

UNION OF INDIA AND OTHERS

v.

MAJ. GEN. MANOMOY GANGULY, VSM

(Civil Appeal No. 17535 of 2017)

NOVEMBER 10, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Service Law:

Promotion – To the rank of Lieutenant General in Indian Army – Respondent considered for promotion by Special Promotion Board (SPB) but not empanelled – An Officer junior to him was one of the promoted officers – Pursuant to his statutory complaint,, his assessment in one of the relevant ACRs was expunged – It was directed that he be considered for promotion – He was considered by review SPB, but even then not empanelled for promotion – Respondent approached Armed Forces Tribunal – Tribunal quashed the proceedings of Review SPB on the ground that it had allotted wrong Board marks to the respondent – On appeal, held: Review SPB is nothing but extension of original SPB – Respondent was supposed to be considered on the same parameters as if he was participating in promotion process undertaken by original SPB – The criteria adopted by original SPB in awarding board marks were not adopted by the Review SPB – Had the Review SPB adopted the same criteria, the respondent would have got higher marks than the last promoted officer – Projection of wrong facts before the Board Members in respect of CR merit of the respondent also resulted in award of lesser marks by the Review SPB.

Dismissing the appeal, the Court

HELD: 1. Undoubtedly, the Members of the Board are empowered to award marks out of the two marks which are reserved for them. For this purpose, it is not the ACR alone but the entire profile of an officer which is to be looked into. Insofar as, marks for ACR are concerned these have already been awarded under the head 'average marks of ACR extrapolated out of 90'. It shows that significant importance is attached to the

A ACRs inasmuch as 90 marks out of 95 marks are to be assigned
 on the basis of ACRs. Therefore, it cannot be disputed that while
 awarding marks out of the two marks reserved for the Members
 of the Board, they can examine the overall profile of the officer
 and are not supposed to restrict it to the ACR alone. It also
 B needs no elaboration that Board Members are the three Chiefs
 of Services and it can very well be presumed that they would
 assess an officer in an objective manner. Indubitably, higher
 degree of trust can be reposed in them and their assessment is
 not to be interdicted unless very weighty and overwhelming
 material is produced warranting interference while undertaking
 C judicial review of such an exercise. [Para 17][70-D-F]

2. In the impugned judgment, the Tribunal wrongly
 distinguished its judgment passed in the case of *Maj. General*
S.K. Chakravorty vs. Union of India and Ors. (which was relied on
 by the respondent), with the remarks that that case was not in
 D respect of the Armed Medical Corps wherein the assessment is
 based on quantified check marks. This basis of distinguishing
 the judgment in *S.K. Chakravorty* is clearly erroneous. The
 provision for assessment for promotion to Lt. General is same
 whether it is Army *per se* or Armed Medical Corps.[Para 18] [70-
 E G-H; 71-A]

Air Vice Marshal S.L. Chhabra VSM (Retd.) v. Union
of India & Anr. (1993) Suppl. 4 SCC 441 : [1993] 2
 Suppl. SCR 659; *Major General I.P.S. Dewan v. Union*
of India & Ors. (1995) 3 SCC 383 : [1995] 2 SCR
 F 532; *Dalpat Abasaheb Solunke & Ors. v. Dr. B. S.*
Mahajan & Ors (1990) 1 SCC 305; *Surinder Shukla v.*
Union of India & Ors. (2008) 2 SCC 649 : [2008] 1
 SCR 449 – referred to.

