

(2021) 05 AFT CK 0001

In the Armed Forces Tribunal

Case No : Original Application No. 1415 Of 2020

Neel Kamal

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 04-05-2021

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14

Citation : (2021) 05 AFT CK 0001

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

Bench : Division Bench

Advocate : S.S Pandey, KS Bhati

Final Decision : Dismissed

Judgement

1. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by a serving Brigadier of the Army. The applicant, is

aggrieved by the fact that his statutory complaint dated 19.11.2019 against two CRs covering the periods 01/18 to 06/18 and 07/18 to 06/19 has been

rejected without due consideration. He is also aggrieved by the possibility that his CR from 02/2009 to 08/2009 may not have been restored to its

original status, in spite of orders on the subject, and that because of the two reports in 2018/2019, he was possibly not nominated for the NDC/APPPA

Course 2019. Aggrieved by the same he has made the following prayers:

(a) Call for the relevant records based on which the respondents have failed to restore the assessment of any of the reporting officer to its original

position if the same was downgraded especially in the CR covering the period from Feb 2009 to Aug 2009, records based on which the respondents

failed to expunge the inconsistent assessment of any of the higher reporting officer wherein the applicant was assessed less than outstanding in the

impugned CRs covering the period from Jan 2018 to Jun 2018 and Jul 2018 to Jun 2019 resulting in denial of nomination to him for the NDC and

thereafter records including the processing of the statutory complaint on the basis of which the statutory complaint dated 19.11.2019 was rejected in

terms of the order dated 09.09.2020 without due application of mind and thereafter squash all such order including order dated 09.09.2020.

(b) Direct the respondents to restore the outstanding assessment of the applicant if it is found that same was lowered in any of the ACR especially in

the ACR covering the period Feb 2009 to Aug 2009 from the outstanding to very good and also expunge the assessment of overall grading lower than

outstanding not commensurate with the assessment of other reporting officers specially the assessment of the RO in the CR covering the period from

Jan 2018 to Jun 2018 or the assessment of the SRO/HOS in the ACR covering the period Jul 2018 to Jun 2019; and

(c) Direct the respondents to consider/ reconsider the applicant afresh for the nomination to the NDC after carrying out the modification in his profile

as prayed in the preceding para and send him for the said course if his merit found be higher than the last officer of his batch with whom he was

earlier considered and who was nominated for the NDC/APPA course from the ASC.

By way of interim relief, the applicant has also prayed that his application be disposed of before Apr 2021 and if that is not possible, a seat be kept

vacant on NDC/ APPA Course till the present OA is disposed of.

Facts of the Case

2. The facts of the case as per the applicant, in brief, are that he was commissioned in December 1990 and since then has had an exemplary service

record. He has held the appointment of CO 502 ASC Bn, Col ST HQ South Western Command, Col Adm HQ CIF (V) and Brig ASC HQ 17 Corps.

The applicant is a recipient of Sena Medal (Gallantry), Vishisht Seva Medal, two COAS Commendation Cards and two Army Commander's

Commendation Cards.

3. It is the applicant's plea that while his performance had been excellent in 2009 and his JO had graded him 'outstanding'; possibly other Reporting

officers too had maintained the grading; the First Technical Officer (FTC) Brig MH Thakur, who later retired as a Lt Gen from the post of Director

General Supply and Transport, might have downgraded his assessment. Aggrieved by this, the applicant had submitted a statutory complaint dated 30.06.2010. During the pendency of the complaint, he was informed by the MS Branch, vide their letter dated 16.06.2011, that the complete report by the FTO had been expunged as part of the internal assessment of the CR. It is the contention that while the details of expunction had been intimated, the respondents had not intimated whether the 'outstanding' report by various reporting officers had been moderated to 'Very Good' based on an internal policy, and whether such moderated gradings had been subsequently restored once the policy of moderation was later rescinded. And that the statutory complaint was not processed being untenable, as the report of the FTC had been completely expunged by then.

