reason has justified both of them though he has agreed with the recommendation made by the Initiating Officer to the effect that the petitioner be promoted and has also given him a 8 point "above average" grading.

The procedure and manner of recording the Annual Confidential Reports in the establishment of the respondents prevalent at the relevant point of time is governed by the Special Army Order (SAO) No. 3/S/89 (hereinafter referred to as "SAO No. 3/S/89") and is titled "Instructions for rendering Confidential Reports on Officers". The clauses of the aforesaid SAO No. 3/S/89 relevant for the purposes of the present case are contained in Paras-5, 98, 99, 100 and 103, and are to the following effect:

5. The aim of a Confidential Report broadly is to have an objective assessment of an officer's professional and personal qualities, his competence, employability and his potential as observed during the period covered by the report. All reporting officers must, therefore, be fair, impartial and objective in their assessment.

to 97. xxx xxx xxx

In accordance with the aim as defined at Para 5 above, the assessment contained in a CR will be restricted strictly to the performance and events during the period covered by the report.

On receipt in the MS Branch, a CR will be scrutinized 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 brief comments (pen picture) and is supported by matching recommendations for potential.

(b) Wide Variations. Variations of 3 or more marks in Personal Qualities. Demonstrated Performance. Technical Assessment or Box Grading by the various reporting officers, need to be explicitly elaborated by the reporting officers.

(c) Inconsistent Recommendations for Promotion and Employment "Normally" an officer assessed High Average or above, should have been recommended for promotion to the next rank in turn. Accordingly the recommendations for employment should also be for the next rank. In case this is not done, explicit reasons will be essential.

(d) Average Assessment. Award of Average grading (4 marks) in the following has been adequately and explicitly justified in the pen picture and is corroborated by the assessment of potential:

(i) Capts. and below. All Personal Qualities, variables of Demonstrated Performance and Box Grading in the pen picture.

(ii) Majors, Lt. Cols and Cols. Mandatory Personal Qualities which have been designated by an asterisk (*) in the CR form and box grading in the pen picture.

(iii) Brig. And Maj. Gens. All Personal Qualities, variables Demonstrated performance and Box grading in the pen picture.

(e) Low and Below Average Assessment. When an officer awarded Low or Below Average (i.e. 3 or less marks any where in the CR, the same has been 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 officers) are supported by figurative assessment in the relevant variables of Personal Qualities and/or the Demonstrated Performance. In addition, the assessment of potential should also be in consonance with the remarks.

In case the requirements specified above are lacking in a CR, the concerned reporting officers) will 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 (Revision of assessment for potential may be accepted depending upon merits of the case.)
- (b) Exclusion of Adverse remarks or Guidance for Improvement to avoid communication to the ratee. In case, the reporting officer(s) fails to communicate the same, the requirement will be executed by the MS Branch.

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Assessment contained in a CR will NOT to communicated to the officer except in the following contingencies:

- (a) When figurative assessment anywhere in the CR is Low or Below Average (i.e. 3 or less than 3 marks). In such cases extract of figurative assessment (i.e. 3 or less) will be communicated to the officer.
- (b) When the brief comments (pen picture) contains adverse or advisory remarks. In such cases complete pen picture (excluding the box grading) together with comments on Guidance for Improvements will be communicated to the officer. Further, the box grading will also need communication to the officer when assessment is Low or Below Average (3 or less).

The respondent/authorities have also issued instructions to supplement the aforesaid Special Army Order known as Instructions for Rendition of Confidential Reports for Officers, 1989 (hereinafter referred to as "Instructions for Rendition"). Paragraphs 120, 128, 139 and 149 to 153 of the aforesaid Instructions, which are relevant for the present case, are to the following effect:

120. Information Regarding "Guidance for Improvement" (Applicable to IO, RO and FTO). The IO and the RO are required to specifically mention whether the ratee was rendered any "Guidance for Improvement". If so, was it Verbal" or "Written" and details of the same. The basic purpose is to ensure that the weakness (if any) reflected in the pen-picture was brought to the notice of the ratee during the reporting period and that he is not exposed to these at the time of initiation of CR. In this regard Para 149 below, dealing with "Guidance for Improvement" also refers. The concerned reporting officers are required to be absolutely specific while completing this portion.

to 127. xxx xxx xxx

Overall Figurative Assessment (Box Grading) Recommendations regarding potential depend upon a number of factors and as such it would not be proper for the reporting officers to base their endorsements solely on the figurative award.

