

**IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI**

TA – 02 /2016

PRESENT

**HON`BLE MR. JUSTICE B.P.KATAKEY, MEMBER(J)
HON`BLE VICE ADMIRAL MP MURALIDHARAN, MEMBER (A)**

IC 57719 L, Lt Col AV Sally,
S/o. Mr.Virnder Kumar Sally,
Aged about 40 years,
R/o. P-22/5, DGQA Officers Complex,
LBS Marg, Vikhroli, Mumbai – 400 083.

..... **Applicant.**
Applicant in Person

- Versus -

1. Union of India, through the Secretary
Ministry of Defence, South Block,
DHQ P.O., New Delhi – 110 011.

2. The Chief of Army Staff,
Through Adjutant General,
Integrated HQ of Ministry of Defence (Army),
South Block, DHQ P.O.,
New Delhi – 110 011.

3. DGQA, MOD (Army), New Delhi.

4. Col Vipin Trivedi, CO,
SQAQ, SQAE (V).
DGQA Complex, Vikhroli (W),
Mumbai – 400 083.

..... **Respondents**

**By Legal Practitioner for the
Respondents**

Brig N. Deka (Retd), CGSC

Date of Hearing : 08.06.2017

Date of Order : 27.06.2017

ORDER

(Vice Admiral MP Muralidharan)

1. The Transferred Application has been filed by Lt Col AV Sally, No.IC 57719L, a serving officer, essentially seeking setting aside of an adverse report initiated on him. The TA had been initially filed as OA.No.328/2015 before the Principal Bench of this Tribunal and based on an application preferred by the applicant, it had been transferred to this Bench by orders of the Hon'ble Chairperson and re-numbered as TA.No.02/2016.

2. The applicant was commissioned in the Corps of EME on 06 December 1997 with antedated seniority of 10 December 1995 and was promoted to the rank of Lt Col on 10 December 2008.

3. The applicant, who appeared in person, submitted that after being commissioned in the Army, he served the Organisation with utmost dedication and his performance has been rated consistently high by his Commanding Officers. While posted at the Senior

4. Quality Assurance Establishment (Vehicles) (SQAE) at Mumbai, he was detailed to carry out inspection of a Mahindra Bolero vehicle at Nasik in June 2014. During the course of the inspection, he observed that the vehicle failed to pass certain mandatory tests and reported the matter to his superior officer viz., Respondent No.4, who however coerced the applicant to recommend the vehicle in his report. As the applicant was not in agreement with such a proposal, he endorsed his observations in the inspection report and also initiated necessary correspondence to the Company to rectify the observations. Despite the above, prior to submission of the final inspection report, Respondent No.4 once again tried to persuade the applicant to recommend the vehicle in the presence of representative of the commercial Company. Since the applicant did not agree with the proposal, a strained relationship developed between him and Respondent No.4.

5. Later the applicant had differences in opinion with Respondent No.4 while taking over duties of Vigilance Officer of SQAE, wherein the applicant had observed a number of discrepancies. Subsequently there were also differences in opinion during the inspection of Mahindra Scorpio vehicles, which also did not meet the requisite standards. All this resulted in the applicant being relieved of technical/administrative duties in the unit by Respondent No.4. The applicant further submitted that Respondent No. 4 also

attempted to transfer him out of the Unit prematurely, but that was not agreed to by the MS Branch of Army Headquarters, observing that there had been no performance counselling or issue of any warning letter for initiation of adverse report or any adverse report per se on the applicant. Since the applicant could not be transferred out of the Unit, the 4th respondent issued a series of warning letters to him which included unsubstantiated allegations in the performance and behaviour of the applicant.

6. In November 2014, the applicant raised a non-statutory complaint against Respondent No.4 (Annexure A11) which was disposed of by the respondents by order dated 06 April 2015 (Annexure A1). The applicant further submitted that even though in his non-statutory complaint, he had raised the issue of investigation of the activities of the Unit, his complaint was disposed of without ordering any such investigation. The applicant then sought an interview with the Chief of the Army Staff (Annexure A14). The applicant further submitted that grave injustice had been done to him by Respondent No.4, by initiating an Adverse Confidential Report on him, which would have a negative effect on his career. He had, therefore, filed the instant TA. Even though in the TA also sought for a fair and impartial investigation into the allegations against Respondent No.4 and the counter allegations made against

him by Respondent No.4, during the course of arguments, he submitted that he was restricting his relief to examination of the Confidential Report initiated on him by Respondent No.4 and setting aside the same.

