

(2012) 08 SHI CK 0083
In the High Court Of Himachal Pradesh
Case No : CWP (T) No. 12595 of 2008

Dr. Amin Chand

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 07-08-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (2012) 08 SHI CK 0083

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Dilip Sharma, with Mr. Umesh Kanwar, CWP T Nos. 12595, 12596, 12597, 12598 and 12599 of 2008, Ms. Madhu Sharma, vice Mr. Ashwani K. Sharma, CWP T Nos. 13675, 13676 and 16167 of 2008. and Mr. Manish Sharma, vice Mr. Y.W. Chauhan, CWP T No. 11172 of 2008, for the Appellant; Vikas Rathore, Dy. A.G. for the respondents in all the petitions, for the Respondent

Final Decision : Allowed

Judgement

Justice Rajiv Sharma, Judge.

1. Since common questions of law and facts are involved in all these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, for clarity sake, facts of CWP (T) No. 12595 of 2008 have been taken into consideration. Respondent-State has framed rules called "The Himachal Pradesh Department of Indian System of Medicine and Homoeopathy, Ayurvedic Chikitsa Adhikari (Class-II-Gazetted) Recruitment and Promotion Rules, 1992" (hereinafter referred to as the "Rules" for brevity sake) under Article 309 of the Constitution of India. According to rule 10, 50% posts were to be filled up by direct recruitment and 50% on batch-wise basis. The minimum essential qualification for filling up the post of Ayurvedic Chikitsa Adhikari was Matric or equivalent in full subjects recognized by the Himachal Pradesh Board of Secondary Education/H.P. University and recognized degree in Ayurveda/Unani (Tibbi) of not less than 5 years duration from a recognized

University/Board established by law or Institution recognized by Central/State Government/C.C.I.M. with compulsory rotatory internship wherever required by the Central Council of Indian Medicine. Rule 18 empowers the State Government to relax the rigours of the Rules. An amendment was carried in rule 10 of the Recruitment and Promotions Rules vide notification dated 6.8.1994 whereby recruitment to the post of Ayurvedic Chikitsa Adhikari was to be made 100% by way of direct recruitment. The Commissioner-cum-Secretary (Health) sent a communication to the Director Ayurveda dated 10.5.1996 laying down the procedure for making appointments of Ayurvedic Chikitsa Adhikaris on batch-wise basis. According to the communication sent by the Commissioner-cum-Secretary (Health), there was provision for one time batch-wise recruitment to be carried out for 124 vacancies as per reservation policy applicable to Class-II Gazetted posts. The Selection Committee was required to screen the candidates whose names were to be sponsored by the Employment Exchanges. The Selection Committee comprised of Director Ayurveda, Himachal Pradesh, Chairman, Joint Secretary (Health), Member and Dr. Pawan Vats, Expert Member. Thereafter, the Commissioner-cum-Secretary (Ayurveda) sent a communication to the Director Ayurveda, Himachal Pradesh on 28.11.1998 informing the decision to fill up 50% posts of Ayurvedic Chikitsa Adhikaris lying vacant against reserved quota of S.C./S.T. categories from General category on ad hoc basis for a maximum period of three years purely on batch-wise basis subject to the conditions that the resultant vacancies by way of regularization of ad hoc appointees against general quota on batch-wise were to continue to remain available for reserved categories in future. In sequel to letters dated 10.5.1996 and 28.11.1998, process for filling up posts of Ayurvedic Chikitsa Adhikaris was initiated. It led to the appointment of 50 Ayurvedic Chikitsa Adhikaris vide letter dated 23.1.1999 on ad hoc basis. Petitioner and similarly situate persons were also issued interview letters. Interviews were held between 29.12.1998 to 2.1.1999 and 23.1.1999 to 1.2.1999 and 24.2.1999. Petitioner and similarly situate persons, whose names were sponsored by the Employment Exchanges, were appointed as Ayurvedic Chikitsa Adhikaris vide Annexure PB in the pay scale of Rs. 7000-10980 with N.P.A. as admissible to other Ayurvedic Chikitsa Adhikaris on contract basis. The appointment was made for a period of one year. According to condition No. 3 of Annexure PB, petitioner and similarly situate persons were to be paid during the service, the minimum of the scale of the Ayurvedic Chikitsa Adhikaris and they were entitled to draw all allowances as are admissible to regularly appointed Ayurvedic Chikitsa Adhikaris. Petitioner and similarly situate persons were repatriated to Ayurveda Department on 13.11.2003 vide Annexure S-6. Their pay was fixed at Rs. 8100/- instead of paying them regular pay scale of Rs. 7000-10980. 22 Ayurvedic Chikitsa Adhikaris, who were appointed on ad hoc basis, were regularized in the month of June, 1999 and the remaining were regularized in the month of November 2003. Petitioners were neither paid increments nor any deduction was made towards G.P.F. subscription. Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis were granted benefits like regular pay scale and regular increments etc. Medical

