

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI**

OA No.380/2015

Order Reserved on: 07.02.2017

Pronounced on: 23.03.2017.

Hon'ble Mr. V. Ajay Kumar, Member (J)

Hon'ble Mr. K.N. Shrivastava, Member (A)

Dr. Beena Aggarwal, W/o Dr. Arvind Aggarwal,
Aged about 42, R/o 815, CA Apartments,
Paschim Vihar, Delhi presently
Working as Junior Specialist (Surgery) in
Dte. of Health Services, Govt. of NCT of Delhi.

-Applicant

(By Mrs. Rekha Palli, Senior Counsel with Mrs. Poonam Singh)

-Versus-

1. Union Public Service Commission,
Through its Chairman, Dholpur House,
Shahjahan Road, New Delhi.
2. Department of Health and Family Welfare
Through its Secretary, Govt. of NCT of Delhi,
Room No.A-907, A-Wing, 9th Level,
Delhi Secretariat, I.P. Estate,
New Delhi-110002.

-Respondents

(By Advocates Shri Naresh Kaushik and Shri Amit Anand)

ORDER

Hon'ble Shri K.N.Shrivastava, Member (A):

The applicant, through the medium of this OA filed under Section 19 of the Administrative Tribunals Act, 1985, has prayed for the following reliefs:

- “a) to direct that the action of the Respondents in not regularizing the Applicant, who is a distinguished Specialist-Doctor and is heading her department for the past several years, having a impeccable professional record, in the initial constitution of Delhi Health Service, in terms of Rule 6 (2) of Rules 2009, is wholly illegal, constitutional and violates valuable fundamental rights of the Applicant.
- b) to direct the Respondents to regularize the Applicant in the Delhi Health Services, on the basis of her exemplary and proven work and conduct record and to grant seniority and all consequential benefits to the Applicant from the date of her initial appointment;
- c) to direct the so-called process of reassessment carried out by the Respondents in compliance with the order dated 28.10.2013 passed by the Hon'ble High Court of Delhi, is arbitrary, unfair, unreasonable and therefore unconstitutional;
- d) to direct the Respondents to reduce the marks of evaluation from 200 to 190 marks as the additional qualification criteria, which was for 10 marks, is totally irrelevant in selection of non teaching doctors and was also not included in the initial selection process;
- e) to direct the Respondents to allot marks for new skills and awards/ affiliations/additional responsibilities and thereafter, declare the applicant selected and successful”.

2. The brief facts of this case are as under:

2.1 The Government of National Capital Territory of Delhi (GNCTD) came into existence in the year 1992. The GNCTD created a number of Hospitals/Dispensaries/Public Health Centres and some of the existing Government hospitals were also brought under its control to attend to the health needs of the residents of Delhi.

Advertisements were issued by the Directorate of Health Services, GNCTD for appointment of Medical Officers on contract basis. Pursuant to one such advertisement, the applicant applied in the year 1996 and was appointed as a Junior Specialist (Surgery), initially for a period of one year. Her services were, however, extended from time to time.

2.2 The GNCTD, in consultation with the Ministry of Health and Family Welfare decided to constitute General Duty Medical Officer (GDMO) and Non-Teaching Specialists Cadre in the first place and Public Health and Teaching cadre at a later date. After receiving the concurrence of the Union Public Service Commission (UPSC), the Delhi Health Services Allopathy Rules, in respect of GDMOs and Non-Teaching Specialists Cadres were notified on 23.12.2009 (in short, 2009 Rules). Rule 6 (2) of the said rules, reads as under:

“All officers appointed on contract basis/ad hoc basis on or before 18th December, 2006, i.e., the date of issue of the Government of Delhi’s O.M. No.F.70/49/206/H&FW/SSHFW 463-475 dated 18th December, 2006, on the basis of their suitability as assessed by the Commission and requisite educational qualifications and experience prescribed for the post and being found fit, shall be deemed to have been appointed under these rules and assigned to the Sub-Cadre of General duty Medical Officers or Non-Teaching Specialists, as the case may be, and they shall be members of the Service at the entry level of the respective Sub-Cadre at the initial constitution stage”.

