

**CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.**

ORIGINAL APPLICATION NO.504/2017

this the ^{6th} day of June, 2018

CORAM:- HON'BLE R.VIJAYKUMAR, MEMBER (A)

HON'BLE RAVINDER KAUR, MEMBER (J)

1. Vinayak Devidas Chaudhari Son of Devidas Tukaram Chaudhari, Aged 36 years, Working as Fireman in Ordnance Factory Bhusawal, Residing at 24/182 Type II, Subhash Nagar, Ordnance factory Estate, Bhusawal:425203.

2. Devendra Dilip Wykole, Son of Dilip Jayram Wykole, Aged 27 years, Working as Fireman in Ordnance Factory Bhusawal, Residing at Govind Colony, Behind Suhas Hotel, Bhusawal:425201.

3. Ashwajeet Pralhad Lokhande, Son of Pralhad Pandurang Lokhande, Aged 32 years, Working as Fireman in Ordnance Factory Bhusawal, Residing at 13/95 Type II, Subhash Nagar, Ordnance Factory Estate, Bhusawal:425203.

4. Vijaykumar Prakash Wankhede, Son of Prakash Baburao Wankhede, Aged 38 years, Working as Fireman in Ordnance Factory Bhusawal, Residing at Plot No.10, vijay Niwas, Golani Complex, Varangaon Road, Bhusawal:425201.

...Applicants

(By Advocate Shri S.V.Marne)

Versus

1) Union of India, Through the Secretary, Ministry of Defence, Department of Defence Production, South Block, New Delhi-110001.

2) The Chairman, Ordnance Factory Board, Shahid Khudiram Bose Marg, Kolkatta-700001.

3) The General Manager, Ordnance Factory, Bhusawal, Dist. Jalgaon, Pin 425203.

....Respondents

(By Advocate Shri V.S.Masurkar)

Reserved on :- 05.04.2019

Pronounced on:- 6.6.2019

O R D E R

R. Vijaykumar, Member (A)

This application has been filed on 17.8.2017 under section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

- a) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same restrain the Respondents from terminating the services of the Applicants from the post of Fireman,
- b) This Hon'ble Tribunal may graciously be pleased to hold and declare that the Applicants have been validly appointed on the post of Fireman in Ordnance Factory, Bhusaval and have attained status of permanent employees of Ordnance Factory, Bhusaval,
- c) Costs of the application be provided for.
- d) Any other and further order as this Hon'ble Tribunal deem fit in the nature and circumstances of the case be passed."

2. The respondents are alleged to have issued an advertisement on 3.9.2011 in unreserved category in the Employment News for filling up one post of Fireman. This advertisement is not attached or impugned, nor are the details of community category mentioned for the post of Fireman that was so advertised in the manner and against which it would appear that applicant No.1 was appointed. Immediately thereafter, the respondents issued a

second advertisement on 31.10.2011 wherein they have advertised for three additional posts of Fireman with two in OBC category and one in Unreserved category and have referred to the previous advertisement for one post in the following terms:

"Note: One post of Fireman (Unreserved Category) is already advertised and published in Employment News dt. 24-30 Sept'2011. Those who have already applied against this advertisement need not apply again".

3. The qualifications prescribed in the second advertisement which are presumed to be identical to the one in the previous advertisement were as below:

"01. Fireman:

(A) Age Limit: 18 to 35 years (relaxable up to 03 years for OBC candidates)

(B) Qualification:

Essential (i) Matriculation or equivalent passed. Must have adequate knowledge of Operational use of Fire-fighting Equipment. (ii) Must be physically fit and capable of performing strenuous duties. This requirement will be tested as under.

(a) height without shoes 165 cms.

(b) Chest (unexpanded) 81.5 cms

Weight 50 kgs minimum

Endurance test: (a) Carrying a man (Fireman lift of 63.5 Kgs. to a distance of 183 mtrs. within 95 seconds)

(b) Clearing 2.7 metres. wide ditch landing on both foot (long jump)

(c) Climbing 3 metres. Vertical rope using

hands and feet".

