

Sergeant (Acting Unpaid J.W.O) B.M. sharma (service No.700097 'R') CLK/GD, HQ, SAC (UNIT) Vs. the Chief Of Air Staff, Air Headquarters (Vayu Bhavan) and Others

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Court : Armed forces Tribunal AFT Regional Bench Kochi

Decided On : May-16-2011

Judge : K. Padmanabhan Nair, Member (J) & the Honourable Lt. Gen. Thomas Mathew, Pvsm, Avsm, Member (a)

Appeal No. : T.A.No.75 of 2010, (WP(C) No.16786 of 2009 Of The High Court Of Kerala)

Appellant : Sergeant (Acting Unpaid J.W.O) B.M. sharma (service No.700097 'R') CLK/GD, HQ, SAC (UNIT)

Respondent : The Chief Of Air Staff, Air Headquarters (Vayu Bhavan) and Others

Judgement :

PadmanabhanNair, Member (J):

1. The petitioner who is working as Sergeant in Air Force has filed this proceedings as a Writ petition before the Hon'ble High Court of Kerala while he was serving at Akkulam, Thiruvananthapuram to quash Ext.P8 and also for a declaration that his Annual Assessment Report for the year 2005 is defective as it was passed in violation of the procedure to be followed and hence unsustainable

and liable to be expunged permanently. He has also sought for a declaration that he is entitled to promotion to the rank of Paid Junior Warrant Officer retrospectively from the date of promotion of his contemporaries and juniors with all consequential benefits. He has also sought for a direction to the respondents to produce Appendix 'F' to AFO 5/97 (corrigendum 1/99 to AFO 9/99) with the counselling register maintained in the SAC(U) (office of the 2nd respondent) during 2005 as per the provisions of AFO 5/97, AFO 9/99 and other relevant policies. The Writ Petition is transferred to this Tribunal consequent to its formation and re-numbered as T.A.No.75 of 2010.

2. The following are the averments in the Transferred Application:- The petitioner has joined the Indian Air Force on 10.5.1985 in the trade of Clerk/General Duties. He was posted to the Headquarters, SAC (Unit) at Akkulam, Thiruvananthapuram on 14/3/2003 and he was working in the office of Air 1. He was promoted locally to the Acting Unpaid Rank of Junior Warrant Officer ('JWO', for short), the next higher promotion rank, with effect from 1.11.2003. Many of his contemporaries and juniors have been promoted to the rank of Paid JWO overlooking his seniority. On enquiry he was told that they have secured better annual assessment marks. Annual assessment gradings are recorded in the IAFF(P) 42, which is kept along with the sheet roll of every Airmen. The grading is as 'Exceptional', 'Superior', 'Satisfactory', 'Moderate' or 'Inferior'. 'Exceptional' will be shown as '5', 'superior' as '4', 'satisfactory' as '3', 'moderate' as '2' and 'inferior' as '1'. That was subsequently changed. 'Exceptional' is shown as EX, 'superior' is renamed as 'above average' and shown as AA, 'satisfactory' as AV, 'moderate' as 'below average' and shown as B AV, inferior as INF. In the annual assessment for the year 2005 he was graded as 'average'. He was graded as 'above average' or 'exceptional' in all his reports prior to 2005 and after 2005. Sergeant who is likely to get 'average' and below grading should be counselled by the Initiating Officer/Reviewing Officer at periodic intervals to improve his performance and a certificate as per Appendix 'F' to AFO 5/97 (Corrigendum No.1 to AFO 9/99) is required to be rendered. Signature of Senior Non Commissioned Officer ('SNCO' for short) should also be taken in the Counselling Register maintained for the purpose. He was never counselled by any of his superiors nor was asked to sign Appendix 'F' to AFO 5/97. So, as far as the SNCO is concerned, assessment of below 70% marks is an

