

(20) 06 AFT CK 0021

Armed Forces Tribunal Principal Bench, New Delhi

Case No: Original Application No. 1957 Of 2018

Rajeev Singh

APPELLANT

Vs

Union Of India And Others

RESPONDENT

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**Date of Decision:** June 19, 0020**Hon'ble Judges:** Sunita Gupta, J; B.B.P. Sinha, Member (A)**Bench:** Division Bench**Advocate:** Chaitanya Agarwal, V. Pattabhi Rain**Final Decision:** Dismissed

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### Judgement

1. The applicant was initially enrolled in the Indian Army as a soldier in the year 1987 and thereafter he was commissioned as an officer on 13th June,

1998. Aggrieved by the order dated 16th July, 2018, rejecting his statutory complaint against nonempanelment for promotion to the rank of Col, the

applicant has filed the instant OA seeking the following reliefs:

a) To direct the respondents to set aside the impugned order on the grounds of illegality and being unsustainable in the eyes of law.

b) To direct the respondents to set aside the CRs for the periods 01/07-12/07 and 06/12-02/13 in entirety.

c) To direct the respondents to treat the CR of the period 02/13-06/13 as a non-criteria report and empanel him for promotion if it brings applicant in merit.

d) To direct the respondents that for Final Review Board the cut off CR Jun 16, be treated as non-criteria or take actual non-criteria reports earned

later i.e., CR Jun18 to determine his merit.

e) Any other relief that the applicant is found entitled to and this Hon'ble Tribunal may deem appropriate, just and proper in the facts and circumstances of the case in the interests of justice.

2. The brief facts of the case are that the applicant is a serving officer, who was initially enrolled as an infantry soldier in 1987 and subsequently he was selected and commissioned as an officer in Indian Army (AOC) on 13.06.1998. The applicant's primary grievance relates to his non empanelment to the rank of Colonel in successive promotion boards from 2016 to 2019. In this context the applicant initially submitted a non-statutory complaint dated 18.05.2016. After examining his complaint, he was given partial relief by COAS vide order dated 29.11.2016, by expunging the complete assessment of SRO and STO in the CR of 01/07-12/07, on technical grounds. However this did not help him to get empaneled in the next Special Review (Fresh) Promotion Board. He subsequently put up a statutory complaint dated 18.12.2017 against nonempanelment by Special Review (Fresh) Promotion Board, however the same was rejected by Ministry of Defence vide its order dated 16.06.2018. Hence this OA.

3. Ld Counsel for the applicant submitted that the applicant is a capable officer, who during his career has extensively served in High Altitude, Field and CI Ops areas and has to his credit two GOC - in-C Commendations and has successfully completed Higher Munitions and Senior Command courses. He questioned the manner in which some of the CRs of the applicant were initiated and considered for the purposes of promotion to the rank of Colonel and claimed that due to incorrect handling of certain CRs the applicant lost out in his Promotion Boards. He specifically mentioned that he lost out on three counts i.e., firstly in one of his CRs, his IO's assessment was set aside after writing of his report. In the second such CR, the JO had assessed him outstanding with box grading of 9 but the RO reduced the Box grading to 8, because as per policy the 10 had failed to inform RO two months in advance about IO's intention to rate him outstanding. In the third such CR, his non criteria appointment CR was treated as a criteria appointment CR by MS branch which effectively resulted in reduction of his overall merit position by decimal .35 marks in the Promotion Board. The details about these three impugned CRs, as stated by Ld counsel, are as follows:

(a) It is submitted that due to non-application of amended policy, which had raised the level of 10 from Lt Col to Col, the first reckonable CR (01/07-

12/07) of the applicant was technically defective because it was raised by a Lt Col. Thus as per applicant, this defective CR for that period ought to

have been deleted in its entirety by MS branch. However, instead of setting aside the CR in its entirety to bring it in conformity with the amended

policy, the MS branch decided to remove the grading given by the 10, retain the RO's assessment and introduce a new SRO and HTO as per

amended policy, without catering for the fact that the newly introduced SRO and HTO had no occasion to judge his performance during the period

under report. It is further submitted that, though, at later point of time, based on his non statutory complaint, the reports initiated by SRO and HTO

were expunged on technical grounds, however the CR as a whole was not set aside.

(b) The next challenge to the CR for the period 06/12-02/13 is on the premise that grading the applicant as outstanding at 9, the JO, as per Para 3(c)

of the Policy Letter AI 17151/MS4 (Coord) dated 31st October, 2011, was under an obligation to inform the same to the RO within two months' time

but 10 did not fulfill his obligation, resulting in RO not assessing the applicant as outstanding.

(c) As far as challenge to CR for the period 02/13-06/13 is concerned, the applicant has contended that it was earned while he was posted on a non-

criteria appointment but to his surprise this CR was changed from non criteria to criteria appointment retrospectively without his knowledge. It is also

submitted that more than half of the officers promoted from his batch have less number of criteria report than him. He has also submitted that his

representations both to MS Branch and Commanding Officer to earn non criteria reports were turned down. It is further submitted that this resulted in

reduction of marks and pulling the applicant down in merit in the quantitative assessment as far as IO's grading is concerned.