3. It is difficult to disagree with the ultimate conclusion
 arrived at by the Tribunal, in the facts of the present case, even if
 G some of the observations of the Tribunal may not be correct.
 Most important feature which is noted by the Tribunal and could
 not be disputed by the appellant is the manner in which exercise
 was undertaken while holding SPB meeting on 20th January, 2016.
 Even when the Board Members were entitled to give marks to
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the candidates on the basis of overall profile, that was not done. A
On the contrary, the marks given to those officers who were
considered in that SPB, were strictly on the basis of marks obtained
by them out of 93 marks. The Tribunal is right in observing that
in the meeting held on 20th January, 2016 Board Marks to all
officers who are considered commensurate with the quantified B
marks of the candidates. Thus, the Board Members adopted the
criteria of looking into the quantified marks as the yardstick for
assessing overall profile. [Paras 19, 20][71-C-F]

4. In the original SPB meeting, one officer junior to the
respondent was awarded 1.70 out of 2 marks whereas the C
respondent was awarded 1.50 marks. Lesser marks given to the
respondent were because of the reason that marks awarded to
him out of 93 were lesser than that officer. Result of the redressal
was that the marks of the respondent became higher than that
officer which necessitated Review SPB. This Review SPB meeting
has to be on the same standards which were adopted in original D
SPB meeting. It has to be on the assumption as if case of the
respondent is considered in the original SPB, but with revised
profile. In the SPB held on 20th January, 2016, had the revised
marks of the respondent available, which were more than the
quantified marks of the other officer, the respondent would have E
certainly got 1.70 out of 2 marks by the Board. Having not
undertaken the independent exercise of looking into the “overall
profile” in the SPB held on 20th January, 2016 and instead
assigning the marks to all the officers out of 2 marks, on the
basis of quantified marks of the candidates which they had received
out of 93 marks by treating the same as “overall profile”, when it F
comes to Review SPB the appellant is supposed to stick to the
same criteria. Only that would show fairness in approach, which
would also be in conformity with the principles of equality
enshrined in Article 14 of the Constitution. It is because of the
reason that Review SPB is nothing but extension of original SPB, G
wherein the respondent was supposed to be considered on the
same parameters as if he was participating in promotion process
undertaken in original SPB. [Para 21][71-G; 72-A-D]

5. Noting No. 3 of the Board proceedings was also factually
incorrect. As per Noting No.3, the respondent’s CR merit in H

- A chance one changed from 16th position to 15th position among 18 officers considered for only 6 vacancies. This Noting gave the impression that even after the redress, the chances of promotion of the respondent hardly improved. On the contrary, fact is that after the redress, position of the respondent had jumped from 16th to 7th. Another significant aspect which was omitted was that with this jump, his quantified check marks (i.e. out of 93) became more than the other officer who was promoted after his assessment in the original SPB even when he was junior to the respondent. But for this error, there was a possibility of different outcome even on value judgment of the respondent by the Board Members. [Para 22][72-E-G]

6. It is made clear that in any future selections, it would always be open to the Members of the Board to award the marks (out of 2 marks assigned for this purpose) keeping in view the overall profile of the officers as per Promotion Policy dated 14th January, 2004 and as amended vide letter dated 17th May, 2006. [Para 23][72-H; 73-A]

Case Law Reference

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|---|-------------------------|-------------|---------|
| | [1993] 2 Suppl. SCR 659 | referred to | Para 18 |
| E | [1995] 2 SCR 532 | referred to | Para 18 |
| | (1990) 1 SCC 305 | referred to | Para 18 |
| | [2008] 1 SCR 449 | referred to | Para 18 |

- F CIVIL APPELLATE JURISDICTION: Civil Appeal No. 17535 of 2017

From the Judgment and Order dated 02.09.2017 in O. A. No. 1093 of 2017 and Judgment and Order dated 05.10.2017 in M. A. No. 1252 of 2017 of the Principal Bench, Armed Forces Tribunal, New Delhi.

- G Maninder Singh, ASG, Harish V. Shankar, Rajiv Nanda, Ms. Nisha Mohandas, Mukesh Kumar Maroria, Advs. for the Appellants.