adverse assessment report. The petitioner was never informed the reason for rendering an adverse report. The petitioner filed Ext.P5 representation on 27.1.2009 explaining his grievances for favourable consideration before the 2nd respondent who forwarded the same to the 3rd respondent. The petitioner filed Writ Petition No.4566/2009 before the High Court of Kerala for a direction to the respondents to expunge the assessment for the year 2005. The Writ Petition was admitted and an interim order staying the transfer of the petitioner was passed. Subsequently, the Writ Petition itself was disposed of with a direction to the 2nd respondent to consider the representation and the competent authority should take a decision in the matter and pass final orders within 6 weeks after hearing the petitioner. On 22.4.2009 the petitioner was called by the 2nd respondent for interview and gave him Ext.P8 order rejecting his claim. He was not given any effective personal hearing. The representation filed by the petitioner was considered and dismissed in a casual manner so as to make it appear that the order passed by the court has been complied with. The respondents are giving more stress to the terminology 'adverse' and taking a stand that there is no adverse report against the petitioner. That is not correct. Any report which adversely affects the career prospective of a person should be treated as adverse report. Further, a Sergeant who is likely to be assessed 'average' and below need to be counselled and to be issued with a warning letter. In the case of petitioner, Appendix 'F' was not raised nor he was counselled by anybody. The petitioner was not aware of the existence of an adverse report until it was recorded in IAFF(P) 42. He had filed Ext.P5 representation immediately thereafter. The respondents rejected his claim on the ground that he did not file Ext.P5 representation within four months. Hence he filed the Transferred Application for quashing Ext.P8, the order rejecting his claim and also for a direction to promote him with retrospective effect and for other reliefs. He was also transferred from Thiruvananthapuram.

3. Initially, on 3.8.2009 a statement was filed by the Assistant Solicitor General raising the following contentions:- In the year 2005 the petitioner was assessed as 'average' and the same is not an adverse report. He was awarded less than 70 marks during the year 2005, for which Appendix 'F' was raised by the S.R.O. as per the policy and guidelines. The petitioner was granted local unpaid rank of JWO only to look after and take over the responsibilities of the section on

recommendation of his Section Commander in accordance with Rule 287 of Regulations for the Air Force 1964. The grading of assessment up to 2006 was recorded in IAFF(P)-42. His assessment for the years 1994, 1997 and 2006 were exceptional. Promotion is authorized on the basis of marks of assessment and on merit and performance of the assessment year. The grant of local rank does not ensure automatic promotion to the next rank/confirmation in to acting paid rank. An Airman has to make merit within the available vacancies in his trade, rank and grade. The petitioner was considered for promotion to the rank of JWO during 2003-2004 to 2008-2009 in accordance with the promotion policy in vogue. He could not be empanelled as he did not make the merit within the available vacancies in the trade, rank and grade in any one of the promotion panels. The grading as 'Exceptional' (EX) comes in the range of 81-99 marks, 'Above Average' (AA) 70-80 marks, 'Average' (AV) 50-69 marks, 'Below Average' 40-49 marks and 'Inferior' below 40 marks. Inferior alone is treated as adverse report. In terms of corrigendum 1/99 to AFO 5/97, all Sergeants who have been awarded with less than 70 marks are to be informed that scoring less than 70 marks in the assessment preceding the year of consideration would make him ineligible for grant of extension of service and promotion. A certificate as per Appendix 'F' to AFO 5/97 is also required to be raised. In the case of petitioner Appendix 'F' was raised by the SRO as per the policy and guidelines. The case of the petitioner that a warning letter is to be issued to him is wrong and misleading. The assessment made by the CO/SRO are independent of previous assessment given to Airmen. Recommendations and assessments once accepted will be final. No change will be made in the assessments except under exceptional circumstances at the discretion of AFRO and in any case not later than four months after the assessments were made. Request for change of assessments, if any, should be initiated by the same CO/AOC/SRO who signed the original assessment. The assessment of the petitioner rendered for the year 2005 is correct and it does not require any change. The representation was considered by the competent authority and the same was rejected. So the Writ Petition is to be dismissed.