This would be a subject of verification and based on which the following analysis progresses.

4. Thereafter, after following the selection procedures specified, applicant No.1 was appointed in order No.687 dt. 11.5.2012 (Annexure A4) w.e.f. 11.5.2012 whereas, applicants No.2, 3 and 4 were appointed in order No.585 dt. 19.4.2012 w.e.f. 19.4.2012. The terms and conditions in the appointment letter specified a two year period of probation and on satisfactory completion of probation, the appointment and service would be temporary. It is also specified at condition 8 that "Your services will be terminated at any time without notice if any adverse remarks received at a later date from Civil authorities".

5. A seniority list of Fireman as on 1.1.2015 had been notified by respondents in which applicants 2, 4, 3 and 1 are at Sl.Nos.7 to 10 of the 10 persons listed. The applicants had assumed their posts on 19.4.2012 for A-2, 3, 4 and on 11.5.2012 for A-1 and are continuing in their posts and were also deputed for training at the Ordnance Factory Institute of Learning, Ambazhari, Nagpur wherein they had completed a written test and

practical training. The orders recording their satisfactory completion of probation on completion of two years from date of joining were also issued in May/June, 2014. They have come to learn that certain complaints were made by some ex-employees alleging irregularities in the selection process and that the selection was not in conformity with SRO 141 dt. 20.11.2006. On this basis, the applicants apprehended that their services would be terminated and on this apprehension the mothers of the applicants filed appeals to the Hon'ble Prime Minister on 15.8.2017. The matter was heard on 21.8.2017 and an order of status quo was granted, which continues till date.

6. The applicants in their pleadings state that on completion of their probation in 2014, their services should have been confirmed rather than to confer temporary status as mentioned in their offer of appointment. Moreover, after probation and satisfactory services of three years subsequent to probation, the respondents were attempting to terminate them without following the rules of natural justice. The respondents had filed their reply on 18.9.2017 and on the same day, the applicants also have filed an MA No.562/2017 to

amend the OA and to include the termination order dt. 22.8.2017 which had subsequently been kept in abeyance in orders dt. 23.8.217 (Annexure A-11, A-12). The respondents have also filed reply to the OA and MA and further, applicants have filed a rejoinder. Applicants have also filed another MA No.509/2017 seeking permission for Joint Petition which also pends consideration. MA No.582/2017 has been filed by respondents for vacation of ex-parte interim orders and is held over for decision.

7. In their reply, respondents have stated that the qualifications mentioned in the advertisements issued in 2011 were not in consonance with SRO 141 dt. 20.11.2006 as amended on 7.1.2008 and which was applicable at that point in time. This SRO specified the qualifications for the post of Fireman as:

- " (i) Matriculation
- (ii) Must have completed basic course on elementary fire fighting from an recognized Institute. *
- (iii) Must be physically fit and capable of performing strenuous duties. This requirement will be tested as under.
 - (a) Height without shoes 165 cms.
 - (b) Chest (unexpanded) 81.5 cms
(expanded) 85 cms
 - (c) Weight 50 kgs. minimum
Endurance test.
 - (d) Carrying a man (Fireman lift of 63.5 kgs to a distance of 183

- mtrs. within 96 seconds)
- (e) Clearing 2.7 mtrs. wide ditch landing on both feet (long jumps).
- (f) Climbing 3 mtrs. vertical rope using hands and feet.

Note:-Concession of 2.5 cms. in height or chest may be allowed for the members of Schedule Castes or Schedule Tribes candidates from hill areas.

* (i) The duration of the Basic Fire Fighting course will not be less than 6 months

(ii) The institutes offering Basic courses on Fire Fighting should be recognized by State Govt./Govt. of India.

Authority: OFB's letter No.283/RR/FFS/A/NI dt.07.01.2008".