6. Brig N.Deka (Retd), the learned Central Government Standing Counsel for the respondents, submitted that the applicant had been posted in March 2014, to Senior Quality Assurance Establishment (Vehicles), (SQAE), headed by Respondent No.4 on a tenure basis. The unit was part of DGQA, which is under the Ministry of Defence. The applicant joined the Unit on 03 April 2014. The learned counsel further submitted that Respondent No.4 received a number of oral complaints from officers and the staff of the unit against the applicant, on his behaviour while discharging the day-to-day duties. Therefore he was verbally counseled by Respondent No.4. Since there was no improvement and his performance was also found unsatisfactory due to lack of professional competence, he was also given verbal professional counseling from time to time. The applicant, who was considered unfit for the appointment, was also issued with warning letters, including for the purpose of initiating an adverse Confidential Report. On receipt of the warning letters, the applicant retaliated by resorting to making baseless and unsubstantiated allegations against Respondent No.4.

7. The applicant eventually filed a non-statutory complaint to the Chief of the Army Staff in November 2014 against warning letters issued to him for initiation of adverse report. The applicant also filed OA.No.126/2014 before the Regional Bench of this Tribunal at Mumbai, which was disposed of by the Bench, directing the Chief of the Army Staff to decide on the non-statutory complaint filed by the officer within a period of three months. The Chief of the Army Staff after considering all aspects declared the complaint untenable being devoid of merit, as most issues raised were based on apprehensions and no adverse report had been initiated on the applicant.

8. The learned counsel also submitted that in accordance with Army Orders, the authority to initiate an adverse report is vested on the Initiating Officer. Respondent No.4, the Initiating Officer of the applicant had advised him on his shortcomings and had also indicated that the warning letters were for the purpose of initiating adverse CR. The learned counsel further submitted that the applicant on being asked to submit his Confidential Report for the period June 2014 to April 2015 failed to do so. Therefore the Initiating Officer (Respondent No.4) initiated the adverse report under the provisions of the Army Order, whereupon the applicant filed OA.No.328/2015 before the Principal Bench of this Tribunal which was eventually transferred to this Bench. The learned counsel

further submitted that the applicant had also sought an interview with the Chief of the Army Staff through a demi-official letter. The applicant was then advised to process his case for interview in accordance with the laid down provisions of Army Order 20/96 regarding interview with the Chief of the Army Staff. The applicant then sought an interview with the Hon'ble Raksha Mantri disregarding the provisions of the Army Orders on the subject.

9. The learned counsel further submitted that the allegations raised by the applicant were unsubstantiated and as the DGQA was under the Ministry of Defence, any examination of complaints against DGQA was not within the purview of this Tribunal. The learned counsel further submitted that the applicant had not yet exhausted the remedies available to him, in that, he had not yet filed any statutory complaint. The learned counsel further contended that the applicant had raised allegations and had filed the OA only to hide his own shortcomings. The very fact that he was not pressing any further for investigation of the allegations indicates that he had no substantial case. The learned counsel also contended that no injustice had been done to the applicant.

10. We have carefully considered rival submissions including the additional affidavit filed by Respondent No.4. We have also perused the Confidential Reports of the applicant, as well as the file

processing his non-statutory complaint, which were placed before us by Major Alifa Akbar, AMS (Legal) who also assisted the learned Central Government Counsel for the respondents.

11. Even though the applicant in the TA had raised a number of issues which included independent investigation into the allegations raised by and against him while in the SQAE, as well as the aspect of denial of any relief to him in his non-statutory complaint, during the course of arguments, he has restricted his relief to setting aside of the adverse Confidential Report (CR) initiated by Respondent No.4. The respondents on the other hand contended that this Tribunal was not the Forum to examine the functioning of the SQAE. The respondents also contended that the non-statutory complaint was raised by the applicant on the apprehension of an adverse report when no such report had been raised. The Respondents also contended that the applicant has not exhausted all the remedies available to him, in that he has not raised any statutory complaint.

12. Since the applicant has restricted the reliefs sought by him, the functioning/happenings in SQAE, is no longer an issue for consideration by us. While it is true that the applicant has not exhausted the remedy of having his grievances examined through a

Statutory complaint, it is also true that the applicant had filed the Original Application for resolution of his grievances before the Principal Bench of this Tribunal in April 2015. In our view it would be inappropriate at this belated point of time not to examine the TA on its merits merely on the ground that the applicant has to first exhaust the remedy of statutory complaint available to him. We therefore proceed to examine the other issues raised.

13. On the issue of processing of the non-statutory complaint of the applicant, perusal of the records placed before us indicates that the complaint was examined in accordance with the procedures laid down and as such the adverse CR now being challenged by the applicant, had not been initiated at that stage. We are therefore of the view that no injustice had been done to the applicant by not granting him any relief sought in the non-statutory complaint. In this regard it is pertinent to mention that the Hon'ble Apex Court in **Union of India and Ors. vs. E.G.Nambudiri, (1991) 3 SCC 38** had held that the decision rejecting a representation does not adversely affect any vested right of the government servant. However post disposal of the non-statutory complaint, an adverse Confidential Report was initiated on the applicant by Respondent No.4, which is now under challenge by the applicant.