The Ld Counsel concluded by pleading for setting aside of the concerned CRs and reconsideration of the applicant for empanelment by a Promotion

Board

4. Rebutting the contentions raised by the applicant, learned counsel for the respondents submitted that the Army has a pyramidal rank structure,

number of vacancies in higher ranks are limited and only those officers whose service record within a particular batch is better are selected. Learned

counsel further submitted that promotions till Lt Col are done by time scale and officers of a particular batch are considered together with same cut

off ACRs and inputs on the basis of individual profile and the comparative batch merit. The ACRs are assessed by three different officers, i.e.,

Initiating Officer (IO), Reviewing Officer (RO) and Senior Reviewing Officer (SRO) which are independent of each other. The numerical gradings

from I to 9 are supported by pen picture as well. For promotion to a selection grade, as contended by the respondents, every officer is entitled to three

considerations, viz., Fresh Consideration, First Review and the Final Review and if he fails to make out in all the three considerations, he is taken to

have been superseded for all times to come.

5. IA Counsel further submitted that as regards the non-empanelment of the applicant for promotion to the rank of Col by No.3 Selection Board is

concerned, the applicant has primarily missed out on his promotion due to pyramidal structure of the Army and the applicant being relatively low in

comparative merit vis a vis other officers who, have been empaneled. He stated that based on the non statutory complaint of the applicant, after

thorough examination of all relevant documents, relief was provided to the applicant with relation to his grievance in CR 01/07-12/07. In this CR the

assessment of SRO and ITO was expunged on technical grounds and the applicant was considered for promotion as a fresh case for promotion by a

Special Review (Fresh) Board. However, the applicant couldn't get empaneled in this board. He further submitted that the statutory complaint of the

applicant against his non empanelment in Special Review (Fresh) Board and his other complaints related to his CRs was examined and after

examining the applicant's overall profile, previous complaints and other relevant details and recommendation of Army Headquarters, all the CRs in the

reckonable profile including the impugned CRs for the period from 01/07-12/07, 06/12-02/13 and 02/13-06/13 were found to be well corroborated,

consistent, fair, performance based and technically valid. Since no evidence of any bias or subjectivity, as alleged, was found, the statutory complaint

was rejected by Ministry of Defence vide its letter dated 16.07.2018. Ld Counsel concluded by stating that the applicant has lost out on promotion

because of pyramidal structure and relative merit. He pleaded for OA to be dismissed.

6. Having heard learned counsel on both sides and perusal of records, we are of the view that the grievances of the applicant is primarily related to his

ACR on three counts. Therefore the following questions need to be answered for a decision with regard to this OA:

i) Whether the AR of applicant (CR 01/07-12/07) raised by a Lt Col as 10 and a Colonel as RO and subsequent deletion of 10 assessment by MS

branch, to confirm with new policy, justified and valid? Is the relief provided to applicant, in this AR, after his non statutory complaint, adequate and

Justified?

ii) Whether the 10 has failed to provide timely information to the RO (CR 06/12-02/13), as per policy, about his intention to grade the applicant

outstanding at 9 and has this caused any disadvantage to the applicant, in terms of assessment by RO?

iii) Whether the CR for the period 02/13-06/13 was earned while the applicant was on a non criteria appointment and is changing of this CR

subsequently as Criteria appointment justified? Has this change harmed the applicant?

iv) Whether the Statutory Complaint of the applicant has been handled in an appropriate manner and in accordance with law?

7. As far as the first question relating to validity of 10, is concerned, we are of the opinion that every organization has a right to enforce its decisions

and find ways and means of coping up with teething problems caused due to a new decision. Thus, when a policy decision was taken by respondents

regarding AR chain and the new rule that JO can't be below the rank of Colonel, thereafter applicants CR, initiated by a Lt Col as 10 had to be

corrected and the same was done by the respondents. We noticed that in this CR the 10 was a Lt Col i.e., Deputy Commandant and the RO was a

Colonel i.e. Commandant of the applicant. Both were co located with him. However as per new policy the 10 should have been the Commandant

hence the corrective action by MS branch. There are many ways to correct a mistake and the organization chose a particular way to rectify this

mistake. The important thing is that applicant should not suffer in this corrective action. In this context we perused the Numerical assessment and Pen

Picture of the applicant for the CR 01/07-12/07 and. noted that the assessment of 10 (Lt Col) Dy Commandant (though deleted), and RO (Colonel)

Commandant of applicant were exactly same. Since Army takes averaging of CR marks between JO, RO & SRO hence no harm has happened to

applicant due to deletion of IO's assessment. We also noticed that as per new AR policy the applicant's SRO and HTO had changed, and the

applicant had objected through his non statutory complaint, to certain time delays, in the writing of assessment by his newly designated SRO and HTO.