Officers appointed on ad-hoc/contract basis by the State Government in Health Department were also granted regular pay scale with increments and N.P.A. and they were also assigned G.P.F. number. Petitioners and similarly situate persons, who were appointed on contract basis, were regularized on 25.11.2008. Mr. Dilip Sharma, learned Senior Advocate has strenuously argued that the names of the petitioner and similarly situate persons were sponsored by the Employment Exchanges. They were duly qualified and they have undergone through the same selection process which has been undertaken by the Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis. He further argued that though the petitioner and similarly situate persons were appointed on contract basis, but they were paid regular pay scale with increments and no agreement was ever entered into between the petitioner and the State Government. He then argued that condition No. 3 of Annexure PB dated 30.3.1999 was unconscionable arbitrary and discriminatory, thus, violative of Articles 14 and 16 of the Constitution of India. He further argued that there was no difference in the duties discharged by the petitioners vis-?-vis Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis in the year 1999. He further argued that petitioners have been discriminated by the State Government by denying them regular pay scale with regular increments and deduction of G.P.F. vis-?-vis Ayurvedic Chikitsa Adhikaris/Medical Officers appointed on ad hoc basis in the Ayurveda Department and in the Health Department. He lastly contended that the pay of the Medical Officers appointed on contract/ad hoc basis has been protected by the State Government vide letter dated 5.3.2007 (Annexure S-9).

2. Mr. Vikas Rathore, learned Deputy Advocate General has vehemently argued that as per condition No. 3 of Annexure PB, petitioners are only entitled to minimum of the pay scale. He then argued that it was always open to the petitioner and similarly situate persons to accept or not to accept the offer of appointment. He further contended that Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis form a separate class vis-?-vis Ayurvedic Chikitsa Adhikari appointed on contract basis.

3. I have heard the learned counsel for the parties and have perused the pleadings carefully.

4. According to the Recruitment and Promotion Rules, initially the recruitment of Ayurvedic Chikitsa Adhikaris was to be made 50% by direct recruitment and 50% on batch-wise basis. An amendment has been carried on 6.8.1994 whereby the post of Ayurvedic Chikitsa Adhikari was to be filled up 100% by direct recruitment. However, State Government by invoking rule 18 decided to fill up 124 posts of Ayurvedic Chikitsa Adhikaris on batch-wise basis. The process was commenced for filling up the posts of Ayurvedic Chikitsa Adhikaris on the basis of letters dated 10.5.1996 and 28.11.1998. Petitioner and similarly situate persons have also got their names registered in the Employment Exchanges. 50 Ayurvedic Chikitsa Adhikaris were appointed on ad hoc basis on 23.1.1999. These incumbents were appointed in Ayurveda Department. Petitioner, who was

interviewed by the duly constituted Selection Committee, was offered appointment as Ayurvedic Chikitsa Adhikari on contract basis vide letter dated 30.3.1999 in the Health Department. Pay scale of Rs. 7000-10980 was prescribed. The fact of the matter is that though the petitioner was appointed on contract basis in Health Department, but he was paid regular pay scale, increments and N.P.A. and he was assigned G.P.F. number. Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis on 23.1.1999 were also being paid regular pay scale of Ayurvedic Chikitsa Adhikari with increments, N.P.A. etc. Petitioner and similarly situate persons were repatriated by the Health Department on 13.11.2003. Petitioner's pay was fixed at Rs. 8100/-. He was denied the regular increments and respondent-State also stopped deducting G.P.F subscription from the salary of the petitioner. He has been regularized on 25.11.2008. Though similarly situate incumbents, who were appointed on ad hoc basis in the month of January, 1999 were regularized in the month of June, 1999 and November, 2003. The Medical Officers, who were appointed in the Health Department on ad hoc/contract basis, were also being paid regular pay scale with increments. There was condition No. 3 enumerated in Annexure PB, but no agreement was ever entered between the petitioner and State Government. Respondent-State was directed to file supplementary affidavit whether any agreement was entered between petitioner and the State Government. The supplementary affidavit was filed by the respondent-State dated 23.5.2012 whereby it is specifically mentioned that no agreement was entered between the State Government and petitioner. Thus, it is evident that respondent-State has waived condition No. 3 and petitioner and similarly situate persons were being paid regular pay scale with increments and the deductions were being made towards G.P.F. subscription at par with the Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis in Ayurveda Department and Medical Officers appointed on ad hoc/contract basis in the Health Department.

5. Petitioner and similarly situate persons were duly qualified and their names were sponsored by the Employment Exchanges. They were interviewed by the same Selection Committee, which recommended the names of Ayurvedic Chikitsa Adhikaris for appointment on ad hoc basis in the year 1999 in the Ayurveda Department. It is not the case of the respondent-State that petitioner and similarly situate persons were not discharging the same and similarly duties being discharged by the Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis in the Ayurveda Department. Petitioner and similarly situate persons have been paid regular pay scale with increments till their repatriation from the Health Department.

