



2024:DHC:975



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 14717/2023**

DNYANESHWAR HIRALAL PHUSE Petitioner

Through: **Mr. Abhimanyu Yadav, Adv.**

versus

UNION OF INDIA & ANR. Respondents

Through: **Ms. Anju Gupta Adv and Mr. Jitender Kumar Tripathi adv for UOI/R-1**
Mr. Waize Ali Noor & Mr. Kartik Baijal,
Advocates for Mr. Kirtiman Singh, Adv. for
R-2.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

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08.02.2024

The Challenge

1. This writ petition prays that Clauses 4.2.2, 6.6 and 9.7 of the Information Bulletin for the final DNB¹ (Broad Speciality) theory and final examinations conducted by the National Board of Examinations (NBE) be quashed. The DNB qualification is, I am informed, is equivalent to MD².

¹ Diplomat of National Board

² Doctor of Medicine



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2. The Clauses under challenge, to the extent they are relevant, read thus:

Clause 4.2.2

“4.2.2 Practical Examination

There is no provision for grace marks in Practical examination.”

Clause 6.6.

“There will be no re-evaluation or rechecking/ re-totaling of answer sheets. Requests for re-evaluation/re-totaling shall not be entertained.”

Clause 9.7

“9.7 The OSCE component of DNB-Final Practical Examinations is a proprietary examination and is conducted only by National Board of Examinations in Medical Sciences. The contents of this exam are confidential, proprietary and are owned by National Board of Examinations in Medical Sciences. NBEMS explicitly prohibits the candidate, from reproducing, transmitting or publishing any or some contents of this exam, in whole or in part, in any form or by any means verbal or written, electronic or mechanical for any purpose whatsoever. NBEMS shall not entertain any request for sharing any content of the OSCE including question paper, answer keys and answer sheets.”

3. Having heard Mr. Abhimanyu Yadav, learned counsel for the petitioner and Mr. Waize Ali Noor, learned counsel for the Respondent 2, it is clear that no case for striking down any of the impugned clauses can be said to exist.



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A prefatory observation

4. As the challenge is purely legal and would apply *in rem*, it is not necessary for me to enter into the facts of the case. Needless to say, the Court can quash the impugned provisions only if they are found to suffer from any constitutional or legal infirmity.

5. At the outset, it has to be noted that the provisions under challenge relate to the manner in which various aspects of the DNB Final examination are to be marked and examined. There is an overwhelming, and undeniable, element of public interest involved in ensuring that the authorities who frame the rules, or guidelines, for conduct of such examinations, and the manner in which the candidates are to be graded and marked, are permitted maximum latitude. It is to those who clear such examinations that the health and wellbeing of the citizenry of the country are consigned. Optimum quality, of the doctors who emerge from such examinations, has to be sedulously assured. The hand that wields the scalpel cannot be allowed to shake.

6. It is only, therefore, if the provisions under challenge are patently unconstitutional that the Court can even tinker with them, let alone strike them down.

Clause 4.4.2

7. Clause 4.2.2 of the Information Bulletin merely states that there is no provision for grace marks in the practical examination. The



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Final DNB examination consists of theory and practical. Admittedly, upto 8 grace marks may be awarded in the theory examination.

8. Mr. Yadav's contention is that the stipulation to the effect that there would be no grace marks in the practical examination infracts Article 14 of the Constitution of India. He submits that a candidate who does not perform upto the optimum level in theory is entitled to 8 grace marks, whereas a similarly situated candidate, who may fare excellently in theory but does not put in an optimum performance in the practical examination does not get the benefit of grace marks. This, he submits, would effectively be discriminating between the two candidates.

9. It is obvious that the submission is completely misconceived. The question of discrimination arises only between equals.

10. Article 14 is infringed only where there is a discrimination between equals, between whom there is no intelligible differentia as would bear a rational nexus to the object of the provision.

11. Inasmuch as the Clause allowing grace marks in theory, and the impugned Clause 4.2.2 which does not allow grace marks in practicals, applies across the board to all students, it is clear that there is no infraction of Article 14 of the Constitution of India.

12. Even if one were to stretch the point, and examine whether the provision of grace marks in theory and absence of grace marks in



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practical examinations is otherwise arbitrary, it is obvious that the answer has to be in the negative. Theory and practical examinations are distinct and different. They are different in form and format. They subject the candidates to altogether different testing environments. They test different aspects of the level of preparedness of the candidates. They are as alike, to employ a time-worn cliché, as chalk and cheese. It would be absurd to hold otherwise.