Thus, based on applicant's complaint, the assessment of SRO and HTO was expunged on technical grounds. Since at no stage the applicant had made

any complaint against the assessment by his commandant i.e. his RO, therefore the RO's assessment continues to be valid in this CR and in the totality

of circumstances we are of the opinion that no wrong has been done to the applicant. Additionally, we further went into the past few years of

applicant's CR assessments and found them to be exactly on same lines as this CR. Thus, after considering all issues we are of the opinion that on a

comparative datum, no harm has been done to the applicant due to the corrective action of respondents on this CR vis a vis his performance as

reflected in previous few years CRs. Hence, we don't agree with the applicant's view that the complete CR should be set aside.

8. As far as the second question related to advance information about raising an outstanding CR (06/12-02/13) from JO to RO is concerned. We have

noted that the applicant's apprehensions are not valid because there is no provision in the policy which states that the RO and SRO are bound to

assess outstanding if advance information about the same is given by JO. We also noticed that vide para 3 (c) of MS branch letter dated 31 Oct 2011,

the requirement of advance intimation for sudden unforeseen posting has been explained as "" If the CR has to be initiated due to sudden/unforeseen

posting of Ratee/IO, maximum possible advance notice will be given to the higher tier reporting office?'. In this background, while scrutinizing the

original CR, we have noted that the 10 has annotated in the CR that due to sudden posting of the applicant, advance information could not be given to

RO. In our opinion, this annotation by 10 is good enough to satisfy the RO/SRO, hence we don't agree with the applicant that non intimation of

advance information by 10 to RO has resulted in reduced assessment of applicant by RO/SRO. Additionally, we compared the previous 5-6 years

CRs of applicant, with this impugned CR, and found that the pattern of assessment of 10, RO and SRO of the applicant was exactly the same in this

impugned CR, as it was in last 5-6 years CRs hence there was nothing to suggest that this particular CR has gone down due to lack of advance

intimation by 10. Thus, we are of the opinion that applicant's contention that he has been under assessed by RO and SRO because JO did not send

advance information of an outstanding report is not based on facts and is not corroborated by the scrutiny of his impugned CR with his general CR

profile.

9. In so far as the third question relating to the CR for the period 02/13-06/13 is concerned, the applicant has claimed that he has earned this CR on a

non-criteria appointment, but subsequently the respondents converted it as a criteria appointment CR thereby causing disadvantage of decimal 0.35

marks in comparative merit to the applicant. In this context, the respondents have brought out that it was well within the knowledge of the applicant

that the CR for this period reflected the appointment as Criteria appointment since the CR (02/13-06/13) was submitted under the signatures of the

applicant dated 14th June, 2013 as a criteria appointment, to which there is no denial by the applicant. We have tried to understand the applicant's

contention that he has lost out due to not having a non criteria report. He has contended that criteria appointments are generally tough and demanding

appointments and are less safer than non-criteria appointments which are generally soft appointments with less risk of making a mistake. He has

claimed that amongst his batchmates he has maximum number of criteria appointments and has been deprived of a non-criteria appointment. We fail

to understand as to how the applicant has been wronged when there is no policy on the subject of how many maximum criteria or non-criteria

appointments can be given to an officer. In the absence of such a policy, it is obviously the organizational interests and organizational compulsions, which will drive a commissioned officer posting and appointments. Notwithstanding the above we tried to understand the applicants contention that by not making the above mentioned impugned report as non criteria, the respondents have caused a marginal loss in comparative merit to the applicant therefore he has missed the promotion. We are not convinced by the logic and explanation given in this case, however without going into the merits of applicants claim, we looked into the original promotion board records and carried out a fact check on applicant's merit position vis a vis cut off mark of last empaneled officer. We found that on an average 12-15 officers were ahead of him but below cut off merit in every promotion board. Thus, when competition in relative merit is going up to second and third decimal, this certainly is not a case of narrow miss in the promotion board. Therefore, after considering all relevant issues related to applicants grievances on impugned CR, we find that the applicant has failed to convince us as to how he has been wronged because of this CR being treated as a criteria appointment CR.

10. As far as the fourth question with relation to reply to the statutory complaint of the applicant is concerned, we have perused the reply of ministry of Defence rejecting the statutory complaint. We find that the reply is a speaking order with proper rationale and logic and all grievances of applicant have been answered, hence we have no reasons to interfere with it.

11. The applicant, till the point of filing this OA, had been given four considerations; as a fresh case in April 2016, First Review in December 2016, Special Review (Fresh) in September 2017 and as a Special Review (First) in October 2018, but to his bad luck, the applicant could not be empaneled.

As held by the Hon'ble Supreme Court in a catena of judgment, the Courts should not substitute the findings of the Selection Boards and interfere in policy matters. The Army has a pyramidal structure and unfortunately all officers can't go up. In the present case we tend to agree with respondents that the applicant has not been empaneled due to pyramidal structure and relative merit of the applicant.

12. For these reasons, we are of the firm opinion that the applicant has squarely failed to make out any case for the reliefs as prayed for in this



application. Hence, the instant OA is dismissed with no order as to costs.

Pronounced in open Court on this 19th day June 2020.