

**ARMED FORCES TRIBUNAL CHANDIGARH REGIONAL BENCH AT
CHANDIMANDIR**

O.A. No 71 of 2010

Lt Col P S Bhinder

... Applicant

Vs

Union of India and others

... Respondents

ORDER

27-10-2010

Coram : Justice Ghanshyam Prasad, Judicial Member.

Lt Gen H.S. Panag (Retd), Administrative Member.

For the Applicant (s) : Col(Retd) N K Kohli, Advocate.

For the respondent(s) : Mr. Mohit Garg, CGC.

Lt Gen H.S. Panag (Retd)

1. The applicant has filed this application under Section 14 of the Armed Forces Tribunal Act, 2007, praying for the following reliefs :-

- (a) Quash non empanelment of the applicant By No. 3 Selection Board held in Apr 2008 as intimated vide the impugned order.
- (b) Summon the records, viz the ACR dossier of the applicant and set aside the ICR for the period 01 Jun 2002 to 28 Sep 2002.
- (c) Direction to the respondents to consider the applicant for a promotion to the rank of Colonel as a fresh case with original seniority based on his modified profile, i.e. after effects of the aforesaid ICR have been removed in entirety.

- (d) Any other order or direction that Hon'ble Tribunal may consider appropriate under the circumstances of the case.

2. The applicant, Lt Col PS Bhinder was commissioned in the Indian Army in ASC on 25.08.1990. The applicant held various regimental and staff appointments in field and peace areas. The applicant was promoted to the rank of Lt Col on 16.12.2004. He was considered by No. 3 Selection Board held in April 2008 and he was found not fit for promotion. On introspection, he felt that an Interim Confidential Report (ICR) covering the period 01.06.2002 to 28.09.2002 could be the reason for his non-empanelment. The report was written by Col MK Rajp, an attached Officer, who had serious differences with the Commanding Officer (CO) of the unit Lt Col BS Yadav. The applicant was performing all duties to the best of his ability but since he was having good relations with the actual CO, Col MK Rajp also became biased towards him. The applicant was posted to 795 ASC Bn (AM) on 27.05.2002. Col MK Rajp and 3 other officers were attached to HQ N Area vide Army HQ/MS Branch signal dated 11 Jan 2002 for 179 days under the provision of DSR Para 93 with the directions that their services were to be utilized by 795 ASC Bn (AM). The attached officers continued to be on the supernumerary strength of their parent unit i.e. ASC Centre and College Bangalore. 795 ASC Bn(AM) was under command of Lt Col BS Yadav posted as CO w.e.f. 14.04.2000. Col MK Rajp, by virtue of his seniority and holding higher rank did not appreciate and accept the fact that he had to serve with Lt Col BS Yadav, as the CO of the unit. Col Rajp and the CO were not on talking terms and their

perception on professional matter were diametrically opposite. This led to lot of friction and the matter was also reported to HQ 14 Corps. During this period Lt Col BS Yadav lost his only son and remained pre-occupied in settling his domestic problems. Taking advantage of this, Col MK Rajp imposed himself as a “self assumed CO”. It is in this environment that Col Rajp wrote the ICR of the applicant. Col Rajp was not eligible to initiate the Confidential Report as he was not appointed as the CO of the unit. Moreover, the channel of reporting for the reporting year in the case of the applicant as per HQ 14 Corps signal dated 13.11.2003 was as under :-

- (a) IO - COS 14 Corps.
- (b) RO - GOC 14 Corps.
- (c) SRO - GOC-in-C, Northern Command
- (d) FTO - DDST 14 Corps
- (e) HTO - MG ASC Northern Command

3. A new channel of reporting was promulgated retrospectively much later on 24.01.2003, but the impugned ICR was covering the period 01.06.2002 to 28.09.2002, when the old channel of reporting was operative. The new channel of reporting promulgated vide HQ Southern Command (Annexure R-7) is given below :-

- (a) IO - Brig OL, HQ Southern Command.
- (b) RO - MG-IC-Adm, HQ Southern Command
- (c) SRO - COS, HQ Southern Command
- (d) FTO/FSCRO - MG ASC, HQ Southern Command
- (e) HTO/HSCRO/HOA - DGST, HQ Southern Command

4. The ICR was also inexplicably delayed and was initiated on 18.08.2003, after a delay of almost one year. The impugned ICR is virtually a one man report as the RO and SRO have not endorsed the same. In the open portion of the ICR, Col Rajp has written an Above Average report of the applicant and endorsed the words that “ the applicant is an asset to the Organization”. However, the closed portion of the ICR i.e. Qualities to Assess Potential and Recommendations for Promotions and Appointments needs to be scrutinized as it is in this portion that Col Rajp has shown his bias. Due to the changed channel of reporting, the Higher Technical Officer (HTO) was now Maj Gen SK Sahni, MG ASC, Southern Command, instead of MG ASC Northern Command as per old channel of reporting, but he never met the officer to assess him. The Military Secretary's Branch ordered the change of channel of reporting retrospectively vide its order dated 24.01.2003 arbitrarily and it was incapable of execution beside being bad in law. Thus, putting the applicant at disadvantage.