However, it needs to be mentioned that officers, graded High Average or above, merit recommendations for promotion to the next higher rank in turn unless there are certain limiting factors which necessitate negative recommendations e.g., an officer may be performing very well in his present rank but his restricted professional acumen may render him unsustainable to shoulder higher responsibilities. The higher reporting officers in the chain should monitor this aspect and refer back the report for necessary elaboration, if required.

to 138. xxx xxx xxx

Inconsistent Recommendations for Promotion. As explained in Para 128 above, an officer assessed High Average or above should normally be recommended for the Next Rank in turn. When this is not done (e.g. an officer awarded 8 marks in the box grading but given "Not Yet" recommendations), the recommendations will be termed as Inconsistent Recommendations and will need explicit justifications.

to 148. xxx xxx xxx

Feed back received through appeals or representations and correspondence with officers on MS Matters, indicates that large number of reporting officers are not conversant with the concept and importance of performance counselling. This fact is further confirmed during the internal assessment of the Confidential Reports in the MS Branch.

The information given in the Confidential Reports is not for the exclusive use of the MS Branch for Personal management functions but is also intended to promote the professional development of the officer reported upon. It is the development aspect which many times is overlooked by the reporting officers. They should counsel and guide the officer as well as apprise him of his shortcomings when noticed throughout the reporting period. This obligation of duty should not be deferred to the time of initiation of the report so that adverse remarks, if any, do not come as a surprise to the officer reported upon.

Some reporting officers carry an erroneous impression that only the IO and the First TO are required to carry out performance counselling before endorsing any adverse remarks. It may be stated that the professional development of the subordinates is a function of all echelons of command and is not the exclusive responsibility of the IO and the First TO. Hence it is the duty of all the reporting officers in the chain of initiation of reports to counsel and guide the ratees. The counselling may be done in person or in writing.

Performance Counselling is a Confidential Communication between the reporting officer and the ratee and as such does not required the presence of an independent witness to confirm the transaction. The reporting officers may, however, maintain a record of performance counselling to substantiate their assessment at a subsequent stage, if required.

It may be emphasized, even at the risk of repetition that performance

counselling should be viewed as a positive instrument to promote a balanced professional development of the ratees. It should neither be utilized to run down subordinates nor be considered as an irritant prescribed by the MS Branch which a reporting officer has to suffer by virtue of his position.

A perusal of the aforesaid SAO No. 3/S/89 and the instructions make it clear that the Annual Confidential Reports should be fair, impartial and objective in their assessment of the officer and that there should be no inconsistency in them. Paragraph-99(c) which deals with Inconsistency of Reporting, elaborates upon the same and states that if an officer who is assessed High Average or above, is not recommended for promotion to the next rank without giving detailed reasons for the same, it would be an inconsistent recommendation for promotion and employment. Paragraph-99(f) which deals with Adverse Remarks and Guidance for Improvement, states that for the remarks to be consistent and acceptable, it is essential that such remarks be endorsed by the reporting officer and should be supported by figurative assessment and assessment of potential should also be in consonance with the remarks. Paragraph-103 lays down that when the pen picture comments contains advisory remarks, they should be communicated to the concerned officer.

Similar" instructions elaborating the aforesaid SAO No. 3/S/89 are contained in paras 120, 128 and 139 of the Instructions for Rendition, wherein it is stated that officers graded high average or above should be recommended for promotion or detailed reasons should be given as to why they are not being recommended. Paragraph-139 of the Instructions for Rendition specifically states that in case an officer graded "high" "average" or above is not recommended for promotion for the next rank, the recommendation will be termed as an inconsistent recommendation. Para-107 of the Instructions for Rendition also gives examples of some of the common inconsistencies and contradictions in the figurative assessment and pen-picture and example (b) given therein deserves to be quoted as it is relevant for the purposes of this case.

(b) The officer is given 7 or 8 points in "Adaptability" whereas in the pen-picture it is mentioned that he should be more tactful in his dealings or has a tendency to be rigid.

The Reviewing Officer in the instant case has given a 7 point grading to the petitioner but has at the same time stated that he is not tactful or good in dealing with his subordinates as he is vindictive and is not able to get along well with his men.