4. As per the applicant, his professional differences with Lt Gen MH Thakur had impacted his placement and posting consequent to his promotion as

Brig. It is also the applicant's plea that out of the three CRs he had earned whilst being posted as the Brig ASC, HQ 17 Corps, he had not been

assessed objectively in his first two CRs by his higher reviewing officers, including Lt Gen MH Thakur who by then was the DGST and Head of

Service. The applicant, therefore, submitted another statutory complaint dated 19.11.2019, in which he prayed that his reckonable profile be scrutinized

for any inconsistency or aberrations, particularly his CRs covering the period 01/2018 to 06/2018 and 07/2018 to 06/2019. This statutory complaint

was, however, rejected as the CRs were found to be consistent, performance based, objective, fair and technically valid and thus did not merit any

interference. Referring to the two CRs of 01/2018 to 06/2018 and 07/2018 to 06/2019, it is the applicant's plea that just as the respondents had

expunged the complete assessment of the FTO in the CR of 2/2009 to 8/2009 during the internal assessment, the respondents should have similarly

expunged the assessment of any reporting officer if the same was below the 'Outstanding' assessment by the IO. That during internal assessment, the

respondents should have examined inconsistency not only based on previous and subsequent profile, but also examined inconsistency in grading by

different reporting officers in the same CR as held in the case of Maj Gen KK Sinha Vs UoI. That despite his exemplary record of service, he has

been a victim of the indifference and lack of adherence to correct rules and procedures by the respondents in scrutinizing his CRs resulting in his not

being nominated for NDC, which he feels, he rightly deserved based on his profile. Hence this application.

Arguments by Counsel for the Applicant

5. The learned counsel for the applicant commenced his arguments by reiterating the overall service profile and achievements of the applicant and

added that the applicant had always been graded 'Outstanding'. The counsel first elaborated on the issues regarding the two CRs earned by the

applicant as a Brig and was posted as Brig ASC, HQ 17 Corps and then explained the issues pertaining to the CR of 2009. 6. The learned counsel

emphasized that the two impugned reports were criteria reports and, therefore, had major significance in the quantification system as these criteria

reports accounted for 47% of the quantified marks of CRs. He then took us through Part VI of Army Order 2/2016/MS (Annexure A-4) and

highlighted the importance of objectivity and consistency in reporting, process to be undertaken in case of variation in figurative assessment between

various reporting officers and where these are not justified in the pen picture, and added that when an officer is graded 'Outstanding' and is

downgraded, it must be questioned. He then elaborated on the responsibilities of SRO outlined in the Army Order, which include assessing the grading

by lower reporting officers as Liberal/ Justified/ Strict and also making necessary recommendation for expunction of assessment by lower reporting

officers which is not considered to be objective. The learned counsel then took us through the mechanics of checking CRs for their correctness and

scrutiny of CRs at the MS Branch including 'Internal Assessment' and 'Assessment Check' as given in Para 146 and 148 of the Army Order. He then

added that detailed guidelines for 'Internal Assessment' were promulgated vide MS branch Letter No A/17151/MS4(Coord) dated 14.10.2013

(Appendix C to Written Brief).

7. The examining and learned counsel then vehemently stated that in undertaking internal assessment of the CR 1/2018 to 06/2018, the respondents

had not adhered to the following provisions of Army Order 2/2016/MS, in that:-

(a) The respondents have not queried the RO/SRO as mandated in Para 130 of Army Order on variations in grading.

(b) Non-compliance of Para 130 violates the procedural safe guard provided to the ratee.

(b) Downward assessment has not been expunged.

(c) Whether the RO/SRO, as per the provisions of Para 132(a) of the Army Order, have indicated the lower reporting officers were

liberal/justified/strict; and that if they found it to be justified, whether the RO/SRO have rated the ratee similarly.

