

(2020) 02 AFT CK 0010
In the Armed Forces Tribunal
Case No : Original Application No. 6 Of 2019

R S Chauhan

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 12-02-2020

Acts Referred:

Citation : (2020) 02 AFT CK 0010

Hon'ble Judges : Rajendra Menon, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : Ajit Kakkar, Tarunvir Singh Khehar

Final Decision : Dismissed

Judgement

1. Vide our detailed judgment of even date, we have dismissed the main OA. Faced with this situation, learned counsel for the applicant makes an oral

prayer for grant of leave to appeal to the Hon 'ble Supreme Court in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007.

After hearing learned counsel for the applicant and going through our judgment, in our considered view, there appears to be no point of law much less

any point of law of general public importance involved in the judgment rendered by the Tribunal, therefore prayer for grant of leave to appeal is

declined.

This O.A has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by a serving Wing Commander (Wg Cdr) of the Administrative

Branch (Fighter Controller) of the Indian Air Force, who feels aggrieved by the fact that he has not been approved for promotion to the rank of Group

Captain (Gp Capt) by the Promotion Board (PB) of his batch conducted in 2016 and review PBs conducted in 2017 and 2018. He has sought the

following reliefs:

(a) Set aside the impugned orders dated 30.01.2018, 24.04.2018 and 03.05.2018 passed by the respondents.

(b) Call for the ACRs considered during his 2017 and 2018 and of the applicant which were promotion boards of 2016, quash the same, if

found inconsistent with the ACRS/marks of the previous years.

(c) Reconsider the applicant for promotion to the rank of Group Captain.

2. Heard the learned counsel on both sides and perused the pleadings and the documents on record.

3. Brief facts of the case, as submitted by the applicant, are that he was commissioned in the Administrative Branch of the Indian Air Force as a

Fighter Controller on 29.06.1996 and achieved high standards of performance throughout his service due to which he was selected for duties as ADC

to the Governor of Madhya Pradesh from 2006 to 2007 and, while performing his duties there in an exemplary manner, he was awarded two CAS

Commendation Cards (CC) and one C-in-C CC and he also maintained professional category BEE as a Fighter Controller. He avers that he has many

professional achievements to his credit, including selection for training on AWACS MSA at Israel, qualifying on the Defence Services Staff College

(DSSC) Course and undergoing the prestigious MFCC (TACDE) Course. During his tenure as Chief Operations Officer of 501 Surveillance Unit

from 2015 to 2017, the applicant claims to have not only conducted accidentâ?"free operations at the busiest Air Defence (AD) Unit of the Air Force,

but also successfully faced DASI inspection. The unit was awarded as Best Operational IACCS node, after which he was posted to HQ Western Air

Command as an Air Defence Staff Officer overseeing critical AD functions. The applicant claims to have over 1000 hours as MSA operator and

being uniquely qualified as a Mission Controller on AWACS. Thus he finds it surprising that he was not approved for promotion to the rank of Gp.

Capt.

4. Mr Ajit Kakkar, learned counsel for the applicant, has argued that though no specific incidence of malice against the applicant by any reporting

officer can be pin pointed by him during the reckonable service, the fact that he was not approved by any of the PBs implies that he has been harmed

as a consequence of unfair ratings by one or more of his reporting officers. He

has also contended that the reports on him by Governors, during his tenure as ADC, was in the form of a 'pen picture'. Hence, he may have been harmed while converting his pen picture into quantified ratings. Further, review by the Air Force authorities of his ACRs, when they were written by Governors, would be illegal and contrary to the extant rules and policy. Thus, learned counsel has argued that all the ACRs of the reckonable period for his PBs should be reviewed and, if they are found to be unjust or unfair, such negative ratings must be expunged from the record and he must be considered afresh by the PBs.

5. On the other hand, Mr Tarunvir Singh Khehar, learned counsel for the respondents, has rebutted the arguments made on behalf of the applicant.