2.3 Pursuant to the framing of the 2009 Rules, the GNCTD in consultation with the UPSC invited the Doctors appointed on contract basis for a personal talk for assessment of their suitability

by the UPSC. To work out the suitability of Doctors under Rule 6 (2) of the 2009 Rules, the UPSC proposed to assess them, for regularization, on the basis of their complete ACRs. Since the complete ACRs in the prescribed form were not available, in respect of the Doctors, the UPSC took a decision that all Doctors appointed on contract basis, who possess the educational qualification as per the Recruitment Rules (RRs) shall be assessed by subjecting them to a qualifying written test followed by a personal talk.

2.4 The UPSC conducted the process of personal talk with the Doctors on different dates during March/April, 2010. The applicant had also participated. The UPSC had prescribed 100 marks for the performance of the candidates in the personal talk and 50 marks for assessment of their bio-data. The cut off was fixed at 50%, meaning thereby that a candidate securing 75 or more marks out of total 150 marks, was to be recommended for regular appointment. Finally, as per the recommendations of the UPSC, vide order dated 15.05.2012, GNCTD issued regular appointment orders in respect of 370 GDMOs and 204 non-Teaching Specialist Doctors leaving behind just six Doctors, including the applicant.

2.5 The six Doctors, including the applicant, who were not recommended for regular appointment by UPSC, approached this Tribunal in OA No.3653/2012, in which they made the following prayers:

“a) direct that the action of the Respondents in not regularizing the petitioners, who are distinguished Specialist-Doctors and are heading their departments for the past several years, having an impeccable professional record, in the initial constitution of Delhi Health Service, in terms of Rule 6 (2) of Rules 2009 is wholly illegal, constitutional and violates valuable fundamental rights of the petitioners;

b) call for the entire records of the selection process carried out by UPSC in consultation with NCTD for the initial constitution of Delhi Health Service, in terms of Rule 6 (2) of Rules 2009;

c) quash the order dated 15.05.2012 passed by the Respondent No.2 to the extent that it omits the names of the Applicants while appointing 370 Medical Officers and 204 Non-teaching Specialist-Doctors under Delhi Health Services with immediate effect;

d) direct the Respondents to grant permanent status to the Applicants from the date of their initial/first appointment and accordingly they should be promoted to their respective ranks as given to CHS doctors under assured career progression, counting full service and seniority from initial/first date of appointment;

e) direct that the Respondents have no power to exploit the Applicants by first appointing them on contract basis for an uninterrupted period of several years, continuing and promoting them and finally denying regularization and the state as a modal employer in a welfare state, is not expected to take advantage of its position and impose wholly un-equitable and unreasonable condition of employment on the prospective employees;

f) direct that the so-called process of appointment of personal talk carried out by the Respondents to appoint doctors under Rule 6 (2) of Delhi Health Services (Allopathy) Rules, 2009, at initial constitution stage, is arbitrary, unfair, unreasonable and therefore unconstitutional;

g) direct the Respondents to regularise the Applicants in the Delhi Health Services, on the basis of their exemplary and proven work and conduct record.

h) direct the Respondents to grant seniority and all consequential benefits to the Applicants from the date of their initial appointments”.

2.6 The said OA was disposed of vide order dated 28.05.2013; the operative part of which reads as under:

“OA is disposed of with direction to respondents to assess the candidature of the applicants once again for their regularization keeping in view the record of their performance in DHS as contractual employee, including their experience. Such elements would be given due weightage in interaction or otherwise. Needful should be done as expeditiously as

possible preferably within a period of three months from the date of receipt of a copy of this order. Till then contractual appointment of the applicants may not be discontinued.”

2.7 The UPSC (R-1) challenged the *ibid* order of the Tribunal dated 28.05.2013 in OA No.3653/2012 before the Hon’ble High Court of Delhi in Writ Petition (Civil) No.6260/2013, which came to be dismissed vide order dated 28.10.2013. Consequently, the UPSC was obliged to implement the order of the Tribunal dated 28.05.2013.