(d) Whether the SROs as per the provisions of Para 132(b), had recommended expunction of any assessment of lower reporting officers which was

not considered to be objective. If yes, whether such recommendations have been acted upon.

(e) Whether the respondents dealt with remarks made by the SRO, if any; and the manner in which they were dealt with.

(f) As per Para 146, after Internal assessment, the CR should have been set aside since Para 130 and 132 are perceived to be violated.

(g) That the Respondents haven't sought comments of SRO while dealing with the CR, especially if he had made comments to expunge any of the reports.

8. With regard to the CR for the period 7/2018 to 06/2018, the learned counsel emphasized the need to check it for consistency and added that any

figurative assessment not supported by pen picture should have been reviewed as per Para 130 of the Army Order. He also added that the CR ought

to have been reviewed in the light of Para 132(b) and set aside if needed. He further added that it was important to examine the remarks of the SRO

regarding the lower reporting officer's assessment profile. Since the applicant earned a third CR in the same appointment, it was relevant that the third

report too was examined to evaluate the applicant's performance and consistency in reporting.

9. In support of his contentions, the learned counsel placed reliance on the following decisions:

(a) Lt Col Vinay Lakhera v. UoI, OA 1168 of 2011 dated 30.07.2013 in AFT Regional Bench Chandigarh regarding applicability of judicial review of

CR where the court finds that adverse entries are made in CR, or grading given to an officer/employee are vitiated by extraneous considerations. Also

that in case the ACR in question stands out as an aberration in the overall profile, it must be interfered with.

(c) Brig VG Gole Vs UoI and others (OA 337 of 2011 dated 15.12.2011, AFT

Principal Bench, New Delhi), regarding restoration of grading given by JO which was effaced arbitrarily.

Arguments by Counsel for the Respondents

10. Learned counsel for the respondents commenced his argument by taking us through the pyramidal structure of the Army, conduct of promotion

boards, the CR system and the figurative assessment system followed in the CR. He elaborated that the rate does not have any right to claim an

'Outstanding' assessment in the CR and that it was solely for the reporting officers to assess the ratee objectively, having observed his performance

during the period of the report. Having recounted the service profile of the applicant, the learned counsel stated that in the Quantification System, the

applicant is given his due credit for various awards and performance on courses as per the scale of marks laid down for this. The learned counsel then

reviewed the applicant's first statutory complaint dated 30.06.2010 challenging the assessment of the FTO in the applicant's CR for the period 2/2009

to 08/2009 and added that the MS Branch in its internal assessment had expunged the complete report of the FTO thus rendering the statutory

complaint 'untenable'. The learned counsel then explained that the moderation carried out in the CR of 2009 had since been restored in 2013, and

therefore the applicant's grievance of nonrestoration does not hold good.

11. The learned counsel then stated that the applicant had submitted a statutory complaint dated 19.11.2019 against two of his CRs earned as Brig

ASC, HQ 17 Corps covering the periods 01/2018 to 06/2018 and 07/2018 to 06/2019. He explained that both the CRs had been examined in the light

of the applicant's overall profile, comments of reporting officers and other relevant documents and the respondents had concluded that both the reports

were corroborated, consistent, performance based, objective, fair and technically valid; and had therefore, rejected it vide their letter dated 09.09.2020.

The learned counsel then added that though the statutory complaint was based on a perceived bias by Lt Gen MH Thakur, and the current O.A too has

elaborated on the reasons for such bias by the Lt Gen, the applicant has not impleaded the Lt Gen and thus the O.A was bad for non-joinder of

necessary parties.

Consideration

12, Having carefully considered the rival contentions of learned counsel for the parties and perused the documents made available to us, the following primary issues arise:

- (i) Whether the respondents examined the applicant's statutory complaint regarding the CRs earned as Brig ASC, HQ 17 Corps correctly? And
- (ii) Whether the respondents were correct in concluding that the CRs did not merit interference?