14. The Respondents have contended that the Confidential Report of the applicant was an assessment of his performance by his Initiating Officer and if a person's performance is found to be below par or unsatisfactory, the IO was well within his rights to initiate an adverse report if necessary and therefore no interference is called for. In our view, there is nothing like exclusion of judicial review in any matter. Even in case of Confidential Reports, while it is an accepted norm that the Courts should not substitute its own views for that of the Assessing Officers, the Courts can examine aspects such as personal bias, denial of natural justice or the aspect of a specific report being out of profile from the performance of the Officer.

15. Before we look at the CRs per se of the applicant, it is necessary to state that the procedure adopted for recording of CRs has been elaborately provided for. There are different officers involved in the process, the Initiating Officer (IO), the Reviewing Officer (RO) and the Senior Reviewing Officer (SRO). In the Confidential Report form there is place for numerical assessment as well as for writing of remarks. In accordance with the rating scale given in the report form, numerical performance for "outstanding" is 9. For "above average" 8 or 7 and for "high average" 6 or 5. "Average" is to be assessed at 4 marks and 3 or 2 denotes "Below Average"

performance. The rating scale is to be used when assessing Personal Qualities, Demonstrated Performance Variables, Qualities to assess potential and in Box grading which is part of the pen picture/remarks section written by IO/RO/SRO. As envisaged, an officer is to be assessed for various personal qualities and demonstrated performance and the pen picture/remarks section is the culmination of that assessment, wherein the Assessing Officer puts in words his overall impressions of the officer. He is expected to highlight and support his assessment for high and low marking in any particular quality and also bring to the notice of the assessee if there are any remarks which are considered adverse.

16. Against this background the Bench perused the Confidential Reports of the applicant and specifically scrutinized the CR cited by him as not in keeping with his overall profile. The report in contention is the one for the period from 01 June 2014 to 17 April 2015 which has been initiated by Respondent No.4 on 23 April 2015 i.e after the disposal of the non-statutory complaint of the applicant. The report is an adverse Confidential Report initiated under the provisions of Para 96 of AO 45/2011/MS as the applicant had refused to submit the report form when called for. It is observed that in the Personal Qualities, the applicant has been numerically assessed between 3 and 5 by the IO, with four out of

the 10 qualities being assessed at 5 (high average), another four assessed at 4 (average) and two of the qualities being assessed at 3 (below average). The numerical assessment of his Performance Variables is similar i.e. between 3 and 5 with five of the 7 qualities being assessed at 4 and one each at 5 and 3, with the overall box grading which is the culmination of the assessment being a 4 (average). The pen picture of the officer as written by the IO reads as follows:

“The Offr is rude, arrogant, quarrelsome, gets easily agitated, picks up row on trivial matters, threatens all and levy false allegations, therefore his conduct needs substantial improvement. He always carries a somber expression on his face and remains socially aloof. As a QAO, he lacked initiative, zeal and motivation in execution of tasks and required constant prodding and supervision. He is undecisive and unable to take timely decision due to which he does not complete assigned tasks in time. He did not behave with propriety and probity when he asked for a favour from a trade firm while carrying out quality assurance (QA). He wilfully defies the lawful command given to him by his superior offr and shirks responsibilities on one or the other pretext. He also issued an advisory note to promote disobedience amongst the subordinates with a clear signal to defy orders of the SQAQO. He approached the Hon'ble AFT against the warnings prematurely, when he had put in a non stat complaint for the same, exhibiting lack of faith in the redressal mechanism available in the org. The offr's loyalty towards the org is questionable.

He lacks professional competence, foresight and planning due to which he failed to accomplish the targets allotted to him. The officer neither has the aptitude for QA tasks nor did he show initiative and drive towards understanding and adoption of QA tasks. He failed in carrying out administrative responsibilities also. He is not fit for DGQA and needs to be posted out in the interest of organisation."

17. The Reviewing Officer has enhanced the numerical assessment of the IO in all cases where the assessment by the IO was "average" or "below average". In Personal Qualities six of the qualities are at 5 (high average), two of them are at 4 (average) and one each at 6 (high average) and 7 (above average). As regards Performance Variables, in six of the 7 qualities the RO has assessed him at high average (5) with remaining one quality at average (4). The RO has assessed him at 5 (high average) in box grading. In the pen picture, while the RO has only partially agreed with the assessment of the IO, he has adversely commented on the temperament of the applicant and has also indicated that he needs to refine his professional skills. The SRO has endorsed the assessment of the RO and has given a box grading of 5 (high average) to the applicant. A perusal of performance counselling and warning letters attached with the Confidential Report as well as the correspondences exchanged between the IO and the applicant on various issues as placed in the TA makes it amply clear

that there was evidently strong difference of opinion between the applicant and the IO on the working of the Organisation. While a number of allegations and counter allegations have been made between the applicant and Respondent No.4, we do not want to comment or go into those issues as they are not for consideration before us.