2.8 In compliance with the Tribunal’s order dated 28.05.2013, the UPSC decided to re-assess the six left out Doctors (who were applicants in OA-3653/2012), including the present applicant. The UPSC, unlike on the previous occasion wherein the selection criteria stipulated was 100 marks for interview/personal talk, assessment of bio-data – 50 marks – Total: 150 marks – cut off percentage – 75%, decided this time to assess the candidates against the 200 marks – 100 marks for personal talk/interview and another 100 marks for assessment of bio-data. The 100 marks allocated for the assessment of bio-data was further split in five segments, the details of which are given in the table below:

S.N.	Details	Marks
1.	Work experience for a period upto 19 years or more	50 marks*

2.	Essential qualifications	10 marks
3.	Additional academic qualification	10 marks
4.	Professional training/new skills acquired related to the field of work	20 marks
5.	Research publications and reports/project reports/Awards/Scholarships/higher responsibilities/affiliation with professional bodies/institutions	10 marks

The cut off stipulated was 100 marks.

2.9 Out of the six candidates considered for selection by the UPSC, only three were selected. The applicant found her name amongst the three rejected candidates. Aggrieved by the action of UPSC (R-1) in not considering her candidature for regular appointment, the applicant has filed the instant OA, praying for the reliefs indicated in para-1 above.

3. The grounds pleaded in support of the reliefs prayed for, are as under:

i) The Tribunal and the Hon'ble High Court had directed the UPSC to re-assess the suitability of the Doctors on the basis of their performance and work experience in DHS as contractual employees. The decision of the UPSC to re-assess the suitability of the candidates by calling them for another personal interaction for the same posts was illegal and against the rules. The applicant has rich and extensive work experience of 27 years, which also included

10 years as Head of the Department of Surgery. This has not been given due consideration by the UPSC.

ii) The applicant could not have been adjudged as unsuitable in the face of her demonstrated excellent work record, competence, skills etc.

iii) At no place has the High Court judgment insisted on requirement of interview for the purpose of re-assessment given the fact that the applicant was already selected in the initial appointment through a properly conducted interview. The re-assessment ought to have been done on the basis of experience and performance record. The academic additional qualification was never a criterion for selection in the initial selection process but has been subsequently added arbitrarily with an objective to declare the applicant unfit.

iv) The applicant has been given zero marks in the additional skills, professional training and new skills and award higher responsibilities/affiliation columns. The applicant is recipient of several awards and has been affiliated to various higher Medical Bodies. She has been given higher responsibility in the hospital where she has been working as In-charge of Surgery Department since 2004. Despite her exemplary work spanning over a period of about 10 years, the UPSC has deliberately ignored all the achievements of the applicant and has given zero marks while re-

evaluating her under the aforementioned three columns of assessment.

4. Pursuant to the notices issued, the respondents entered appearance and filed reply. The applicant thereafter filed her rejoinder. Controverting the averments made in the OA and the grounds pleaded therein, the respondent No.1 has broadly pleaded as under:

- “i) Hon’ble Tribunal and High Court clearly gave direction to re-assess the suitability of the doctors on the basis of their performance and work experience in DHS as contractual employee. At no place has the judgment insisted on requirement of interview for the purpose. Thus, the suitability ought to have been as assessed on the date of contractual employment and only the rich experience was supposed to be reviewed by the Commission.
- ii) Marks/criteria fixed for selection in previous and subsequent assessments differ to a large extent. 523 candidates were assessed on a total of 150 marks, whereas the six candidates including the Applicant were assessed for suitability on a total of 200 marks. This is not justified and is discriminatory in nature. Also, again no specific parameter had been fixed in personal talk and there has been no explanation by the Commission in this regard.
- iii) The marks set for any additional qualification is not justified as this criteria does not form a part of essential criteria in a selection process of non-teaching doctors, the Applicant being so.
- iv) Despite the Applicant having all the three things to her credit, she has been given zero marks in new skills section. The marks allotted for new Skills, Awards by the board are quite contrary to what the Applicant deserves.”