Learned counsel has argued that no specific case of bias or malice has been made out against any reporting officer or in the CR reporting of the applicant or in the conduct of the PBs. Further, the prayers made by the applicant in the O.A tantamount to seeking a generic analysis of all his ACRs as well as the proceedings of his PBs with a view to identify any adverse contents and thereafter expunge them and approve the applicant for promotion. Such a prayer amounts to a 'roving' or 'fishing' exercise and thus is untenable and the instant O.A must be rejected on that account alone.

6. With regard to the prayer for setting aside the decisions/orders of the respondents dated 30/01/2018, 24/04/2018 and 03/05/2018, respondents have submitted that the applicant has admittedly filed the 15th statutory complaint on 14/11/2017 and that the said complaint was rejected on 30/01/2018.

Accordingly, the cause of action accrued to the applicant on 30/01/2018 and not on 24/04/2018 or 03/05/2018. Reliance in this regard is placed on the

judgment of the Hon'ble Supreme Court in KV. Raialakshmiah Setty v. State of Mysore AIR 1967 SC 993, wherein it was held that representations

would not be adequate explanation to take care of delay. This was reiterated in Rabindranath Bose v. Union of India (1970) 1 SCC 84, wherein

the Hon'ble Supreme Court of India observed that there is a limit to the time which can be considered reasonable for making representations and if the

Government had turned down one representation, the making of another representation on similar lines will not explain the delay.

7. On merits of the case, learned counsel for the respondents has contended that the applicant was not approved for promotion purely on account of

comparative merit, where clearly, others who were approved had performed better than him.

8. With regard to the 2nd prayer of the applicant ""to call for the ACRs of the applicant which were under consideration during his promotion boards of

2016, 2017 and 2018 and quash the same, if found inconsistent with the ACRs/ Marks of the previous years"", learned counsel has contended that the

applicant has not raised any grievance of mala fide, against the promotion boards conducted. Therefore, the promotion boards cannot be interfered

today on the basis of a vague and roving enquiry as sought by the applicant. It is stated that the applicant, prima facie, does not have any grievance

with any of his ACRs. However, he is wanting to initiate a roving enquiry against all his ACRs which were under consideration by the PB. Counsel

submits that Hon'ble Supreme Court in a catena of judgments has held that the subject satisfaction of the committee/Board is not open to interference

by any Court/Tribunal on account of comparative merits of candidates undertaken by the committee/Board. Also, in Municipal Board,

Maynathbhanjan v. M/s. Swadesh cotton Mills Co. Ltd (1977) 1 SCC 875, the Hon'ble Supreme Court held that in the absence of a specific plea and

ground of invalidity, the court is not justified in entering into an inquiry and interfering in state affairs. The applicant was considered in the Promotion

Boards of 2016, 2017 and 2018 and that he was not empanelled in any of the PBs purely on account of being low in the order of merit of his batch.

Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in Ashok Kumar and another v. State of Bihar (2017) 4 SCC 357,

where it was held that the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful,

a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has

appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein,

merely because the result is not palatable.

9. On the issue of the legality or otherwise of the review of an ACR written by the Governor being undertaken by an official of the Air Force who is

junior to him, the respondents have submitted that the applicant's assumption that his ARs during the period of 2003-2007 while he was ADC to

Governor would have been affected is baseless. Review of all ARs of officers of Indian Air Forces, whether serving within or outside the Air Force, is carried out at Command/ Air HQ. At Air HQ, it is carried out uniformly in an unbiased manner at the level of ACAS (P0)/AOP/CAS. It is applied across the board to officers of all branches of the Air Force upto the rank of Gp. Capt (TS). This is done to streamline dips/spikes in performance so as to create a level platform for all. There is no such term as 'moderation' in Air Force Order 06/2012 except for 'review'. The Appraisal Reports of the applicant were initiated, reviewed and processed in accordance with the provisions of Air Force Order 06/2012.