In the instant case, while the report of the Initiating Officer is consistent inasmuch as he has given the petitioner an outstanding 9 point grading and has supported it with his pen picture comments and recommendation for promotion, the grading given by the Reviewing Officer is inconsistent in view of para-99(c) and (f) of SAO No. 3/S/89 and paragraphs 120, 129 and 139 of the Instructions for Rendition, as the Reviewing Officer while grading the petitioner as an above

average officer by giving him a 7 point grading has not supported the same in the pen picture profile wherein he has stated that the petitioner is a vindictive officer who does not enjoy good relations with his subordinates and has also not recommended him for promotion.

There is yet another glaring and apparent reason for holding that the report of the Reviewing Officer is inconsistent. In my considered opinion it defies logic as to how an "above average" officer who is given a 7 point grading can at the same time be said to be vindictive in the pen picture, specifically when the complaint by Hav. Kulvinder Singh against the petitioner only related to harsh treatment and there was no occasion for the Reviewing Officer to use the word vindictive in the pen picture which has a totally different connotation and is used to indicate a spiteful or revengeful attitude adopted with an intent to harm somebody. No reasonable person would grade an officer "above average" and at the same time revengeful and spiteful and, therefore, in my considered opinion the entire report of the Reviewing Officer is inconsistent and deserves to be ignored and rejected.

Paragraph-120 of the Instructions for Rendition provides that the reporting officer prior to making an adverse entry in the Confidential Report must render guidance either verbal or written to the officer to ensure that the officer improves during the reporting period and is not exposed to such an entry for the first time at the time of initiating the Confidential Report. Paragraphs 149 to 150 of the Instructions for Rendition which relate to Guidance for Improvement lays down in great detail the procedure to be followed by the Reviewing Officer and also states that verbal or written guidance during the reporting period is not a mere formality and that the Reviewing Officer should actually undertake this exercise and give details of the oral and written guidance given by him to the officer concerned. Paragraph-151 of the Instructions for Rendition, specifically states that the duty to give verbal or written guidance is not confined only to the Initiating Officer and the First Technical Officer, but is also required to be undertaken by the Reviewing Officer and the Superior Reviewing Officer.

In addition, it is also apparent from a perusal of paragraphs 101 and 102 of the SAO No. 3/3/89 that it is the responsibility of the Senior Reporting Officer to study the remarks given by the Junior Reporting Officer and state as to whether the assessment made is "Liberal", "Justified" or "Strict" and it also required to ensure that the Confidential Report has been rendered in accordance with the provisions of SAO No. 3/S/89 and is consistent. Paragraph 86 of the Instructions for Rendition makes it obligatory on the Senior Reporting Officer to specifically endorse and make comments upon the Confidential Report when there is a difference of two or more marks between the assessment of the Initiating Officer and the Reviewing Officer.

In the instant case, as is apparent from a perusal of the Annual Confidential Report of the petitioner relating to the period June, 2000 to November, 2000, the Reviewing Officer while making comments regarding the vindictive nature of the petitioner in the pen picture column has simply stated that guidance for

improvement during the reporting period was given to the petitioner through the Initiating Officer. Apparently the guidance as required to be given in accordance with the instructions of SAO No. 3/S/89 was not given by the Reviewing Officer to the petitioner as the instructions require the Reviewing Officer to himself give verbal or written guidance and to give details of the same during the reporting period prior to initiating the Confidential Report. The importance of giving guidance has been highlighted by the respondents themselves by emphasizing that it is not a mere formality and cannot be overlooked. In fact the petitioner in his statutory complaint has specifically stated that prior to recording the advisory/adverse noting in his Confidential Report, the Reviewing Officer did not at any point of time inform him about the complaint against him by Hav. Kulwinder Singh either orally or in writing nor did he call for his comments. This fact is also affirmed by the Initiating Officer as is evident from the comments submitted by him on the statutory complaint filed by the petitioner.

In view of the aforesaid undisputed facts it is apparent that the advisory/adverse entry recorded by the Reviewing Officer was in direct violation of the guidelines as no verbal or written counselling was given by him personally to the petitioner at any point prior to making of the entries nor were his comments or explanation sought by him on the complaint of Hav. Kulwinder Singh prior to recording of the entries. It is also apparent that the Senior Reporting Officer has also not followed the procedure laid down in paragraphs 101 and 102 of SAO No. 3/5/89 and paragraph 86 of the Instructions for Rendition by blindly justifying the report of the Reviewing Officer.