6. According to the respondent-State, persons, who are appointed on contract basis, cannot be compared with the incumbents appointed on ad hoc basis as Ayurvedic Chikitsa Adhikaris. The appointments made on contract basis are to be treated at par with the ad hoc appointees. Petitioner and similarly situate persons though initially appointed for a period of one year but have been permitted to work for a period of about ten years on contract basis. Thereafter,

their services were regularized. Ad hoc appointees, who were appointed on ad hoc basis, were regularized in the month of June, 1999 and the remaining were regularized in the month of November, 2003. In the Health Department, Medical Officers who were appointed on ad hoc/contract basis, were being paid regular pay scale with increments and their pay has been protected as per Annexure S-9. In the case of petitioner and similarly situate persons, the employer is the same, i.e. State. Petitioners have been discriminated against by the respondent-State by not paying them regular pay scale at par with the Ayurvedic Chikitsa Adhikaris/Medical Officers appointed on ad hoc basis in Ayurveda Department and Health Department. Conditions of service of the petitioner and similarly situate persons were to be regulated at par with the Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis in the Ayurveda Department. In the present case, petitioners have rightly invoked "equal pay for equal work". Respondent-State cannot treat equal as unequal.

7. The matter is required to be considered from another angle. Condition No. 3 imposed in Annexure PB is unconscionable and arbitrary. Respondent-State could not take advantage of its superior bargaining power. There cannot be waiver of fundamental and legal rights. Condition No. 3 has apparently been waived by the respondent-State by granting the petitioner and similarly situate persons regular pay scale till they were working in the Health Department and no agreement was ever entered between the petitioner and respondent -State.

8. Petitioners are claiming parity with Ayurvedic Chikitsa Adhikaris appointed on ad hoc basis in Ayurveda Department and the Medical Officers appointed in Health Department. Petitioners have specifically assailed condition No. 3 contained in Annexure PB. The Court is of the considered view that condition No. 3 was unconstitutional being violative of Articles 14 and 16 of the Constitution of India. This condition was also unconscionable and oppressive. Petitioners are, thus, entitled to the regular pay scale, which was being paid to the Ayurvedic Chikitsa Adhikaris, appointed on ad hoc basis and Medical Officers appointed on ad hoc/contract basis, with increments and deductions of G.P.F., appointed in the Ayurveda Department and in the Health Department minus the amount which they have already received.

9. The Division Bench of this Court in Baldev Singh and others versus State of H.P. and others, Latest HLJ 2009 (HP) 293 has held that the contract appointees are at par with ad hoc. The Division Bench has held as under:

15. The contention of the State that the employees" appointed on contract basis are lower in status to the ad hoc employees and therefore, cannot be granted salary during the vacations is totally ill founded. In fact, a contractual employee has been appointed after following some procedure even though the procedure may not be in accordance with rules. His status is better than that of an ad hoc employee who may be appointed without following any procedure whatsoever. The apex Court in Rattan Lal and Others Vs. State of Haryana and Others, has clearly held that the persons appointed on ad hoc basis are entitled to salary for

the vacations and the State being a model employer cannot follow invidious method of making public appointments from the first day of the academic term and terminate the appointment on the last date of the academic term. The teachers were appointed on contract basis have worked for a period of more than 2 to 3 years and cannot be deprived of the benefit of salary for the vacation period.

16. In view of the above discussion, we dispose of the writ petitions by summarizing our findings as follows:

- i) that the State should normally not make any appointment without following the R & P rules;
- ii) that in a situation where the State or its instrumentalities are forced to make public employment without following the R & P rules, we recommend that the approval of the Administrative Secretary not below the rank of Principal Secretary should normally be obtained after given complete reasons, in respect of each post, as to why the post could not be filled up by following the R & P rules;
- iii) that the appointees on contract basis are to be treated at par with the ad hoc appointees;
- iv) that this court has no power to direct the State to regularize the services of any employee appointed without following the R & P rules;
- v) that this court cannot direct the State to frame a policy of regularization; and
- vi) that the State must follow the principle of "last come first go" as enumerated above vis-?-vis the employees who are appointed de hors the rules.
- vii) that normally the State should not regularize the employees appointed without following the rules since this adversely affects the rights of many eligible candidates.

Accordingly, in view of the findings and analysis made hereinabove, all the petitions are allowed. Respondents are directed to pay the petitioners pay scales including all other benefits, i.e. regular increments, N.P.A., deduction of G.P.F. subscription etc., which were being paid to the Ayurvedic Chiktisa Adhikaris appointed on ad hoc basis in the Ayurveda Department and Medical Officers appointed in the Health Department on ad hoc/contract basis w.e.f. 31.12.2003. Needful be done within a period of 8 weeks from the date of production of certified copy of this judgment by the petitioner(s). Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.