5. The counsel for the applicant summed up his case as follows :-

(a) Col Rajp was not the CO of the applicant as he was an attached officer and was thus not authorized to initiate the ICR of the officer.

(b) Col Rajp was biased against the officer due to his differences with the actual CO of the unit Lt Col BS Yadav.

(c) Col MK Rajp was also biased against the applicant as he had a grudge against his late father-in-law under whom he had done his attachment in 14 JAT.

(d) The channel of reporting of the applicant was arbitrarily changed by the MS Branch retrospectively vide order dated 24.01.2003, thus putting the applicant at a disadvantage.

(e) Inordinate delay in initiating the ICR. The SRO and RO did not endorse the report, thus making it a one man report.

6. The learned counsel for the respondents argued :-

(a) That in the Army, promotions are based on a Selection-cum-Preferential Merit Based System. Army being a pyramidal structure, vacancies get progressively limited in the higher ranks.

(b) The applicant has completed Part I of the impugned ICR where he himself has endorsed his appointment as Company Commander from 01.06.2002 to 28.09.2002 in Field, OP PRAKARAM, Jodhpur, 21 Corps, Southern Command. He has further endorsed Col MK Rajp as his CO. He submitted the Confidential Report for initiation on 19.07.2003 which was received by the IO on 03.08.2003 and was initiated by him on 18.08.2003. The applicant has under his own signature shown the appointment of Col MK Rajp as the CO of 79 ASC Bn (AM) whereas now he says that Col Rajp was not his CO,

being an attached officer. Thus the principal of 'ESTOPPELS' applies to him.

(c) The extract of the ICR was conveyed to the petitioner and was duly signed by him and forwarded to MS Branch through proper channel in Aug 2003. At that time, the applicant did not raise any objection about the status of Col Rajp as his CO, his 'alleged bias' against him and about the channel of reporting. He was well within his rights to file a Non-statutory/Statutory Complaint against his ICR within six months of his signing the extract.

(d) In his non-statutory/Statutory complaints, the applicant has not mentioned about the differences between Col Rajp and his father-in-law Col TS Randhawa. Apparently, this is an afterthought.

(e) The applicant has withheld the facts that Col MK Rajp while on attachment was appointed CO of 795 ASC Bn (AM) w.e.f 18.01.2002 vide MS 14 Signal No 392010/MS-14A dated 18.01.2002 (Annexure R-1). Thus, Lt Col BS Yadav was no longer the CO of the unit. The petitioner has relied upon the differences between Lt Col PS Yadav and Col MK Rajp without impleading them.

(f) Due to the change in command and control of units during "OP PRAKARAM", the channel of reporting also got changed. MS Branch lays down the channel of reporting and not the

lower HQs which merely promulgate the orders of MS Branch. 795 ASC Bn (AM) is a unit which remains in Suspended Animation (SA) during peace time. The channel of reporting covering the period 30.05.2002 to 14.11.2002 pertains to the period of Reanimation when the unit was placed under command of HQ 21 Corps/Southern Command during Operation 'PRAKARAM'. The channel of reporting promulgated by HQ 14 Corps covers the period prior to 30.05.2002 and post 14.11.2002 when the unit was again under Command of HQ 14 Corps/Northern Command. Thus, there is no anomaly as far as the channel of reporting is concerned.

7. Based on the arguments of the learned counsels and the documents on record, we framed the following issues.

Issue No 1.

Was Col Rajp the CO of 795 ASC Bn (AM) and consequently the Initiating Officer in respect of the applicant ?

Issue No. 2

What was the correct channel of reporting applicable to the applicant ?

Issue No. 3

Has any bias been shown by Col Rajp while writing the Confidential Report as compared to the overall ACR profile of the applicant.

Issue No. 4

Should the ICR be set aside being a 'One man report' ?