The respondents have presented a chart showing the manner in which the qualifications and the eligibility of the four applicants differed from the requirements of SRO 141:

Name	C a t e g o r y	D.O.B.	Age on last date of submis- sion of applica- tion	Age per SRO 141	Experience certificate duration	Experien ce per SRO 141, OFB clarific ation
Devendra Dilip Waykole	OBC	01/08/91	20 years, 05 months, 12 days	Between 18 and 25 years	01 year (part time)	Must have complete d basic course on elementa ry firefigh ting from an recogniz ed institut e & the duration of the basic
Ashwajet P.Lokhan de	Genl	02/05/85	26 years, 08 months, 26 days	(Relaxab le up to 35 years for	01 year	
Vijaykum ar P.Wankhe de	Genl	09/04/79	32 years, 07 months, 06 days	Departme ntal candidat es or in	13 days	
Vinayak Devidas Chaudhar i	OBC	04/04/82	29 years, 06 months, 10 days	accordan ce with the instruct ions issued by the	07 months	

				Governme nt from time to time		firefigh ting course will not be less than six (6) months. The institut es offering basic courses on firefigh ting should be recogniz ed by State Governme nt of India
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They state that the matter had come to the knowledge of the Chief Vigilance Officer, OFB, Kolkata, and since the selection procedure was not in compliance with the SRO 141/2006, the OFB came to the conclusion that the selection of the four candidates was invalid for this reason and the respondent No.2 approved the initiation of proceedings for termination of the above four selected candidates with the following instructions:

" As indicated in the above paras and available records CVO has come to the conclusion that the selection of all the above four candidates is invalid due to flawed selection procedure and not as per extant SRO 141 of year 2006 and OFB Instructions No.288/RR/FFS/A/NI dt. 07.01.2018, DGOF & Chairman/OFB has

endorsed the views of CVO/OFB.

DGOF & Chairman/OFB has approved for initiation of proceeding for termination of the above four selected candidates as recommended by CVO by following due process as per Service Law.

02 Accordingly, the factory is hereby directed to initiate proceedings for termination of the abovementioned candidates by following due process as per Service law immediately".

They pointed out that at the time when this OA was filed on 17.8.2017, there was no cause of action and only apprehension on the part of applicants and orders of termination were issued only subsequently which, they assert, was in accordance with law. They also state that the contention of the applicants that their probation period was completed was incorrect since as per extant rules the case of such persons who have completed probation period has to be placed before a DPC for confirmation and when this action for confirmation was initiated, it was informed by the Director (Vigilance), Ordnance Factory, Ambazhari that a vigilance investigation was in progress and therefore, the applicants continued to be temporary employees. Hence, in terms of the orders of appointment, they could be terminated at any time without notice and this was the basis for issuing

the orders of termination. The applicants have not challenged the conditions specified in the offer of appointment in 2012 or 2014 and cannot object at the present stage. They also emphasize that the applicants are lacking the qualifications required as per SRO 141/2006.

8. The applicants have filed a rejoinder arguing that various factories across the country continued to operate the previous SRO No.14(E) of 1989. Now even SRO 141 has been replaced by SRO 32 dt. 4.5.2012. They submit that R-3 followed SRO 14(E) while issuing the advertisement and applicants are not to be blamed and it is for respondents to explain how they could hold the applicants liable for their own error. Further, respondent No.2 was aware of the progress of recruitment and never raised any objection nor communicated these objections to R-3 who was conducting the selection. The applicants satisfied the requirements of the advertisement although admittedly not of SRO 141. They also state that they have relevant certificates of their qualifications which can always be verified by the respondents and that they were fully in compliance with the specifications of adequate knowledge of

operational use of Fire Fighting Equipments mentioned in the advertisement. They deny the correctness of the Vigilance report and state that the respondents never followed the procedure required as per service law prior to issue of termination orders although this was specified in the orders of R-2. They further refer to the fact that the respondents have overlooked similar appointments made in other Factories under R-2 and in the same Factory of one Shri M.D.Sonawane, who was recruited in 2011 under the previous SRO and should have been dealt with similarly, but that has not been done. They emphasize that the applicants had been working for five years at the time when they filed this OA and it cannot be argued by respondents that they continued to be holding temporary status throughout this period although they had completed the prescribed period of two years of probation successfully.