13. We have also perused the CR Dossier of the applicant and the files pertaining to the examination of the statutory complaint submitted to the

Tribunal by the second Respondent after the final hearing on 15.04.2021 and the facts, as given in subsequent paragraphs, have been established.

14. The statutory complaint dated 19.11.2019 was examined by the Complaint and Advisory Board (CAB) with inputs from the MS Branch. The

applicant has impugned CRs 01/2018-06/2018 and 07/2018-06/2019 earned as Brig ASC, HQ 17 Corps on a perceived bias and grudge by Lt Gen MH

Thakur who as DGST was the Head of Service and thus the Higher Technical Officer (HTO). The applicant has based this perception on the fact

that these CRs were endorsed by Lt Gen MH Thakur with a sense of bias and prejudice since Lt Gen's earlier endorsement as FTO in the applicant's

CR 02/2009- 08/2009 had been expunged and the fact that the applicant and the Lt Gen had certain professional differences and the applicant felt that

the Lt Gen was not well disposed towards him. The applicant, therefore, sought the following redressal:-

(a) Set aside complete assessment of Lt Gen MH Thakur as HTO in CRs 01/18-06/18 & 071/18-06/19. He also be debarred from writing his CR (if

due on account of his/ las posting out) before his retirement on 31 Mar 2020.

(b) Set aside any assessment by the SRO in his present rank (influenced by the report by Lt Gen MH Thakur) seen in context of reports given by 10

& RO and if found not in consonance.

(c) Any effacing of his CR be restored back as per AFT, Principal Bench, New Delhi O.A. NO 377 of 2011.

(d) Any report even outside the reckonable period be seen in context of his overall profile & be set aside, if not in consonance with other reports.

(e) Any other redressal which competent auth may deem just and proper in view of the facts & circumstances of the entire case.

15. All reckonable CRs of the applicant in the rank of Col and Brig from 09/2008 to 06/2019 have been examined. In this period, the applicant had

earned a total of eleven CRs, nine in the rank of Col and two in the rank of Brig; the impugned CRs. 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, including the impugned CR have a mix of figurative grades of '49s' 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 contribution towards sound supply and transport management in the formation. Contrary to the applicant's apprehension that Lt

Gen MH Thakur, who as DGST and HTO may have been biased and prejudiced in his report, and that such reports may have influenced the reporting

by the SRO is also misplaced. In both the impugned CRs, the HTO has found the applicant to be a hardworking and proficient officer who has

concluded various contracts in a timely manner and has provided intimate and quality supply and transport support to the formation. The applicant's

fear of not being recommended for promotion/ NDC is also misplaced as all the reporting officers in both the impugned CR have recommended the

applicant for promotion to the next rank and for NDC.

16. CR Feb 2009 to Aug 2009 was examined. There is no dispute that the FTOs Report in this CR has been completely expunged as has already been

intimated to the applicant. The CR was moderated on 14.06.2011 and was later restored to its original content on 25.06.13 as submitted by the

respondents in their counter affidavit. Both the initial moderation and subsequent restoration are duly endorsed and authenticated in the CR and the

restored gradings are correctly reflected in the data sheet of Jun 2020.

17. In the overall analysis, the CAB, therefore, concluded that both the impugned CRs were technically valid, corroborated and performance based. In

the absence of any infirmity or inconsistency in these reports, they did not warrant any interference. The COAS, the competent authority, thus saw no

reason to interfere with the impugned CRs and, therefore, rejected the complaint.

18. The applicant was considered for nomination for NDC and equivalent courses commencing in 2019. Army Supply Corps, to which the applicant

belongs, has two vacancies on these courses. A total of ten officers were considered and two were nominated. For the course commencing in 2019, the applicant was at the eight position in the order of merit; and for the course commencing in 2020, the applicant was at sixth position in the order of merit. Thus, the applicant was not nominated for the NDC / equivalent course purely based on his overall profile and comparative merit amongst the batch of officers assessed by the nomination board.

