

(2019) 12 AFT CK 0051

In the Armed Forces Tribunal

Case No : Original Application No. 1513 Of 2017

S T Upasani

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 13-12-2019

Acts Referred:

Citation : (2019) 12 AFT CK 0051

Hon'ble Judges : Sunita Gupta, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : S.S. Pandey, Karan Singh Bhati, Dinkar Adeeb

Final Decision : Dismissed

Judgement

1. Respondents have brought the record, but, the same are not complete. Respondents are directed to submit complete records pertaining to applicant

including CRs and all Selection Board proceedings in which the applicant has been considered.

Arguments heard. Orders reserved.

Aggrieved by his initial non-empanelment for promotion to the rank of Lt Gen by SSB conducted in October 2015 and subsequently, on reconsideration

as Review Case after grant of partial redressal by Respondent No. 1, his empanelment only for promotion to rank of Lt Gen (Staff Stream), the

applicant, who is a serving Lt Gen (Staff Stream), has prayed for the following reliefs :

(a) Call for the records based on which Respondent No. 1 has passed the impugned order dated 28.03.2017 in response to his Statutory Complaint by

granting partial relief only and declined to remove the prejudicial assessments in the CR from 01.07.2014 to 29.12.2014 rendered by the RO and SRO

as well as not empanelling him for promotion in terms of the order dated 30.06.2017 to the rank of Lt Gen, and thereafter, quash the same including the order dated 28.03.2017 to the extent the relief as claimed has been denied to the Applicant.

(b) Direct the Respondents to consider the Applicant for promotion afresh strictly as per policy, after removing subjective assessments, if any, in CRs

earned by the Applicant, particularly the assessment of the RO and SRO in its entirety in the CR covering the period from 01.07.2014 to 29.12.2014

and with further direction to grant him promotion to the rank of Lt Gen based on his modified profile, with all consequential benefits such as seniority,

continuity of service, back wages etc. if his merit so determined is found to be above the benchmark merit of the last empanelled Officer of 1981 batch

who were considered for promotion in Oct 2015 by the SSB and approved for such promotion in April 2016.

(c) Issue such other order/direction as may be deemed appropriate in the facts and circumstances of the case.

2. Heard the learned counsels on both sides and perused the pleadings and documents on file, including the CR Dossiers as also the files relating to

'Conduct of SSB' of 1981 Batch (Fresh) and subsequent review SSBs and 'Consideration of Statutory Complaint' of the applicant, which were handed

over to the Tribunal after the final hearing on 13.12.2019.

3. Brief facts of the case, as averred on behalf of the applicant, are that the applicant, then a serving Maj Gen of the Indian Army (Infantry), had an

outstanding service profile throughout and also, he performed exceptionally well in the appointment of General Officer Commanding (GOC) Victor

Force in an active counter insurgency area of South Kashmir, however, he was denied empanelment for promotion to the rank of Lt Gen initially by

the Special Selection Board (SSB) held in October 2015 and Review SSB held in December, 2016 due to a series of illegal, arbitrary, unfair and

discriminatory actions of the respondents. Thereafter, as per the applicant, he was unfairly given only partial redressal by Respondent No. 1 in

response to his Statutory Complaint, due to which, he was cleared only for Lt Gen in Staff Stream and not for Lt Gen in Command 86 Staff Stream,

by the Review SSB held in October 2017, after not having been empanelled earlier by the Special Review (Fresh) SSB held in April 2017. The

applicant alleges that he was unfairly under-rated by his RO (GOC in C Northern Command) and SRO (COAS) in his CR for the period from

01.07.2014 to 29.12.2014 and that is the primary reason that he was not empanelled for promotion to the rank of Lt Gen (Command &, Staff Stream)

by the SSB (Fresh) of his batch or in subsequent review SSBs. It has been alleged by the applicant that, though he may have been rated fairly, based

on his exceptional performance, in his first CR as GOC covering the period from 07.11.2013 to 26.06.2014, however, the RO and SRO for his next

CR, covering the period from 01.07.2014 to 29.12.2014, viz. Lt Gen D.S. Hooda, then GOC -in-C Northern Command and then COAS Gen Dalbir

Singh Suhag, appear to have underrated him. Further, he has expressed his apprehension that, in his next CR covering the period from 27.03.2015 to

06.07.2015, when he was posted as COS 17 Corps, his RO (GOC-in-C Eastern Command) and SRO, Gen Dalbir Singh Suhag, have underrated him

as evident from the redressal given to him in response to his Statutory Complaint. This, he alleges, could have happened as the latter would have been

negatively influenced by the fact that he (the applicant) was Military Assistant (MA) to the earlier COAS, Gen V.K. Singh, whose action of issuing

Show Cause Notice (SCN) to then Lt Gen (later Gen) Dalbir Singh Suhag in 2012 had resulted in delaying the latter's elevation as Army Commander.