4.1 Giving details of the modalities adopted by it in re-evaluating the candidates, the UPSC has contended as under:

“8.1 With regard to the averment made in para 7.2 (i) above, it is respectfully submitted that the order of the Learned Tribunal, as upheld by the Hon’ble High Court, clearly directed the Respondents *“to assess the candidature of the Applicants once again for their*

regularization keeping in view the record of their performance in DHS as contractual employee, including their experience. Such elements would be given due weightage in interaction or otherwise". Thus, it may be observed that both the Hon'ble Tribunal as well as Hon'ble High Court took note of the selection process which included personal talk/interaction and accordingly ordered that due weightage of performance and experience would also be given in the process of interaction. Accordingly, the Commission devised a revised criteria of assessment of suitability in respect of Applicants giving due weightage of their performance and experience would also be given in the process of interaction. Accordingly, the Commission devised a revised criteria of assessment of suitability in respect of Applicants giving due weightage of their performance and experience, as per directions of the Tribunal and High Court. There is no case of violation of direction of the Hon'ble Court. It may also be submitted that the Personal Talk has been an integral part of the selection process based on which 526 doctors were initially selected and 3 doctors were selected later. Solely because of the fact that the Applicant could not qualify again, the Applicant has chosen to challenge the selection process, which is devoid of any merit.

8.2 With regard to the averment made in para 7.2 (ii) above, it is respectfully submitted that as stated in the above para, it was the direction of the Learned Tribunal duly upheld by the High Court that due weightage of 'performance' and 'experience' would also be given in the process of interaction. Accordingly, to comply with the direction of the Hon'ble Court, the allocation of marks of Bio-data was revised and 50 additional marks were allotted for 'work experience'. Accordingly, total marks in Bio-data were increased from 50 to 100. The personal talk was held by the designated Selection Board (Assessment Board) consisting of experts in the relevant field of specialization who assess the candidates in a holistic manner on the basis of such questions as deemed fit for the post in overall public interest. Therefore, the fairness of the Assessment in the Personal Talk by the Board comprising of senior experts in that particular field may not be questioned just for the reason that three candidates (including the Applicant) were not assessed 'fit', out of a total of 532 candidates.

8.3 With regard to the averment made in para 7.2 (iii) above, it is respectfully submitted that the averment made by the petitioner is incorrect and baseless. Being an independent constitutional body, the Commission can devise its own methods for making fair and transparent selection. In order to recognize any additional qualification that the candidates would have been acquired subsequently during the course of their employment, the selection criteria need to give some allocation of marks on additional qualification as well. It is relevant to mention that this criteria has been adopted in respect of all the candidates. It is pertinent to submit that out of six doctors who did not qualify in the first assessment, three were assessed 'fit' in the second assessment later as per the revised criteria".

5. The applicant in her rejoinder to the reply filed by UPSC has by and large reiterated her stand and pleadings in the OA.

6. After completion of the pleadings the case was taken up for hearing the arguments of the parties on 07.02.2017. Arguments of Mrs. Rekha Palli, learned senior counsel together with Mrs. Poonam Singh, learned counsel for the applicant and Shri Naresh Kaushik, learned counsel for respondent No.1 and Shri Amit Anand, learned counsel for respondent No.2 were heard.

7. Besides reiterating the pleadings in the OA and the rejoinder, the learned senior counsel for the applicant stated that the applicant has been unfairly re-evaluated by the respondent No.1. She further submitted that the UPSC has completely ignored the work experience certificate issued to the applicant by Medical Superintendent, Guru Govind Singh Hospital, the certificate issued to her by Pioneers' Circle (page 316) and various other certificates issued to her by different organizations (pages 35-49). She vehemently argued that the professional profile of the applicant has also been noted by the Hon'ble High Court. She drew our attention to the observations made by the Hon'ble High Court in para-17 of its judgment dated 24.02.2011 in Writ Petition (civil) No.7318/2010 regarding the ACRs of the applicant, which reads as under:

“17. It is settled law that entries in the ACRs and in particular the adverse remarks are the subjective satisfaction of the concerned officer recording the ACR and/or the adverse remark, but that does not mean that the subjective

satisfaction can be whimsical. Objective facts have to be disclosed and once so disclosed, it would then be a matter of the subjective satisfaction and this would be in the domain of the officer concerned and hence immune from judicial intervention. But where no objective fact on which the subjective satisfaction is reached is shown to the Court, judicial intervention would require the Court to direct corrective action to be taken.”

7.1 She said that the UPSC seem to have got prejudiced against the applicant due to her filing a Contempt Petition before the Hon’ble High Court as the judgment of the Hon’ble High Court dated 24.02.2011 was not getting implemented. She further submitted that the Speciality Technical Committee (STC) of Directorate General of Health Services, GNCTD has co-opted the applicant to it, which has not been considered by the UPSC.