Mukul Rohatgi, Ms. Jyoti Singh, Sr. Advs., Sudarshan Rajan, Ms. Shriya Chauhan, Archit Arora, Ramesh Rawat, Karanjot Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

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A. K. SIKRI, J. 1. Respondent herein belongs to the Army Medical Corps. He is the Major General and aspires to become Lieutenant General (Lt. Gen.), which is next higher rank in his cadre. First Special Promotion Board (SPB), for this purpose was held on 20th January, 2016 but he was not empanelled to the rank of Lt. Gen. by the said Board. His statutory complaint there against was partially redressed whereby an assessment of the Technical Officer (TO) in his Annual Confidential Report (ACR) of 2014 was expunged. This entitled him to fresh screening by Review SPB which held its meeting on 21st March, 2017. However, even Review SPB did not empanel him for the promotional rank. After exhausting departmental remedies in the form of statutory complaint etc., the respondent approached the Armed Forces Tribunal (for short, 'AFT') and has finally succeeded inasmuch as vide orders dated 2nd September, 2017, passed in O.A. No. 1093 of 2017, the AFT has quashed the proceedings of Review SPB on the ground that it had allotted wrong board marks to the respondent. Directions are given to convene fresh Review SPB to consider him for promotion to the rank of Lt. Gen. in consonance with the parameters of relevant policies and his changed profile after allotting entitled board marks as stated in the said judgment, and to also restore his seniority. This appeal aims at questioning the correctness of the said judgment of the AFT.

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2. Facts which are absolutely essential for disposal of this appeal may be mentioned at this stage:

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3. The respondent was commissioned in the Army Medical Corps (AMC) on 3rd March, 1980. He has an outstanding academic record and brilliant service record, for which he has been decorated time and again. This includes GOCin-C's Commendation in the year 2013, Commendation of Chief of Army Staff in the year 2014 and Vishisht Seva Medal in the 2015. He has earned promotions from time to time, whenever became due and has arisen to the rank of Maj. Gen. He is due for superannuation in this rank on 31st May, 2018.

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4. The respondent was considered for promotion to the rank of Lt. Gen. and equivalent by SPB held on 20th January, 2016. However, vide DGAFMS letter dated 1st March, 2016, the respondent was informed that he was not empanelled for promotion. The respondent submitted his statutory complaint dated 30th June, 2016 against his non-empanelment

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- A challenging certain assessments in his relevant annual confidential reports. After seven months, the appellant granted partial redressal to the respondent vide their letter dated 30th January, 2017, by way of expunging the entire assessment of the TO in the respondent's ACR of 2014 on grounds of inconsistency, and directed that the respondent be considered for promotion by an appropriate Promotion Board. Consequent to the redressal granted to the respondent, his overall ACR profile for consideration before the SPB improved and consequently his merit logically came above that of the last officer empanelled in the SPB held on 20th January, 2016. Since, the redressal was granted, as per the policy of the appellants, the respondent had to be put through a fresh/Review SPB.

5. It is pertinent to note at this stage that as per the Promotion Policy dated 14th January, 2004 as amended by the Government of India letter dated 17th May, 2006, the selection criteria was based on following parameters:

- D “(a)Average marks of ACR : 90 marks extrapolated out of 90
 (b)Total Marks for various : 02 marks
 Qualifications like MD, DM,
 M.Ch. etc.
 (c)Marks for Military Awards of : 01 marks
 E Decorations
 (d)Marks awarded by the members : 02 marks
 of the Board
 Total Marks : 95 marks”

- F 6. The composition of the Promotion Board (Medical) is as per the Ministry of Defence letter No. 301/DGAFMS/DG-IX/87-S/D (Med.) dated 8th February, 1988 and for the SPB for promotion to the rank of Lt. Gen. (&equiv) the board comprises:

- Chairman : Chairman Chiefs of Staff Committee
 G Members : The other two Chiefs of Staff
 Member Secretary : DGAFMS

7. As noted above, as per the Promotion Policy, the Board Members are empowered to assess and award the marks. Award of

these marks, not exceeding two (2), is based on the overall profile of the officer, exceptional achievements, appointments held, medical category, disciplinary background, field area – difficult area posting. Average of the marks awarded by all the Board Members present, out of two (2), is used to calculate the overall marks.

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8. The procedure for selection and promotion which is communicated vide Circular dated 14th January, 2004 issued by the Ministry of Defence (MoD), Government of India and as amended vide letter dated 17th May, 2006 enumerates basis for awarding two marks keeping the following criteria in mind.