4. According to the respondents, a counter affidavit was also filed before the Hon'ble High Court subsequently. But the original counter affidavit was not available among the records. Initially the Transferred Application was heard and

posted for orders. On that day the respondents filed an additional statement along with a verified petition. The case was suo motu re-opened and posted to 20th July, 2010. On that day the Transferred Application was dismissed after hearing both sides.

5. The petitioner filed Review Application No.2/2010 against the final order contending that on 8/7/2010 the case was actually adjourned to 13/7/2010 and on that day the case was not taken up, but it was taken up on 20/7/2010 and the same was dismissed without hearing the petitioner. It is also contended that neither the applicant nor his counsel received copy of counter affidavit stated to have been filed before the High Court. It is also contended that the petitioner has serious contentions to raise and he did not get an opportunity to file rejoinder and argue the matter in detail. After considering the arguments of both sides, we have reviewed the final order passed on 20/7/2010 and posted the case for re-hearing. No rejoinder was filed by the petitioner. The matter was again heard.

6. The main contention raised by the petitioner is that the report of the Initiating Officer for the year 2005 as 'average' which carries marks between 50-60 out of 100 is an adverse assessment. According to him, he was promoted locally to the Acting Unpaid Rank of JWO and if, as a matter of fact, his performance was so bad the unpaid rank of JWO should have been removed. According to him, barring 2005, his assessment from 1991 onwards is 'Above Average' or 'Exceptional' and so the assessment for the year 2005 is to be expunged and grading as 'Above Average' for the other years have to be taken and he has to be given promotion to the Paid JWO with retrospective effect. The respondents have admitted that from the year 1991 to 1993 the grading of the petitioner was 'above average', in the year 1994 it was 'exceptional', in the year 1995 and 1996 it was 'above average', in the year 1997 it was 'exceptional', from 1998 to 2004 it was 'above average' and in the year 2005 it was 'average'. According to the respondents, the petitioner was considered for promotion to the rank of JWO, but he could not be empanelled as he did not make the merit within the available vacancies in the trade, rank and grade in any one of the promotion panels. So, the crucial question to be considered is whether grading of an Airman as 'average' is an adverse report.

7. The petitioner has produced AFO 05/97 which deals with the Assessment of Character and General Behaviour and Trade Proficiency of Airmen. Original para 9 which was subsequently amended as 10, deals with the Assessment of Character and General Behaviour. Paragraph 23 deals with 'Adverse Report'. It reads as follows:-

An award of less than 50% marks in columns 16, 19 or 20, i.e. less than 25 marks in column 16 (Trade Proficiency) less than 12 in column 19 (Airmen Like Qualities) or less than 50 in column 20 (Grand Total) would be construed as an adverse report. In such cases, Commanding Officers are to interview the airmen who have been given adverse report and inform them of the reasons thereof, in writing, in order to afford them an opportunity for improvement. A certificate to this effect as per appendix 'B' to this order, duly signed by the CO and the airman concerned, is to be forwarded along with the return. In case, an airman who has been adversely reported upon refuse to sign in Appendix 'B' as mentioned above, it should be annotated in red ink as follows:-

Airman refused to sign in Appendix B.

Paragraph 24 which was renumbered as paragraph 25, deals with Submission of Return. It reads as follows:-

Assessment of character and trade proficiency of all airmen is to be submitted as on 31 Oct each year to Air Force Record Office as per the proforma at appendix 'C' to this order.

Subsequently a corrigendum was issued as No.1/99 on 25.6.1999, adding the following sentence to para 25.

Wherever airman (of the rank of Sgt. only) has scored 50-69 marks, a certificate as per Appendix 'F' will be attached by the ACO/CO along with the assessment return.

As per the corrigendum, in the case of airman who scores 50-69 marks, a certificate as per Appendix 'F' is to be attached by the AOC/CO along with the assessment return. Appendix 'F' to AFO 5/97 (corrigendum 1/1999) need not be

signed by the ratee.