19. The learned counsel for the applicant had vehemently argued that the respondents had not adhered to the provisions of Para 130, 132(a), 132(b) and 146 during their internal assessment of the two impugned CRs. While examining the issue of violation of Para 130 raised by the learned counsel for the applicant, it is important that the aspect of 'Consistency in Reporting' as contained in Para 129 of the AO be elaborated upon. Para 129 states that on receipt of the CR in the MS Branch, it will be scrutinized for consistency in reporting. It entails examining if the CR meets the laid down criteria for 'Outstanding Assessment' when applicable, inconsistent recommendations for promotion and employment; criteria for 'Average' and 'Below Average' assessment; adverse remarks and guidance for improvement; wide variation in figurative gradings. Para 129(b) is reproduced below:

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.129. Criteria for the same are defined below: -

(a) XX XX XX XX

(b) Wide Variations. Variations of three or more grades in PQs/ DPVs, QsAP, TPVs (as applicable in CR forms promulgated by MS Branch from

time to time), and two points in box grading by various reporting officers, need to be explicit elaborated by the reporting officer(s) in the pen picture.

xx xx xx xx xx xx

20. It is in the light of such variation that Para 130 becomes relevant; in that if the variation is three or more in the figurative grading of various qualities, and a variation of two points in box grading that it needs to be elaborated in the pen picture. It is only in the eventuality of inadequate justification of variation in the pen picture, that the concerned reporting officer needs to be queried by the MS Branch. In both the impugned CRs, there is no quality grading or box grading which varies by more than one mark. Thus there is no reason for MS Branch to have sought any clarification

on the assessments made. Para 130 is reproduced below:-

130. Whenever the variations in figurative assessments between various reporting officer(s) are not adequately justified in the pen picture, or the

figurative grades of the reporting officer(s) is not in consonance with their pen picture, the concerned reporting officer(s) may be queried by 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 assessments to avoid explicit justification.

(b) Exclusion of adverse remarks or guidance for improvement to avoid communications to the ratee.

21. In the light of Para 132 of the AO, in the CR 01/2018 to 06/2018, RO has remarked that the IO's assessment is justified; the SRO has remarked

that the IC's assessment is justified while that of the RO is strict. However, in the column 'Do you recommend any portion of the Report by the IO/RO

to be expunged? If so, state such portion and reasons', the SRO has once again only commented that 'RO has been strict in reporting for reasons other

than professional'. However, the SRO has not amplified his reasoning. Nor has he stated or recommended any portion of the report that needs to be

expunged. In the absence of any recommendation for expunction there was no clarification required from the SRO and therefore MS Branch is

justified in not seeking any comments from the SRO who had since retired. In the CR 06/2018 to 06/2019, RO has remarked that the IO's assessment

is justified; the SRO has remarked that the assessment of both the RO and SRO are justified. Para 132 of the OA is reproduced below:-

Responsibilities of Senior Reporting Officers

.132. It will be mandatory for senior reporting officers (ie RO/ SRO/ HTO/ HSCRO) to endorse specific remarks on the assessment by lower

reporting officers for the following in the pen picture

(a) Whether the assessment by lower reporting officer is 'Liberal; Justified' or 'Strict'. At MS Branch the above endorsement by RO/ SRO/HSCRO

forms a very important input during Internal Assessment process.

(b) Recommendations for expunction of assessment by lower reporting officers which is not considered to be objective. These recommendations will

be justified with reasons.

22. The learned counsel for the applicant had argued that under the provisions of Para 146, as part of the process of 'Internal Assessment', the MS

Branch should have set aside the CR 1/2018 to 6/2018 being violative of Para 130 and 132. The examination of the CRs as explained above does not

indicate any violation of Para 130 or 132. It was also contended by the Counsel for the applicant that this CR should have been set aside in the same

manner as the assessment of the FTO in the CR covering the period 2/2009 to 8/2009 was set aside. Examination of the CRs indicate that in the case

of CR 2/2009 to 8/2009, both the RO and SRO had endorsed that the complete report of the FTO be expunged. In the light of such recommendations,

the MS Branch reviewed the assessment and expunged it. However, in the CR 1/2018 to 6/2018, SRO apart from stating that the assessment of the

RO is strict, has NOT endorsed any portion of the report to be expunged; nor does the CR stand out as an aberration, that it needed to be interfered

with.