9. During arguments for final hearing learned counsels for the applicant and respondents were heard at length and we have carefully considered the facts and circumstances, law points and rival contentions in the case.

10. M.A. No.509/2017 for Joint Petition is

allowed on the basis that all four applicants were recruited in a common selection although one applicant was recruited under the first advertisement of June, 2011 and the other three applicants were recruited in terms of the advertisement of October, 2011. The first advertisement was for one UR and the other two were for two OBC and one UR candidates. The present applicants are noted in the seniority list (MP-5) filed by applicant as three UR and one SC (Applicant No.3) candidate which is clearly a discrepancy in terms of the advertisement itself, since no SC post was notified and two vacancies are specifically kept for OBC candidates. In contrast, the appointment orders at Annexures A-2 & A-5 make no mention of this fact. However, while noting this obvious conflict between the reservation requirements that had to be followed and which had been prescribed in the orders of R-2 for conducting the selection and has evidently not been followed in a faithful manner, in the facts and circumstances stated, we allow the MA No.509/2017 for Joint Petition for the purposes of further consideration of this case.

11. M.A. No.562/2017 for amendment of the OA to

include termination order passed before receipt of interim orders of this Tribunal is also allowed in view of the stage of proceedings in this matter.

12. M.A. No.528/2017 dt. 4.9.2017 for vacation of interim orders have been rendered infructuous by the continuance of proceedings and is accordingly closed.

13. At the outset, it is observed that it is the settled law that an advertisement inviting applications cannot specify qualifications contrary to the concerned SRO which is extant and applicable at the time of advertisement and for receiving applications and considering them for selection. The advertisement is evidently based on an Executive Instructions but executive instructions must run subservient to the statutory provisions and such Executive Instructions shall be inoperative if these are contrary to provisions of statutory rules. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation - **State of H.P. v.**

Suresh Kumar Verma - 1996(7) SCC 562. Again in State of Sikkim v. Dorjee Tshering Bhutia - AIR 1991 SC 2148, it is held,

"It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity".

In this case, the advertisement is admittedly in direct conflict with SRO 141 of 2006 as amended in 2008 and as hazarded by the applicants, it has evidently been issued by following SRO No.14(E) in the year 1989. The applicants have challenged the amendment of 2008 which required a six month Fire Fighting Course and is reproduced below:

- " (i) Matriculation
- (ii) Must have completed basic course on elementary fire fighting from an recognized Institute.*
- (iii) Must be physically fit and capable of performing strenuous duties. This requirement will be tested as under.
 - (a) Height without shoes 165 cms.
 - (b) Chest (unexpanded) 81.5 cms
(expanded) 85 cms
 - (c) Weight 50 kgs. minimum
Endurance test.
 - (d) Carrying a man (Fireman lift of 63.5 kgs to a distance of 183 mtrs. within 96 seconds)
 - (e) Clearing 2.7 mtrs. wide ditch landing on both feet (long jumps).
 - (f) Climbing 3 mtrs. vertical rope using hands and feet.

Note:-Concession of 2.5 cms. In height or chest may be allowed for the members of Schedule Castes or Schedule Tribes candidates from hill areas.

- * (i) The duration of the Basic Fire Fighting course will not be less than 6 months
- (ii) The institutes offering Basic courses on Fire Fighting should be recognized by State Govt./Govt. of India.

Authority: OFB's letter
No.283/RR/FFS/A/NI dt.07.01.2008".

The applicants have denied the validity of this amendment but have not produced any evidence to support this statement which is clearly inadmissible in the face of the evidence produced by respondents (Annexure-R3). The applicants have urged in rejoinder that one Shri Sonawane recruited in the year 2011 has not been similarly dealt with since the respondents were following SRO 14E even at that time. That is definitely a matter for respondents to examine and take appropriate action. However, that does not mean that illegalities contrary to statute can to be perpetuated and applicants cannot raise an argument that such illegalities should be perpetuated in their favour.