7.2 The learned senior counsel drew our attention to the judgment of the Hon’ble Supreme Court in the case of **National Institute of Mental Health and Neuro Sciences (NIMHANS) v. Dr. K. Kalyana Raman & Others**, [1992 Supp. (2) SCC 481]. In that case NIMHANS had invited applications for the post of Professor in Neurology. Two Doctors, namely Dr. Gauri Devi, who was then working as Associate Professor at the NIMHANS and Dr. Kalyana Raman, Associate Professor of Neurology at Peoria School of Medicines, University of Illinois, USA were the candidates. The Governing Body of NIMHANS constituted a Selection Committee, which selected Dr. Gauri Devi against the post. The unsuccessful candidate, Dr. Kalyana Raman challenged the said selection before

the Hon'ble High Court of Karnataka, which was allowed on the following grounds:

- i) that it was not possible to say with any degree of confidence that Dr. Kalyana Raman's case has received a fair and reasonable consideration at the hands of the Selection Committee; and
- (ii) that the Selection Committee has not given any reason, however brief, to establish any rational nexus between the facts said to have been considered by the Selection Committee and the conclusion drawn by it on the basis of those facts."

7.3 The judgment of the Hon'ble High Court of Karnataka was challenged by NIMHANS in Civil Appeal No.1537/1982, in which the Hon'ble Apex Court has made the following observations:

"The procedural fairness is the main requirement in the administrative action. The 'fairness' or 'fair procedure' in the administrative action ought to be observed. The Selection Committee cannot be an exception to this principle."

7.4 Concluding her arguments, the learned counsel prayed for the grant of the reliefs claimed by the applicant.

8. The learned counsel for respondent No.1-UPSC submitted that the applicant has been re-assessed by a Committee of Experts constituted by respondent No.1 and as such the said assessment is binding and cannot be questioned. He further stated that the two other Doctors, namely Dr. Saroj Bala and Dr. Vimla were re-assessed and rejected by the same Committee of Experts appointed by respondent No.1, had filed OA No.1556/2014 before this Tribunal praying for similar reliefs. The Tribunal, however, relying on a catena of judgments of Hon'ble Supreme Court dismissed the

said OA vide order dated 15.11.2016. The said order of the Tribunal also refers to the pendency of the present OA. The learned counsel relied on the following judgments of the Hon'ble Apex Court:

i) **R.S. Dass & Ors. v. Union of India & Ors.**, [1986 Supp (1) SCC 617], **Held:**

“There is no reason to hold that they would not act in fair and impartial manner in making selection. The recommendations of the selection committee are scrutinised by the State Govt. and if it finds any discrimination in the selection it has power to refer the matter to the Commission with its recommendations. The Commission is under a legal obligation to consider the views expressed by the State Govt. along with the records of officers, before approving the select list. The selection committee and the Commission both include persons having requisite knowledge, experience and expertise to assess the service records and ability to adjudge the suitability of officers. In this view we find no good reasons to hold that in the absence of reasons the selection would be made arbitrarily. Where power is vested in high authority there is a presumption that the same would be exercised in a reasonable manner and if the selection is made on extraneous considerations, in arbitrary manner the courts have ample power to strike down the same and that is an adequate safeguard against the arbitrary exercise of power.”

ii) **Union Public Service Commission v. L.P. Tiwari & Ors.**, [2006 (12) SCALE 278]; **Held”**

“It is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Such view was reiterated as late as in 2005 in the case of U.P.S.C. vs. K. Rajaiah & Ors., reported in (2005) 10 SCC 15, wherein the aforesaid Rules for the purpose of promotion to the I.P.S. Cadre was under consideration. Apart from the above, at no stage of the proceedings, either before the Tribunal or the High Court or even before this Court, has any allegation of mala fides been raised against the Selection Committee and the only grievance is that the Selection Committee erred while making assessment of the comparative merits of the respective candidates.”

iii) **B.C. Mylarappa @ Dr. Chikkamylarappa v. Dr. R. Venkatasubbaiah and Ors.**, [(2008) 14 SCC 306]; **Held:**

“In the absence of any rule or regulation requiring the Board to record reasons and in the absence of mala fides attributed against the members of the Board, selection made by the Board without recording reasons cannot be faulted with.”