8. The Air Headquarters by its order Air HQ/C 40657/1/PA(CPC) dated 22.4.2003 has issued the New appraisal system for Sergeants and below with nine years and above of service. Paragraph 6 deals with 'adverse report'. It reads as follows:-

Para 22 of AFO 05/97 is amended as follows for all airmen of the rank of Sgt and below, A report with grading as 'Inferior' (below 40 marks) will be construed to be an adverse report. For an individual to be assessed 'Inferior', he should have been given at least two warnings in the preceding 12 months.

It is very pertinent to note that in the year 2003 there was no requirement of maintaining any counselling register. The Air Force Record Office by its order RO/C 1815/1/CP dated 26th September 2005 made certain clarifications or changes to the assessment report. A new guidelines for filling the annual reports were issued on that day. Para 2 (d) deals with the marks, grading etc. Clause (j) deals with Appendix 'F' to AFO 5/97. It reads as follows:-

Sgts as on 31 Oct 05 likely to get a 'AV' and below grading should be counselled by the IO/RO at periodic intervals to improve their performance. A certificate as per Appendix 'F' to AFO 5/97 (Corrigendum No.1 to AFO 9/99) is required to be rendered for those SNCOs who do not fulfill the criteria for grant of further extension. Signature of such SNCOs also be taken on Counselling Register maintained for the purpose.

It is pertinent to note that the opening of counselling registers is introduced for the first time as per these guidelines. In fact the copy produced by the petitioner itself shows that there was a direction to open a counselling register by the officer who received the same. It is also very pertinent to note that the annual reports are to be raised and despatched on or before 31st October of every year. In the year 2006 some more changes were made to the guidelines on assessment by letter No.Air HQ/C 40651/PA(CPC) dated 12th September, 2006. Para 39 of the said letter deals with 'Adverse Report'. It reads as follows:-

The airman of the rank of Sgt and below if assessed 'Inferior' (below 40 marks), should have been given at least two warnings in the preceding 12 months. There should be a gap of at least one month between the two warnings so as to give him an opportunity to improve his performance. ARs with 'Inferior' grading should accompany a certificate (as per Appendix 'E' to this HRP) duly signed by the CO and the airman concerned. In case, an airman who has been adversely reported upon refuse to sign the certificate as mentioned above, it should be annotated in red ink as follows:-

Airman refused to sign in Appendix B.

Para40 deals with Sgts Assessed Less than 70 marks. It reads as follows:-

Sgts as on 31 October likely to get a 'AV' and below grading should be counselled by the IO/RO at periodic intervals to improve their performance. They have to be informed that scoring less than 70% marks in 7 years assessment preceding the year of consideration, would make them ineligible for grant of further extension of service and promotion. A certificate (as per appendix 'F' this HRP) is required to be rendered by the SRO. Signature of such SNCOs also to be taken on Counselling Register maintained for the purpose. AOC/Stn Cdrs are to ensure that the above certificate is rendered in letter and spirit whenever a Sgt scores less than 70 marks.

This order makes it very clear that the certificate is to be rendered by SRO. Appendix 'F' shows that the same shall be signed by the ratee also. So until 12.9.2006 there was no statutory requirement to obtain the signature of ratee in Appendix 'F'.

9. The main contention raised by the petitioner was that the grading for the year 2005 as 'Average' is an adverse report and that has to be expunged permanently as there was failure to comply with the mandatory provisions. A reading of the various clauses of the Air Force orders referred to above shows that there are different types of gradings. It also shows that very clear-cut guidelines are issued in the matter of awarding marks. The assessment of an airman is based on performance of that individual during a particular assessment year. An airman is

assessed initially by the Initiating Officer. There is a Reviewing Officer and a Senior Reviewing Officer. Following the detailed instructions on assessment appraisal were made in the Air Force and the latest orders on the subject issued by the Headquarters petitioner was graded as 'average' in the year 2005. This assessment and recommendations are treated as final unless it is reviewed under exceptional circumstances by the AFRO at the request of the individual. A grading of 'inferior' which is below 40% mark alone is an 'adverse report'. A person is graded as 'average' if he gets marks between 50 69 out of 100. It is not an adverse report at all. Though the petitioner has got a case that in all other years he had scored very high marks, a perusal of the marks awarded to the petitioner in the year 2003, 2004 and 2005 shows that the difference was marginal. The records also shows that Appendix 'F' to corrigendum 1/99 to AFO 5/97 was also raised as per the policy and guidelines. The petitioner was considered for promotion on six occasions, but he could not be empanelled as there were other candidates who had more meritorious service. So there is absolutely no merit in the contention raised by the petitioner that grading of 'average' is an adverse report. So that contention is only to be rejected.