8. **Issue No. 1.**

Onset of "OP PRAKARAM" and Mobilization of the Indian Army resulted in attachment of large number of officers serving in Static/Training Establishments to units in field in order to make up the deficiency of officers as also to man Reanimated units. Army Act Section 3(b) read in conjunction with Regulations for the Army, 1950 and para 9 lays down the definition of the term of CO. These are reproduced below :-

ARMY ACT SECTION 3(V)

"3(v). Commanding Officer. When in any provision of this Act, with reference to any separate portion of the regular Army or to any department thereof, means the officer whose duty it is under the regulations of the regular Army, or in the absence of any such regulations by the custom of the service to discharge with respect to that portion of the regular Army or that department, as the case may be, the functions of a Commanding Officer in regard to matters of the description referred to in that provision."

REGULATIONS FOR THE ARMY PARA 9

"9. Commanding Officer. Except where otherwise expressly provided in these Regulations, the Commanding Officer of a person subject to the Army Act is either :-

- (a) The officer who has been appointed by higher authority to be a commanding officer while able effectively to exercise his power as such, or**

expediency of Operation “**PRAKARAM**” has been cited as an afterthought to justify an avoidable lapse. Also, the fact that the applicant was aware of the appointment and accepted it as such, by entering the data in Part I of the ICR, or that he did not raise the issue on his Non-statutory/Statutory complaints, cannot alter the legal status of the appointment. In all probability, the petitioner at that time was not aware that the appointment was illegal and accepted the orders of MS Branch on their face value. Even the MS Branch itself was not aware of the illegality of its unprecedented action. There has been no precedence of an attached officer being appointed as a Commanding Officer even in War and Counter Insurgency Operations. Thus on Issue No 1, we find that the appointment of Col Rajp an attached officer, as the Commanding Officer was unprecedented and bad in law and he was not the legal Commanding Officer of the petitioner and thereby not entitled to write his ICR.

10. **Issue No 2.** 795 ASC Bn (AM) is a unit that normally remains in suspended animation with a truncated establishment and functions under HQ 14 Corps/Northern Command. During “OP PRAKARAM” on Reanimation it was placed under HQ 21 Corps/Southern Command w.e.f 30.05.2002 to 14.11.2002 as per requirements of the operational situation. We find nothing wrong in having two channels of reporting for two specific period for officers of this unit i.e. the channel promulgated by HQ 14 Corps for the period prior to 30.05.2002 and post 14.11.2002 and the channel promulgated by HQ 21 Corps/Southern Command for the period 30.05.2002 to 14.11.2002.

11. **Issue No. 3.** We perused the entire confidential dossier of the officer from the date of commissioning to date. We find that portion of the ICR written by Col Rajp was inconsistent with the overall profile of the officer. While it does not reflect bias perse it deserves to be set aside on grounds of inconsistency. In the criteria Confidential Reports(CRs) w.e.f 2000 – 2001 to 2006 – 2007 and in the two CRs thereafter, the petitioner has been graded Above Average/Outstanding in box grading by his IO/RO/SRO and by FTO/HTO. He has been given no figurative grading of 7 in the open portion. In his entire profile from 2000-2009, he has earned figurative assessment of 7 in the closed portion – Qualities to Assess Potential, 5 times from IO/RO/SRO. Out of which, in the ICR initiated by Col Rajp, he was awarded three figurative assessments of 7, showing it to be inconsistent in general. In respect of Technical Reporting by the FTO/HTO, the petitioner has been awarded the figurative grading of 7 only twice and that also in the impugned ICR by the HTO Maj Gen SK Sahni. There does not appear to be any bias, as such, shown by Col Rajp or by Maj Gen SK Sahni as figurative grading of 7 is also considered as Above Average. However, the impugned ICR is not consistent with the overall career actual profile from 2000 to 2009. Thus, on grounds of inconsistency, the ICR deserves to be set aside.

12. **Issue No 4.** The impugned ICR has not been endorsed by the RO and the SRO due to inadequate knowledge. The Technical Report has been endorsed by Col Rajp as the FTO and Maj Gen Sahni as the HTO. The petitioner averred that Maj Gen Sahni never met him. This has not been denied by the respondents. Thus, for all practical purposes, the ICR

Is a one man report and thereby bad in law and deserves to be set aside.

13. **Order.** Keeping in view the facts and circumstances of the case the Interim Confidential Report for the period from 01.06.2002 to 28.09.2002 is set aside . The officer will be considered as fresh case by the next No. 3 Selection Board without taking into account the impugned Interim Confidential Report. If approved for promotion by No. 3 Selection Board, the seniority of the officer will be protected and the date of approval will be the same as for officers of his Batch and Corps who were approved by the No. 3 Selection Board held in April 2008.

(Justice Ghanshyam Prasad)

[Lt Gen H S Panag(Retd)]

27.10.2010

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