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“Weightage to the Members of the Board: Board Members will have a weightage of two (2) mark for selection of the officers. The Board Members may award marks not exceeding two (2) based on the overall profile of the officers, exceptional achievements, appointments held, medical category, disciplinary background, field Area-Difficult Area posting. Average of the marks awarded by all the board members present, out of the two (2), will be used to calculate the overall marks.”

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Thus, it can be discerned that while 93 marks (ACR average 90, qualification marks-02, honour and awards – 01) can be quantified on the basis of relevant records, and need only arithmetical calculations, marks to be assigned by the Board Members out of two(2), depend on the subjective assessment of the Board Members, *al beit*, after objectively evaluating the overall profile on the parameters laid down in the Promotion Policy.

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9. From the aforesaid facts, it is clear that insofar as award of 93 marks, out of 95 marks, is concerned that can be calculated arithmetically on the basis of ACR, academic qualifications as well as military awards and decorations. Discretion is given to the Board to give weightage out of 2 marks and while exercising these discretions the Members of the Board are supposed to keep in mind the overall profile of the concerned officer, exceptional achievements, appointments held, medical category, disciplinary background, field area—difficult area posting.

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10. Insofar as the respondent is concerned, he was assigned 87.90 marks on the basis of ACR, i.e., against extrapolated out of 90 marks, when his case was considered for promotion originally by the SPB on

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A 20th January, 2016. However, after redressal of his statutory complaint which resulted in expunging of some adverse remarks in ACR of the year 2014, these extrapolated out of 90 marks stood enhanced to 88.50. However, in the Review SPB, the Board stuck to the same marks which were awarded by the first Promotion Board. In this manner, though
B there was some increase in the total marks awarded to the respondent (as a result of increase in marks on account of ACRs). The final marks awarded to him were still below the cut-off marks because of which he was not empanelled for promotion by the Review Board as well. The entire controversy before the AFT, thus, pertained to the award of marks by the Board Members in the Review SPB.

C 11. The case pleaded by the respondent before the AFT was that one Mr. Sanjeev Chopra, VSM, who was junior to the respondent was empanelled by the SPB on the basis of proceedings held on 20th January, 2016. Total marks obtained by him out of 93 marks (i.e. without Board marks) were more than the respondent at that time. However, with
D increase of ACR marks of the respondent after his redress, total marks of the respondent out of 93 marks became more than that of Mr. Sanjeev Chopra. But the respondent was still denied promotion by the Review SPB by awarding marginally less marks than Sanjeev Chopra by the Board. It was argued that since total without board marks of the respondent were more than that of Mr. Sanjeev Chopra, there was no
E reason for the Board to give him lesser weightage while awarding marks out of the 2 marks by the Board.

12. This contention is accepted by the AFT in the following manner:

F “We have heard the learned counsel for the parties and seen the records. The main point of dispute is the award of Board Marks to the applicant during the Review Special Promotion Board held on 21.03.2017. It is a matter of record that the redressal given to the applicant by the respondent in his Annual Confidential Report for the year 2014 has enhanced his quantified marks from 90.65 to 91.25 and with these revised quantified marks, the applicant
G jumps above the last empanelled officer of his batch, i.e., Major Gen Sanjeev Chopra whose quantified marks are 91.15. We find that Maj. Gen Sanjeev Chopra with lower quantified marks in comparison to the applicant has been given 1.70 out of two marks by the Board. We have also seen the trend of awarding the

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Board Marks to all officers considered in this Board which is commensurate with the quantified marks of the candidates. Therefore, the same cannot be denied to the applicant unless it is justified by the Board Members, which has not been done in the Board Proceedings.”

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13. In the process, the AFT has also observed that wrong facts were projected to the Board Members inasmuch as in the noting of the Board proceedings it is, inter alia, mentioned that ACR merit of the respondent in Chance one changed from 16th position to 15th position among 18 officers considered for only six vacancies. Noting No. 3 of the Notings in the Board proceedings, giving this information, reads as under:

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“3. His CR merit in chance one changed from 16th position to 15th position among 18 officers considered for only six vacancies.”