10. When the case was taken up to file and posted for re-hearing, counsel for the petitioner raised three points. It is argued that the grading of 'average' was given without observing the guidelines. It is also argued that the Commanding Officer alone can sign appendix 'F' to corrigendum 1/99 to AFO 5/97. It is also argued that the guidelines enjoins that if the mark awarded between 50 and 69, a certificate as per Appendix 'F' is to be raised by the Commanding Officer and he should also obtain the signature of the individual in Form 'F'. The third contention raised is that no Counselling Register was maintained in this case. No warning letter issued to the petitioner. No periodical counselling given to him and his signature was not obtained in the Register.

11. We have already extracted the relevant portion regarding raising of appendix 'F'. It only shows that a certificate as per Appendix 'F' will be attached by the AOC/CO along with the assessment return. It does not say that appendix 'F' is to be signed by the Commanding Officer alone. In fact in the year 2006 the guidelines were modified, by which it was the duty of the SRO to sign appendix 'F'.

So it may be raised by the AOC or CO or by the SRO. It has been specifically averred in the counter affidavit that in this case Form 'F' was signed by the SRO. A copy of the Appendix 'F' was made available for our perusal. As the guidelines do not contain a provision that Form 'F' is to be signed by the CO alone, we do not find any merit in the contention raised by the petitioner that it has to be raised and signed by the CO alone. We reject the same.

12. The second contention raised is that as per the guidelines the CO ought to have obtained the signature of the ratee in Form 'F' and in this case the signature was not obtained and that is the reason why the respondents did not produce Form 'F' along with their statements. Appendix 'F' made available for our perusal does not contain the signature of the ratee. The counsel relying on Ext.P3(3) has argued that on that ground alone the grading of 'average' for the year 2005 is to be expunged. The petitioner produced a copy of the corrigendum No.1/99 as Ext.P3(2) and the copy of Appendix 'F' for Sergeants assessed less than 70 marks as Ext.P3(3). The respondents have also produced a copy of Appendix 'F' as Ext.R2(a) along with the copy of the corrigendum No.1/99. There is a vital difference between the copy of Appendix 'F' produced by the petitioner and the one produced by the respondents. We have closely examined Exts.P3(2) and P3(3) produced by the petitioner and Ext.R2(a) produced by the respondents. Ext.P3(2) which is the corrigendum, is a photo copy of a cyclostyled paper whereas Appendix 'F' attached to that is a computer generated copy.

Ext.R2(a)/21 is again a photo copy of a cyclostyled paper. In view of the difference between Ext.P3(3) and R2(a)/21 we directed the respondents to make available a copy of AFO 5/97, corrigendum 1/99 and any subsequent orders issued on this subject. The respondents produced AFO 5/97 with amendments and also guidelines on assessment issued by the Air Headquarters as per letter No.Air HQ/C 40651/PA(CPC) dated 12th September 2006. The copy of corrigendum 1/99 in the possession of the respondents also shows that Appendix 'F' appended to corrigendum No.1/99 was a cyclostyled paper and there is no requirement for obtaining the signature of the ratee. The guidelines issued on 12.9.2006 is a computer generated copy and Appendix 'F' attached to that order is also a computer generated copy. In the Form 'F' attached to the order dated 12.9.2006

there is provision to obtain the signature of ratee. The petitioner with a malafide intention of playing fraud on the Hon'ble High Court as well as this Tribunal has appended computer generated copy of Appendix 'F' issued in the year 2006 along with corrigendum No.1/99 and has argued that from the year 1999 onwards there is a requirement for obtaining the signature of the ratee also. Though the respondents produced the correct Appendix 'F', the fraud played by the petitioner was not brought to our notice by the respondents. The original Appendix 'F' of the petitioner produced by the respondents for our perusal is as per the guidelines then existed and it is correctly done and hence there is no violation of that provision also.