14. The applicants have argued that they had been employed for five years by the time they filed this OA and when they received the orders of termination. However, when the appointment itself

has been made in a manner contrary to the law as set out in the SRO notified under the proviso to Article 309 of the Constitution, a defence of this kind cannot be sustained as their appointment is itself contrary to the equality provisions of the Constitution especially since, as applicants admit, more than 100 candidates competed. In such matters, it is the statute comprised in the extant SRO No.141 dt. 2006/2008 that will prevail over any incorrect advertisement that may have been published by respondents. It may be argued that the long period of time suggests that the matter has become stale and that an old issue is being brought into play to the disadvantage of the respondents. However, in this case it is evident that the complaints about the manner in which the selection had been done arose much later and once the respondents took cognizance of the matter, they have acted swiftly.

15. In the matter of the procedure followed by the respondents in terminating the applicants it is clear that Respondent No.2 too had issued directions to respondent No.3 to follow the required procedure as per service law. Instead, the respondents have claimed that the applicants

continued to be holding temporary status and therefore, under the terms of appointment, they can be discharged without issue of show cause notice. The applicants have argued that their probation had been completed and therefore the question of temporary status simply did not arise and the respondents should rightly have confirmed them after completion of probation. Further, there is no blemish in the service even subsequent to confirmation of probation. The applicants received these orders in 2012 and 2014 but have challenged this aspect of the orders only in 2017 when limitation is attracted but no application with reasons have been filed for condonation of delay. However, reference to the appointment letter shows that there is no closing period for converting the temporary status of the appointee to permanent status and in terms of this letter of appointment, a new entrant would continue to hold temporary status even up to the date of superannuation. The respondents have offered no defence on this paradoxical situation and the circumstances under which such an appointment letter was issued. Therefore, given the ambiguity and lack of clarity in this matter, the correct procedure to be

followed by the respondents and in keeping with the principles of natural justice, is that they should have issued a show cause notice setting out the facts and law and directed the concerned applicants to provide an explanation and then to obtain orders of the Competent Authority. This elementary principle has not been followed in this case and therefore, the orders of termination are clearly bad in law and need to be quashed.

16. Subsequent to the recruitment that took place in 2011/2012, the respondents have issued a fresh SRO No.32 dt. 4.5.2012 with a different age limit and with relaxations in age for SC/ST. They have also marginally modified the qualifications for the post by relaxing the course specifications. Therefore, if the respondents issue a fresh advertisement to fill up the vacancies consequent upon removal of the applicants and other unqualified persons, the new advertisement would have to conform to SRO 32 dt. 4.5.2012. In that case, the applicants may have a disadvantage because they have already spent a number of years in the service of the respondents. In such a case, it would be appropriate that the respondents grant them age relaxation equal to the period spent in

service with the respondents from date of appointment up to the date of filing this OA, the later period post-OA being held by virtue of the stay obtained in litigation. The technical qualifications of the applicants shall also now include whatever training they may have obtained from a government recognized institute in the subsequent period.

17. In the circumstances, the impugned orders of termination issued by respondents dt. 22.8.2017 are quashed and the applicants are restored to service. The respondents are directed to take fresh action in the manner as already directed by respondent No.2 in accordance with the principles of natural justice in an unbiased manner for all similarly placed recruits appointed de hors the extant recruitment rules and then, after taking necessary action to take a decision based on the explanations furnished by the applicants, if so required, to grant them their entitled exemptions as per actual experience with the respondents in age for the purpose of enabling them to compete for the posts so advertised. In respect of the fresh proceedings to be initiated by the respondents against the present applicants and others similarly

placed, the final orders of the respondents shall be communicated to the applicants within two weeks of receipt of their explanations and the applicants shall have a further two weeks' time during which, if any adverse orders are passed, status quo ante shall continue. This OA is allowed in the above terms, without any order as to costs.

(Ravinder Kaur)
Member (J)

(R. Vijaykumar) b/v/
Member (A)

B.

JD
07/06/19