14. The AFT found that it was factually wrong as the respondent's revised profile after getting redressal had resulted in elevating his position to 7th place instead of 15th. According to the AFT, had there been correct facts before the Board Members, they may have given higher marks to the respondent. The AFT has even castigated the officers who, according to the AFT, were guilty of furnishing wrong information which caused serious injustice to the respondent and subverted the system.

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15. The AFT mentioned that since Mr. Sanjeev Chopra was given 1.70 marks out of the two marks, by the Board, there was no reason to give 1.50 marks to the respondent. Having regard to the fact that in the original SPB meeting, award of these marks commensurate with the quantified marks of the candidate, the respondent is also entitled to 1.70 marks and in this way he would attain above the cut-off marks and more marks than given to Mr. Sanjeev Chopra, who has been promoted as Lt. Gen.

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16. Challenging the aforesaid approach of the AFT, Mr. Maninder Singh, learned Additional Solicitor General appearing for the appellant submitted that AFT has committed a grave error in undermining the discretion that is given to the Members of the Board for award of board marks. It is pointed out that these marks are not to be given on the basis of ACRs. On the contrary, it is on the basis of overall profile of the concerned officer which included exceptional achievements,

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- A appointments held, medical category, disciplinary background, field area-difficult area posting etc. In this very hue, it is also contended that it was not permissible for the AFT to determine as to how many marks are to be given to the respondent and by doing so the AFT has usurped the function of the Members of the Board. It is also submitted that
- B Members of the Board are Chiefs of Air force, Army and Navy. It can reasonably be inferred that they would have gone through overall profile of the respondent and still decided to maintain the same marks in the Review SPB which were given to the respondent in the original SPB held in January, 2016. On this basis, the learned ASG also took strong exception to the remarks of the AFT that the three Service Chiefs are
- C hardly expected to examine the records in minute details.

17. There is no dispute insofar as legal propositions advanced by the learned ASG are concerned. Undoubtedly, the Members of the Board are empowered to award marks out of the two marks which are reserved for them. For this purpose, it is not the ACR alone but the
- D entire profile of an officer which is to be looked into. Insofar as, marks for ACR are concerned these have already been awarded under the head 'average marks of ACR extrapolated out of 90'. It shows that significant importance is attached to the ACRs inasmuch as 90 marks out of 95 marks are to be assigned on the basis of ACRs. Therefore, it cannot be disputed that while awarding marks out of the two marks
- E reserved for the Members of the Board, they can examine the overall profile of the officer and are not supposed to restrict it to the ACR alone. It also needs no elaboration that Board Members are the three Chiefs of Services and it can very well be presumed that they would assess an officer in an objective manner. Indubitably, higher degree of
- F trust can be reposed in them and their assessment is not to be interdicted unless very weighty and overwhelming material is produced warranting interference while undertaking judicial review of such an exercise.

18. We may mention here that the appellants had placed strong reliance upon the earlier judgment of the AFT dated 16th January, 2015 rendered in OA No. 120 of 2014 entitled *Major General S.K. Chakravorty v. Union of India and Others*. In that case, the AFT had held that the allocation of system of marks, i.e., award of marks by the Board Members out of two (02) marks allotted to the Board, is based on value judgment. In the impugned judgment, the AFT distinguished the said judgment with the remarks that that case was not
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in respect of the Armed Medical Corps wherein the assessment is based on quantified check marks. This basis of distinguishing the judgment in *S.K. Chakravorty* is clearly erroneous. We may note that the provision for assessment for promotion to Lt. General is same whether it is Army *per se* or Armed Medical Corps. The principle enunciated in *S.K. Chakravorty* is based on the judgments of this Court in *Air Vice Marshal S.L. Chhabra, VSM (Retd.) v. Union of India & Anr.*¹, *Major General I.P.S. Dewan v. Union of India & Ors.*², *Dalpat Abasaheb Solunke & Ors. v. Dr. B.S. Mahajan & Ors.*³, and *Surinder Shukla v. Union of India & Ors.*⁴