The applicant asserts that though he had no role in the same, he appears to have been targeted unfairly in terms of underrating in his CRs and non-

award of distinguished service medal. Hence, the OA has been filed to quash the impugned CR and provide him consequential benefits, including

promotion as Lt Gen (Command & Staff Stream) and benefits thereto.

4. Mr. S.S. Pandey, learned counsel for the applicant, has contended that the applicant has an outstanding service profile, especially the fact that his

performance in all Army Courses was outstanding and he was selected for the Higher Defence Management Course, and subsequently for the

National Defence Course at the United States War College. Counsel asserted that even the instructors at the US War College were very impressed

by his exceptional performance and had praised him profusely in the report that was written on him. Counsel has highlighted the applicant's

professional achievements during his tenure as GOC Victor Force.

5. Learned counsel has alleged malafide against the applicant's SRO (Gen Dalbir

Singh Suhag, COAS) in terms of his ratings in the CR covering the period from 01.07.2014 to 29.12.2014 as well as non-award of Ati Vishisht Seva Medal' (AVSM) in recognition of his performance as GOC Victor

Force which he has attributed to the fact that the applicant had earlier served as MA to the earlier COAS, Gen V.K. Singh, who had issued SCN

against Gen Dalbir Singh Suhag, in 2012, which had delayed the latter's elevation as Army Commander. Learned counsel has submitted that, however,

he has not impleaded Gen Suhag as a respondent in the case as his allegation of malafide is not tantamount to 'malice in fact' but only 'malice in law'

and thus, there is no need to implead him in the case. In this regard, counsel has placed reliance on Para 19 of the order dated 29.04.2015 of AFT

(Principal Bench) in the matter of Maj Gen K.K. Sinha Vs. Union of India & Ors. (O.A. No. 74 of 2015), where the difference between 'malice in

law' and 'malice in fact' has been alluded to. The same is reproduced as hereunder:

19. However, as rightly pointed out by the learned ASG, in the absence of the RO or the SRO in his individual capacity, it will neither be

fair nor proper to record a finding that malice in fact had vitiated the assessments in question. Still for malice in law, there is no

requirement for the petitioner to array the authorities concerned as respondents in their individual capacities. The distinction between

malice in fact and malice in law was explained by Lord Haldane in *Shearer Vs. Shields* 1914 AC 808 (HL):

Between ""malice in fact"" and ""malice in law"" there is a broad distinction which is not peculiar to any system of jurisprudence. The person

who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He

is taken to know the law and can only act within the law. He may, therefore, be guilty of ""malice in law"", although, so far as the state of his

mind was concerned he acted ignorantly, and in that sense innocently. ""Malice in fact"" is a different thing. It means an actual malicious

intention on the part of the person who has done the wrongful act."" (quoted with approval by the Apex Court in *ADM, Jabalpur Vs.*

Shivakant Shukla AIR 1976 SC 1207).

6. Mr. K.S. Bhati, Senior Central Govt. Standing Counsel, learned counsel for the

respondents, assisted by Colonel S. Prabhu, Col M.S. Legal, Army

Headquarters, on the other hand, have vehemently contested the arguments made on behalf of the applicant. In the first instance, learned counsel has

contended that a number of unfair and unjustifiable assertions, clearly amounting to malafide, have been made against Gen Dalbir Singh Suhag, then

COAS, who reviewed the impugned CRs of applicant as SRO, and thus, in fairness to the latter, he should have been impleaded as a Respondent in

the case. To that extent, the allegations against Gen Dalbir Singh Suhag cannot be described as 'malice in law' as they are, in fact, 'malice in fact'. The

COAS, as the SRO in all such CRs, would be failing in his duty if he does not report objectively so that only the very best are promoted to the rank of

Lt Gen, based on the comparative merit ranking assessed by the SSB. Therefore, the applicant's claim of malafide clearly amounts to 'malice in fact'

as evident from the repeated assertions to this effect in his OA.

7. On the merits of the case, learned counsel has, while admitting that the applicant is a meritorious officer, made reference to the pyramidal

structure of the Army wherein there are very few vacancies at the Lt Gen level, and comparative merit, based on very detailed computation of

qualified CR ratings, determines as to who gets empanelled for promotion and who does not. Thus, it would be unjustified to allege malafide just

because the reviewing officers, viz. RU and SRO, do not repeat the outstanding (9 points) box grading given by the IO. It would be very difficult to

compute comparative merit if the RU and SRO were to repeat the JO's ratings every time. Further, why would the ROs (GOC-in-C Northern

Command in CR 07/14 to 12/14 and GOC-in-C Eastern Command in CR 3/15 to 7/15) also have rated him only as above average, when no malice has

been alleged against them. Based on the RU's ratings, the SRO would have been fully justified in replicating their ratings. It is the SRO who has to

take a call after he sees the ratings given by the IO and RO, as also keeping in view other inputs received by him, as to how many marks he should

give. No malafide can justifiably be alleged only because the SRO is endorsing his considered assessment of a ratee after considering all available

inputs, which he is duty bound to do.