23. With regard to the process of 'Assessment Check' outlined in Para 148 of the AO, examination of the Internal Assessment noting indicate that

while the IOs report in both CRs were seen as 'Near Perfect Nine' reports, the overall variation noticed in the two CRs were within the permissible

limits; moreover, there were no other observation on any aberration/ in consistency in the reports, or their technical validity. Therefore, both CRs were

recommended to be accepted as it is. Para 140 and 148 are reproduced below: -

Scrutiny of CR at MS Branch

146. Internal Assessment. All CRs on receipt will be subjected to scrutiny during internal assessment at MS branch for correct entitlement, channels

of reporting, completion of CR in all respect and objectivity in reporting. In case endorsement of CRs is in violation of one or more provisions of this

AO (channel of reporting, entitlement of a reporting officer to endorse CR etc) by any reporting officer, the endorsement of complete assessment by

any reporting officer in the CR may be set aside on technical grounds by MS Branch.

148. Assessment Check. The CR when checked for objectivity in reporting also be analysed for consistency of the performance of the ratee and

corroboration of the report within the reporting officers and with ratee's past

profile. Depending upon variation from past profile of the ratee against parameters like performance in past CRs, environment of current and past CRs, adverse remarks/special achievements in the past, course profile, rating tendency of reporting officers, recommendations of higher reporting officers on the assessment of lower reporting officers etc., the CR may be accepted as it/s or with enfacement for inflated/deflated report, to be reflected on master data sheet for Selection Boards/ Panels. However, CR identified as grossly inconsistent or with inflationary/ deflationary/ subjective reporting, after due examination at the appropriate level may be expunged by the COAS.

24. The decision in Lt Col Vinay Lakera (supra) does not help the applicant's case as the circumstances of that case are unique and specific to it

which necessitated judicial review of the CR for the reason that the impugned CR by the petitioner therein distinctly stood out as an aberration and the

assessment of the IO/RO/SRO were inconsistent with the reckonable career profile of the petitioner, resulting in the petitioner not being empaneled in

No3 SB to the rank of Col. In the case of the applicant, the impugned CRs do not, by any stretch of imagination, stand out as aberrations. Moreover,

considering his merit position in the nomination for NDC, it is established that there are equally, if not more, accomplished officers who are his

contemporaries and that his not being nominated is due to his comparative merit.

25. The case of Maj Gen KK Sinha (supra) too does not help the applicant since here again the circumstances of the case are unique and peculiar to

it. In this case, the box grading of the RO, SRO and the pen picture of the SRO have been expunged based on the aspect of 'malice in law' in the

delay in processing the CR by the RO resulting in all three CRs earned by the ratee in the rank of Maj Gen being reviewed by the SRO in a short span

of 40 days just prior to the conduct of the Special Selection Board. In the applicant's case no facts on malice in law or malice in fact has been made

out. The only reason put forth by the applicant is that where the IO/RO has assessed him as 'outstanding', the RO/SRO must assess the applicant as

'outstanding' as a matter of right. On the contrary, the Reporting Officer, whom the applicant perceived as being biased and prejudiced, has made no

such mala fide assessment.

26. 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 statutory complaint too has been examined correctly and MS branch

has not violated any provisions of AO 2/2016/MS and the applicant has not been nominated to NDC/ equivalent course based on comparative merit.

27. Viewed thus, we do not find any merit in the O.A and it is dismissed. No order as to costs.

The original records submitted by the first respondent be returned in a sealed cover. Pronounced in open Court on this 4th day of May 2021.