It is also apparent from a perusal of the comments of the Reviewing Officer and the Initiating Officer submitted by them before the concerned authority for decision of the statutory complaint filed by the petitioner, that while the Reviewing Officer held the petitioner responsible for harassment of Hav. Kulwinder Singh, the petitioner's Commanding Officer and Initiating Officer specifically stated in his written comments that it was the Commanding Officer himself who reduced the leave of Hav. Kulwinder Singh to 6 days and that it was on his orders as the Commanding Officer/Initiating Officer that Hav. Kulwinder Singh's course was cancelled due to shortage of staff and clerks. The Initiating Officer has also stated in his comments that in fact Hav. Kulwinder Singh was given more than his dues at each stage and has reiterated that the petitioner was an excellent officer and the fear harboured by Hav. Kulwinder Singh that he would spoil his Confidential Report was misplaced as Hav. Kulwinder Singh had worked for less than 90 days under the petitioner and, therefore, the petitioner would not write his Annual Confidential Report.

Apparently, the respondent/authorities, while deciding the petitioner's statutory representation, have failed to take into consideration the aforesaid/glaring factual aspect namely; that the report of the Reviewing Officer was apparently inconsistent in view of the guidelines contained in SAO No. 3/S/89 and the Instructions for Rendition and that the reasons given by the Reviewing Officer for

recording the Confidential Report were totally incorrect in view of the comments made by the Initiating/Commanding Officer of the petitioner.

The view taken by me is in consonance with the judgment of the Supreme Court in the case of Union of India (UOI) and Another Vs. Major Bahadur Singh, , relied upon by the Learned Counsel for the petitioner, wherein the Supreme Court after going through similar instructions has held as under in para-19:

...A reading of the instructions clearly indicates that there are different stages: first is the counselling, second is the guidance and third is the consequences of the officer failing to show the desired improvement. Only when an officer fails to show the desired improvement the adverse/advisory remarks are included in his confidential report so that cognizance is taken of his weakness while planning his future placements....

In view of the aforesaid facts and circumstances, I am of the considered opinion that the petition, filed by the petitioner, deserves to be and is hereby allowed. The impugned orders rejecting the petitioner's statutory complaints are set aside and it is directed that the entire report of the Reviewing Officer for the period June, 2000 to November, 2000 be ignored by the respondents as it is inconsistent in view of the instructions and guidelines issued by the respondents themselves.

As the petitioner's case for promotion to the rank of Lt. Colonel was considered by the respondents in the No. 4 Selection Board held in August, 2001 taking into consideration the aforesaid reports of the Reviewing Officer and Initiating Officer resulting in his non-empanelment, it is directed that the respondent/authorities shall hold a Review Selection Board as on August, 2001 to reconsider his case by totally excluding the remarks and gradings of the Reviewing Officer.

At this stage it is stated by Lt. Colonel S. George, Assistant Military Secretary, Legal, who is present in the Court that in view of the existing policy, the petitioner should be given benefit of consideration for promotion on the next higher post, i.e. Full Colonel, in a Special Review Selection Board along with his batch mates and if he is found fit, his seniority on the post of Lt. Colonel would be restored and he would be granted promotion on the post of Colonel along with his batchmates.

In view of the aforesaid statement made by Lt. Col. S. George, Assistant Military Secretary, Legal, the respondents may adopt the procedure of considering the petitioner's case for promotion on the post of Full Colonel in the No. 3 Selection Board along with his batchmates of 1985 and if found fit be given future benefits as well as past benefits by treating him to have been selected and promoted as a Lt. Colonel along with his batchmates. It is however clarified that as in the present petition the issue relates to non-empanelment of the petitioner on the post of Lt. Colonel in the No. 4 Selection Board that was held in August, 2001 and as the petition has been allowed by this Court, in case the petitioner is not found fit for promotion on the post of Full Colonel along with his batchmates in

accordance with the statement made by the Assistant Military Secretary, Legal, the petitioner's case would in any case have to be considered by convening a Review Selection Board as on August, 2001 for reconsidering the case of the petitioner for promotion on the post of Lt. Colonel by totally deleting and excluding the remarks and gradings given by the Reviewing Officer in the impugned Annual Confidential Report.

The petition, filed by the petitioner, is accordingly allowed with the aforesaid directions. In the peculiar facts and circumstances of the case there shall be no order as to the costs.