10. The appraisal methodology in Indian Air Force is brought out by the respondents in the counter affidavit, which are as follows:

(a) All Indian Air Force officers are assessed through an Appraisal Report (AR) which is confidential, once filled. This report is rendered

annually and/or on occasions as specified in the Air Force Order 06/2012 on the subject. The appraisal report is an assessment of

demonstrated performance and manifested behavior during the period of report. This report seeks objectivity and uniformity in assessment

of all officers. It contains specific professional and behavioural attributes that are assessed on a numerical scale from 1 to 9 for

quantitative assessment with a descriptive pen picture for qualitative assessment. The report is initiated by the immediate senior officer in the

chain of command called Initiating Officer (TO). It goes through two more levels of assessment and review in the form of the Reviewing

Officer (RO) and Senior Reviewing Officer (SRO) prior to being reviewed by the Command HQ. Thereafter, the AR is forwarded to Air HQ

where it is once again reviewed. The grading / average grading given by the last officer in the reviewing chain is considered as the final

grading of an AR.

(b) Many Indian Air Force officers are posted/deputed to Army, Navy, Tr-service institutions and civil organizations. The appraisal

philosophy and methodology of these organizations is different from that of the Air Force. This manifests in the Air Force officers, serving

in such organizations, being assessed on different scales. Even within the organizations, there are many posts that are low risk/high

visibility and vice-versa. The officers occupying such posts may get assessments disproportionate to the job content and work output.

Occasionally, an officer is faced with dilemma/pressures on the personal front that may hamper his/her output on the professional front for

a short while. Such ARs if left un-reviewed, may lead to long term effects on an officer's career.

(c) Further, though appraisal should be confined to the appraisee's performance during the period of report only, appraisers tend to get

influenced by incidents/happenings outside the period of report as well as their previous knowledge of the appraisee. There are occasions

when different reporting officers adopt differing assessment yardsticks. Also, there may be cases wherein personal biases on the part of

reporting officers come to play while the appraisal is conducted. Such ARs if un-reviewed will entail disadvantage and injustice to the

similarly placed officers performing similar duties.

(d) The process of variation review at Air HQ has been devised to rectify all the aforesaid errors and is carried out when a large variation

upwards or downwards is noticed between the numerical grading awarded, when compared the officer's AR average for the preceding five

years. Review of ARs for officers upto the rank of Gp. Capt. (TS) is carried out by a Board of Officers (BOO) presided over by an officer

who is of the same or higher rank than the last reviewing officer. Amongst numerous aspects, the appraisee's performance profile, job

content, location and IO/RO/SRO combination are taken into account when carrying out this review and awarding the final marks. The

procedure and methodology of carrying out variation review at Air HQ is clearly laid down in the directives. The process of variation

review is applied equally to all officers and across all the branches of Air Force.

(e) The objectivity and uniformity in the Indian Air Force appraisal system is sought to be addressed beginning from the 10 level followed

by the review at the RO, SRO, Command and Air HQ level. The last review is always at Air HQ level. The review at Air HQ forms crucial and

critical aspect of the Air Force appraisal system as it is the apex and only body reviewing each and every AR thus providing uniformity of

assessment across the entire Air Force officer cadre.

11. The learned counsel for the respondents then drew our attention to the decision of this Tribunal in Gp Capt TM Rao v. Union of India and others

(0.A No. 155 of 2011 decided on 06.01.2012), wherein this Tribunal had held that the orders dealing with review of ACRs were, in no manner,

violative of Articles 14 and 16 of the Constitution. He also contended that this Tribunal had examined the issue of review of ACRs of officers of the

Air Force and in this regard, he relied upon Paragraphs 30, 31 and 32 of the decision in Sqn Ldr Neetu Nehere V. Union of India and others (0.A No.