Consideration

8. We have given careful consideration to the arguments from both sides and

find that the primary issue before us is whether the applicant's CR for the period from 01.07.2014 to 29.12.2014 should be set aside to enable fresh reconsideration for promotion to the Command and Staff Stream in the Lt General rank. In this regard, we find that, when the applicant was not cleared for promotion to the rank of the Lt General initially in the fresh consideration of his batch in October 2015, he had filed a Statutory Complaint, in response to which, Respondent No. 1 (Govt. of India/MoD) had, vide its speaking order dated 28.03.2017, concluded that the assessments by all reporting officers in the impugned CRs, including CR 07/14-12/14, were well corroborated, performance based and technically valid. However, some assessments in the CR 03/15-07/15 were found to merit interference, and consequently, some ratings were expunged including the 'box grading' by RO. Subsequently, the applicant was cleared for promotion to the rank of Lt General (Staff Stream only) by the Review SSB, though he was not found fit for the Command 86 Staff Stream in that rank. To that extent, the respondents have already granted him partial redressal, which has enabled his reconsideration and empanelment for promotion, though only in the Staff Stream.

9. We have perused the documents handed over to the Tribunal, after the final hearing on 13.12.2019 and find the following:

(a) The applicant was graded 'Outstanding' by all three reporting officers in his first CR (11/13 - 06/14) in the rank of Maj General, viz, by his 10

(Corps Commandex), RO (GOC-in-C Command) and SRO (COAS). However, he was rated 'Outstanding' by his 10 and 'above average' by his RO

and SRO in his next two CRs (07/14 - 12/14 and 03/15 - 06/15). The 'above average' box grading by RO and two other 'above average' assessments

in demonstrated qualities by RO & SRO were expunged by Respondent No. 1 subsequently.

(b) The applicant was considered for promotion by SSB initially on 15.10.2015, as a 'Fresh' case with the 1981 batch and, as he was not empanelled,

he was considered subsequently by review SSBs on 17.12.2016, 21.04.2017 (Review - Fresh) and 14.10.2017. Value Judgment (VJ) marks were

assigned correctly by the members of the Board in that in no case did his overall merit come down after computing the VJ, to the effect that it came in

the way of empanelment for promotion. He was empanelled for promotion to the

rank of Lt General (Staff Stream only) in the Review (Spl) SSB held

on 14.10.2017 after his overall marks were found to be less than the last officer of the 1982 batch cleared for promotion in the Command 86 Staff

Stream but more than the last officer in merit cleared for the Staff Stream only in that batch.

(c) The Statutory Complaint dated 25.04.2016 in respect of the applicant was given detailed consideration by Respondent No. 1 whereby, it was

assessed that, in CR 03/ 15 - 07/15, two ratings by RO (including box grading) and one rating by SRO lacked objectivity and were technically invalid and

thus, these were expunged. However, it was assessed that all other assessments by all the reporting officers in the reckonable profile including those

in the impugned CRs 11/13 - 06/14 and 07/14 -12/14 were well corroborated, performance based and technically valid.

10. In view of the above, the primary issue of contention boils down to whether interference by the Tribunal is merited if a Maj Gen, who is assessed

as outstanding (9 points) by all three reporting officers in his first CR in the rank, is assessed below that (above average - 8 points) by one or more of

his reporting officers in his 'box grading' in subsequent CRs.

11. We are aware of the contextual background in such cases, where there is stiff competition among senior officers in the rank of Maj General for

promotion to the rank of Lt General against the availability of very few vacancies. Further, the majority of initiating officers (IOs) in the Army tend to

give Outstanding ratings (9 points) to the ratees in a system where the IO has to show his rating to the ratee. Hence, it devolves upon the senior

reporting officers, viz. Reviewing Officer (RO) and Senior Reviewing Officer (SRO) to bring objectivity into the reporting system by awarding above

average (8 points) ratings to some ratees, based on merit.

12. In the instant case, both the senior reporting officers, viz. RO and SRO have graded the applicant 'above average' in the impugned CRs. The

applicant has clearly alleged malafide against his SRO (then COAS, General Dalbir Singh Suhag) but has opted not to implead the latter as a

respondent on the contention that it is not essential to do so, this being only a case of 'malice in law'. We do not agree with this contention as the

allegations made, in our opinion, constitute 'malice in fact'. We also find that the ROs in both these CRs, who endorsed the CRs independently before

they were sent to the SRO, have rated the applicant as 'above average' only, against whom there are no allegations of bias/malice. Thus, the act of the SRO, to affirm the ratings by the RO by also giving an above average (8 points) rating cannot be construed as a malign act which requires

interference by the Tribunal. Moreover, we find that the respondents, specifically Respondent No.1, has already provided partial redressal to the applicant by setting aside some ratings, including the box grading by the RO in CR 03/15 to 07/15, which has resulted in promotion of the applicant to

Lt General rank in Staff Stream only. We thus see no grounds for interference by the Tribunal.

13. In the result, the OA is found to lack merit and is liable to be dismissed. Ordered accordingly.

14. No order as to costs.

Pronounced in open Court on this 24th day December, 2019.