13. The third contention raised is regarding the non-maintaining of Counselling Register. It is strenuously argued by the counsel for the petitioner that though there was a provision for maintaining Counselling Register the same was not produced. The respondents have contended that Counselling Register is maintained by the unit of the ratee. The Commanding Officer of the unit of the petitioner is made a party. The Counselling Register, if any, is not to be maintained by the 2nd respondent, it is not obligatory on the part of the respondents to produce the same. Again it is to be noted that for the first time the guidelines for maintaining the Counselling Register was issued as per AFRO letter No.RO/C 1815/1/CP dated 26.9.2005, which is produced as Ext.P2 by the petitioner himself. It shows that fresh guidelines were issued for assessment report for the year 2005. The policy letter was issued on 26.9.2005. It is not likely to be disseminated down to the unit before the middle of October, 2005. As we have already noted, Annual Reports are to be initiated and despatched as on 31.10.2005, it is not very likely that the unit would have opened and maintained a Counselling Register within a period of 15 to 20 days. However, the question of obtaining signature arose only if a counselling was done. The petitioner has no case that any counselling was done to him during the second half of October. Further, the orders referred to as above shows that counselling as per the guidelines is to be done by the IO and RO at periodic intervals. As there was only about 15 to 20 days left for initiation of the report, the chance of raising a Counselling Register making the petitioner subject to a counselling is very remote. Further, by all probability the petitioner himself might have been in charge of the section which was responsible for maintaining

the register. If that be the position he had every opportunity to remove the same. We are of the considered opinion that there was no point in directing for production of a Counselling Register which even if exists will be one created for the purpose. Hence that contention is also without any merit.

14. The facts and circumstances discussed above clearly shows that the petitioner was graded as 'average' in his assessment for the year 2005 strictly in accordance with the Rules and Appendix 'F' to AFO 5/97 concerning the petitioner was initiated as per the policy then existed. It also shows that the grading of 'average' is not an adverse report. The petitioner was assessed as 'average' based on his performance as per the guidelines and policy then existed. He was also considered for promotion as per Rules, but he was not empanelled because there was other meritorious candidates. We are, therefore, of the considered view that there is absolutely no merit in the contention raised by the petitioner that his assessment report for the year 2005 is defective and the same is really expunged. We reject the prayer for deletion of the assessment report of the year 2005. There is no merit in the case put forward by the petitioner and this T.A. is only to be dismissed.

15. The facts stated above show that the petitioner with a malicious intention to defrauding the High Court as well as this Tribunal has produced Ext.P3(3) which actually came in to existence in the year 2006 as one which was in existence in the year 2005. The petitioner is a Clerk working in the Air Force establishment. When we queried about this the learned counsel for the petitioner gave an evasive answer that the petitioner might have got it from the unit. That statement is not true. The petitioner fully knowing that Ext.P3(3) is not the correct document, produced the same with the intention of playing fraud on the court. But considering all aspects of the matter, we refrain from taking extreme step initiating proceeding under Sec.340 of Criminal Procedure Code for launching criminal prosecution against the petitioner. Here we also note that the learned counsel for the petitioner stated in the open bench that the petitioner is in possession of certain sensitive communications concerning his case between the respondents which evidently shows that he was being helped by someone among the respondents with a document which is very confidential in nature. It is for the Air Headquarters to look

into the matter and take proper remedial measures. In view of the fraud played by the petitioner, we are of the considered opinion that this is a fit case to be awarded with exemplary cost.

In the result, the Transferred Application is dismissed with a cost of Rs.25,000/-. In case the petitioner fails to deposit the cost, the respondents can recover the same in accordance with law.

Forward copy of the order to AFRO for information and necessary action.

Issue free copies to both sides.

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