18. The applicant had contended that his CR by Respondent No.4 was not in keeping with his overall profile. We therefore examined the other Confidential Reports of the applicant. We observe that in all the preceding Confidential Reports of the applicant in the rank of Lt Col prior to the adverse Confidential Report under consideration, he has been consistently assessed as above average (8) or outstanding (9). We also observe that the applicant has been consistently assessed as a high performer in the Confidential Reports even as a junior officer ie prior to his promotion as a Lt Col. The pen pictures indicate him to be extremely hard working, sincere, meticulous in approach and as one who keeps himself professionally up to date. He has also been assessed as sober, soft spoken, playing a pivotal role in the functioning of the organization and as a person who accepts additional responsibility. The reports of various Initiating Officers have been well supported by equally laudatory remarks by the ROs/SROs as well as by the Senior Technical Officers

viz., FTO/HTO. In the Confidential Report immediately succeeding the report under consideration, the applicant has once again been assessed as above average (8) and outstanding (9) in equal measure in all qualities. It is pertinent to mention that there is no numerical assessment below 8 in any of his Confidential Reports in the rank of Lt Col other than in the report under question.

19. It therefore clearly emerges that the adverse Confidential Report, is not in keeping with the overall profile of the applicant. This aspect is all the more evident as we find that the applicant has been assessed in the Physical Attributes quality at 5 (high average) by the IO (Respondent No.4), which has been enhanced to 7 (outstanding) by the Reviewing Officer. The applicant who appeared before us in person is a tall, well built officer with smart military bearing and a pleasing demeanour. Therefore to assess him at 5 indicates a clear animosity towards the applicant or some perversion in the mind of the IO. The pen picture in the report indicates lack of initiative and zeal, motivation and professional competence. This is totally at variance with the pen pictures in preceding and succeeding ACRs by different Initiating Officers who have always given laudatory remarks on all such qualities of the officer. In fact, we observe that in the report succeeding the ACR in question, the IO has endorsed the remarks that **"I would love to**

have this officer in war with me.” In our view such an endorsement indicates a very high level of confidence in the officer, in not only his professional capabilities but also in his loyalty and commitment to service. Therefore in our view the entire CR of the applicant for period from 01 June 2014 to 17 April 2015 (ie the one initiated by Respondent No.4) is not in keeping with the profile of the officer.

20. We do appreciate that an Officer's performance would vary depending upon the circumstances and conditions of service and the challenges thrown up by different assignments. We also agree that there is some merit in the contention that past performance or subsequent performance cannot be taken as a baseline for performance during a specified period. However in our view the basic qualities and capabilities of an officer cannot ever dip or vary to the extent as reflected in the CR in question. It, therefore, clearly indicates possibility of a personality clash or difference of opinion on the methodology of working in the Organization. We are therefore of the view that the entire CR for the period from 01 June 2014 to 17 April 2015 needs to be expunged being totally out of profile.

21. While based on the observations made by us we are of the view that the entire Confidential Report in question viz, for the period from 01 June 2014 to 17 April 2015 initiated by Respondent No.4, should be expunged, we do not consider it

conducive to direct so in view of the principles established by the Hon'ble Apex Court in **Air Vice Marshal SL Chhabra vs. Union of India and Anr. (1993) Supp (4) SCC 441**, wherein the Hon'ble Apex Court had ruled that "neither the High Court nor this Court can moderate the appraisal and the grading of the appellant for a particular year. While exercising the power of judicial review, a Court shall not venture to assess and appraise the merit or the grading of an officer". This view has been consistently held by all the Courts since then.

22. It is well known that periodically depending on merits of the case, the Army Headquarters and other Service Headquarters and also the Ministry of Defence have been expunging remarks and gradings of Officers which have been found to be not in conformity with the prescribed norms. Even in the case of **Air Vice Marshal SL Chhabra** (supra), it has been recorded that the adverse remarks in the appraisal report of the petitioner for the year 1986 was expunged by the respondents in 1989. We would therefore direct that the case be looked at by Respondents 1 and 2 based on the observations made by us in accordance with the rules and Regulations.

23. Accordingly taking all facts and circumstances into consideration, the Transferred Application is disposed of directing Respondents Nos. 1 and 2 to take a de novo look at the Confidential Report of the applicant for the period from 01 June 2014 to 17 April 2015, taking into consideration the overall profile and performance of the officer and the observations made by us in the order. It is further directed that the above review be carried out and the applicant be informed of the outcome within a period of four months from the date of receipt of a copy of this order.

24. There will be no order as to costs.

25. Issue free copy to the parties.

MEMBER (A)

MEMBER (J)

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