19. Having said that, insofar as the present case is concerned, we find it difficult to disagree with the ultimate conclusion arrived at by the AFT in the facts of this case, even if some of the observations of the AFT may not be correct. Most important feature which is noted by the AFT and could not be disputed by the appellant is the manner in which exercise was undertaken while holding SPB meeting on 20th January, 2016. Even when the Board Members were entitled to give marks to the candidates on the basis of overall profile that was not done. On the contrary, the marks given to those officers who were considered in that SPB, were strictly on the basis of marks obtained by them out of 93 marks.

20. That becomes clear from the record produced by the learned ASG for our perusal at the time of hearing. This is the case in respect of all officers, without any exception. The AFT is right in observing that in the meeting held on 20th January, 2016 Board Marks to all officers who are considered commensurate with the quantified marks of the candidates. Thus, the Board Members adopted the criteria of looking into the quantified marks as the yardstick for assessing overall profile.

21. In the original SPB meeting, Major General Sanjeev Chopra was awarded 1.70 out of 2 marks whereas the respondent was awarded 1.50 marks. Lesser marks given to the respondent were because of the reason that marks awarded to him out of 93 were lesser than Mr. Sanjeev Chopra. Result of the redressal was that the marks of the respondent became higher than Mr. Sanjeev Chopra which necessitated Review

¹ (1993) Supp (4) SCC 441

² (1995) 3 SCC 383.

³ (1990) 1 SCC 305

⁴ (2008) 2 SCC 649

A SPB. This Review SPB meeting has to be on the same standards which were adopted in original SPB meeting. It has to be on the assumption as if case of the respondent is considered in the original SPB, but with revised profile. In the SPB held on 20th January, 2016, had the revised marks of the respondent available, which were more than the quantified marks of Sanjeev Chopra, the respondent would have certainly got 1.70 out of 2 marks by the Board. It is stated at the cost of repetition that was the criteria adopted by the Members of the Board itself viz. awarding the marks (out of 2) in line with the quantified marks. Having not undertaken the independent exercise of looking into the “overall profile” in the SPB held on 20th January, 2016 and instead assigning the marks to all the officers out of 2 marks, on the basis of quantified marks of the candidates which they had received out of 93 marks by treating the same as “overall profile”, when it comes to Review SPB the appellant is supposed to stick to the same criteria. Only that would show fairness in approach, which would also be in conformity with the principles of equality enshrined in Article 14 of the Constitution. It is because of the reason that Review SPB is nothing but extension of original SPB, wherein the respondent was supposed to be considered on the same parameters as if he was participating in promotion process undertaken in original SPB.

22. Other aspect which is highlighted by the AFT in the impugned judgment is equally significant, viz., Noting No. 3 of the Board proceedings was factually incorrect. As pointed out above, as per Noting No.3, the respondent’s CR merit in chance one changed from 16th position to 15th position among 18 officers considered for only 6 vacancies. This Noting gave the impression that even after the redress, the chances of promotion of the respondent hardly improved. On the contrary, fact is that after the redress, position of the respondent had jumped from 16th to 7th. Another significant aspect which was omitted was that with this jump, his quantified check marks (i.e. out of 93) became more than Major General Sanjeev Chopra, who was promoted after his assessment in the original SPB even when he was junior to the respondent. But for this error, there was a possibility of different outcome even on value judgment of the respondent by the Board Members.

23. For these reasons, we are not interfering with the directions given by the AFT. We make it clear that in any future selections, it would always be open to the Members of the Board to award the marks (out of 2 marks assigned for this purpose) keeping in view the overall

profile of the officers as per Promotion Policy dated 14th January, 2004 A
and as amended vide letter dated 17th May, 2006.

24. This appeal is, accordingly, dismissed with the direction to the
appellant to take further steps, without loss of time, as stated by the AFT
in the impugned judgment.

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Kalpana K. Tripathy

Appeal dismissed.