8.1 Shri Kaushik vehemently argued that the applicant after having participated in the selection process cannot question the selection at this stage and that this OA may be disposed of in terms of the order of this Hon’ble Tribunal dated 15.11.2016 in OA No.1556/2014.

9. The learned counsel for the respondent No.2 adopted the arguments of learned counsel for respondent No.1.

10. We have given our thoughtful consideration to the arguments put-forth by the learned counsel for the parties and have also perused the pleadings and documents annexed thereto. A similar matter has already been considered by the Tribunal in OA-1556/2014, and decided vide order dated 15.11.2016. The case of the two applicants therein was identical to that of the present applicant. The Coordinate Bench while dismissing OA-1556/2014 has considered a catena of judgments of the Hon’ble Supreme Court on the issue. The gist of all the judgments is that after having participated in the selection process and having been declared unsuccessful, a candidate cannot question the selection process.

For clarity, we would like to extract the relevant portion from the said order:

“51. Moreover, it is trite law that after having participated in the selection process, and having been unsuccessful, and having failed to be selected in the process of selection, the persons not selected cannot turn around and question the whole process of selection undertaken. In the instant case, the two applicants of this OA had, like the applicant of OA No.380/2015 – Dr. Beena Aggarwal, willingly participated in the process of assessment undertaken from 27.03.2012 to 04.04.2012 by the Respondent No.5-UPSC, and had been declared unsuccessful, alongwith three others. When the orders thereafter obtained by those six unsuccessful persons from a Coordinate Bench of this Tribunal, for their re-assessment being taken up, were challenged before the Hon’ble Delhi High Court, the Hon’ble Delhi High Court had ordered for such reassessment to be undertaken, as already discussed above. Even after such a reassessment was conducted on 21.02.2014, the two applicants, along with the third applicant Dr. Beena Aggarwal in OA No.380/2015, had still not been found suitable, even after such reassessment. When 529 Doctors have been so found to be suitable to be inducted into the new cadre at the time of the initial constitution of the DHS, including the three Doctors re-assessed on 21.02.2014, and only the two applicants before us, along with one more Dr. Bina Aggarwal, whose OA still pending for adjudication, were not so selected, they cannot now, after having voluntarily participated twice in the process of their assessment, turn around and challenge such process of assessment. The law in this regard has been laid down by the Hon’ble Apex Court in the following cases:

- “i) **Madan Lal vs. State of J&K: AIR 1995 SC 1088;**
- ii) **Dhananjay Malik & Ors. vs. State of Uttaranchal & Ors.: AIR 2008 SC 1913: (2008) 4 SCC 171;**
- iii) **National Institute of Mental Health & Neuro Sciences vs. Dr. K.Kalyana Raman & Ors. AIR 1992 SC 1806;**
- iv) **Osmania University Represented by its Registrar, Hyderabad, Andhra Pradesh vs. Abdul Rayees Khan: (1997) 3 SCC 124;**
- v) **K.H. Siraj vs. High Court of Kerala & Ors. (2006) 6 SCC 395;**
- vi) **University of Cochin Rep., by its Registrar vs. N.S. Kanjoonjamma and Others, AIR 1997 SC 2083;**

- vii) **K.A. Nagamani vs. Indian Airlines & Ors., (2009) 5 SCC 515;**
- viii) **Amlan Jyoti Borooah vs. State of Assam & Ors., (2009) 3 SCC 227;**
- ix) **Manish Kumar Shashi vs. State of Bihar & Ors. (2010) 12 SCC 576;**
- x) **Chandra Prakash Tiwari & Ors. vs. Shakuntala Shukla & Ors., (2002) 6 SCC 127: 2002 SCC (L&S) 830;**
- xi) **Union of India & Another vs. N. Chandrasekharan & Ors. (1998) 3 SCC 694.”**

11. We are of the considered opinion that the instant case is fully covered by the judgment of the Coordinate Bench of this Tribunal dated 15.11.2016 in OA-1556/2014 and hence in terms of the *ibid* judgment, the OA is dismissed.

12. No order as to costs.

(K.N. Shrivastava)
Member (A)

(V. Ajay Kumar)
Member (J)

‘San.’