181 of 2012 decided on 10.12.2014). Learned counsel also stated that the name of the applicant did not figure in merit list of the PB due to his lower

relative merit vis-à-vis the available vacancies. The issues raised by the applicant in his applications dated 14.11.2017 and 06.02.2018 were

considered as per the provisions of the Air Force Act and the provisions of the AFO 05/2008, therefore, the apprehension of the applicant has no

basis. The procedure and selection criteria for grant of Gp Capt (Select) rank to officers of all branches other than Medical and Dental branches is

laid down in the Human Resource policy on the subject and the applicant was considered as first timer, second timer and third timer in PB 2/2016, PB

2/2017 and PB 2/2018 respectively as per the Human Resource Policy 04/2013. Many factors like AR marks for the last ten years,

decorations/awards/commendations marks, performance in Defence Services Staff College entrance exam and weightage for seniority were also

considered. Based on the officer's potential for employability in the next higher rank, the Board assessment marks were awarded. Further,

commendations earned by the officer had been factored and the achievements and qualifications were considered in the PBs. The learned counsel

also rejected the contention of the applicant that he was marked lower than his performance and there was unfair moderation in his appraisal reports

and pointed out that the ACRs of the applicant were initiated, reviewed and processed in consonance with the extant instructions/orders on the

subject.

12. Summarizing his arguments, learned counsel for the respondents submitted that there is no illegality or irregularity in the impugned orders issued by

the respondents and that the applicant was given fair consideration for promotion and as such, there is no violation of extant policy or his fundamental

rights. Therefore, the instant O.A deserves to be dismissed.

Consideration by the Tribunal:

13. We have given careful consideration to the arguments made before us and find that the primary issue for adjudication is, whether the applicant,

who has not been approved for promotion to the rank of Gp Capt, has any justifiable ground for seeking review of the impugned PB proceedings of

2016, 2017 and 2018 and for upward modification of his ACR ratings of the reckonable period.

14. We find that the applicant has not impugned any specific CR where he feels his reporting officers may have harmed him by giving him low ratings.

In fact, he has mentioned that there is a possibility that his ratings in any of his ACRs may have been brought down unfairly by the competent

authority during the process of moderation in relation to the average rating of the last five years. He also feels that his 'pen picture' CRs during his

tenure as ADC to Governor of Madhya Pradesh may have been converted to quantified ratings improperly and thereafter moderated unfairly.

15. We have carried out a detailed perusal of the CR Dossier and PB proceedings, which were handed over by the respondents after the final hearing,

and observe the following:

(a) We do not find any apparent inconsistency or violation of policy in the reporting or review of CRs in respect of the applicant. The

applicant has been rated fairly by his reporting officers and there are no adverse comments in any of his ACRs and review has been done in

a fair and uniform manner, consistent with the policy.

(b) In the PB of 2016, where the applicant was considered the first time, 259 Wg Cdrs were considered against a total of 13 vacancies. The

applicant stood at merit ranking 74 and thus figured much lower than the cut-off merit.

(c) Similarly, the applicant was not approved for promotion in 2017 as a second timer, because he stood at merit ranking 45 among 272

officers considered against 17 vacancies. In 2018, on third consideration, the applicant stood at rank 31 among 280 Wg Cdrs who were

considered against 15 vacancies.

(d) The PBs have been conducted fairly, keeping with policy laid out in the policy circular dated 20.09.2013. In all three PBs, the applicant

was awarded high value judgment marks but despite that, he did not rate high enough to be selected for approval to the rank of Gp Capt.

16. Thus, we are of the considered opinion that the only reason the applicant was not approved for promotion to the rank of Gp Capt was that he did

not stand high enough in the comparative merit after computation of his pre-Board ACR marks and the value judgment (board) marks during the PBs

in 2016, 2017 and 2018. We do not find any violation of extant policies or any bias or malice on behalf of the respondents in this case.

17. In the result, we do not find merit in the instant O.A and the same is dismissed. No order as to costs.

Pronounced in open Court on this the 12th day of February 2020.