13. Hypothetically, it may well be that, in the perception of the authorities who conduct and monitor the DNB examinations, the caliber of the doctor is more thoroughly tested in his paper, rather than his theory paper and, therefore, while grace marks could be awarded in the theory paper, no grace marks can be allowed in practicals. Yet another consideration which could justify the decision to award grace marks in theory and not award grace marks in practicals is if they carry different marks overall. There may be any number reasons for the decision not to allow grace marks in practicals even while allowing grace marks in theory, and this Court would be grossly overstepping its jurisdiction if it embarks on an enquiry in that regard.

14. Grace marks, incidentally, are not a matter of right. Mr. Yadav has not drawn my attention to any judicial pronouncement to the effect that a candidate is entitled, as of right, to grace marks. No doubt, if there is a provision for awarding grace marks, the authorities cannot act capriciously between persons identically situated, and award grace marks to one and refuse grace marks to the other, though both are



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covered by the provision, as held by the Supreme Court in *P. Velson v. U.O.I.*³

15. It cannot be said, therefore, that the decision to allow grace marks in theory and not allow grace marks in the practical paper in the DNB (Broad Specialty) Final Examination is in any way arbitrary.

Clause 9.7

16. Clause 9.7 treats the OSCE component of the DNB Final practical examinations as confidential and does not allow release either of the question paper, the answer keys or the answer sheets undertaken by the candidates. The justification for this is thus provided in paras 18 to 24 of the counter affidavit filed by Respondent 2 which read as under:

“18. The answering Respondent most respectfully submits that Objective Structured Clinical Exam (OSCE) is a clinical exam to assess the candidate’s knowledge, skills and competence which is widely used the world over in clinical examinations for doctors.

19. In an OSCE, candidates get marks for each step on the mark scheme that they perform/answer correctly, which therefore makes the assessment of clinical skills more objective, rather than subjective questions. Where simulated patients/clinical scenarios, clinical videos & clinical photographs are used, detailed scripts are provided to ensure that the information that they give is the same to all candidates. The OSCE is carefully structured to include parts from all elements of the curriculum as well as a wide range of skills and knowledge. It is submitted that the OSCE is designed to apply clinical and theoretical knowledge.

20. In view of the above, it is vehemently denied that virtual OSCE component of the DNB Practical Exam is a theoretical exam and that there should be provision of grace marks in the virtual

³ (2005) 11 SCC 192



OSCE component. It is submitted that the answering Respondent publishes the theory question papers of DNB/DrNB Final Examination on its website after the conduct of the final theory exam. Further, the copies of the assessed answer sheets are provided to the candidates on their request.

21. In so far as the OSCE component of the Practical Examination is concerned, the same is covered under the Non-Disclosure Agreement which is follows:

“9.7. The OSCE component of DNB-Final Practical Examinations is a proprietary examination and is conducted only by National Board of Examinations in Medical Sciences. The contents of this exam are confidential, proprietary and are owned by National Board of Examinations in Medical Sciences. NBEMS explicitly prohibits the candidate, from reproducing, transmitting or publishing any or some contents of this exam, in whole or in part, in any form or by any means verbal or written, electronic or mechanical for any purpose whatsoever. NBEMS shall not entertain any request for sharing any content of the OSCE including question paper, answer keys and answer sheets”.

22. The answering Respondent most respectfully submitted that in medical Post graduate (specialist courses) exit practical examination having OSCE component, the number and nature of questions that could be framed for the practical examination is very limited as the specialists are often dealing with one organ/system of the human body. It is submitted that generation of high quality OSCE questions and marking scheme is very time consuming and requires collective effort of several subject matter experts to generate just a few such questions. This involves question banking from the subject matter experts, conduction of OSCE item writing workshops, OSCE validation and moderation workshops involving several subject matter experts.

23. Further, DNB practical examinations having OSCE component are also conducted in batches and are conducted during different dates/venues. Any revelation of the OSCE questions and marking scheme could lead to a situation wherein the candidates of other batches who are yet to undergo the practical exam would know the OSCE questions and this may lead to undue advantage/disadvantage to a batch of candidates.



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24. It is most respectfully submitted that disclosure of the OSCE questions, marking scheme and answer sheets would only encourage the candidates to memorize the OSCE questions and answers, thereby affecting the purpose and quality of the practical exam.”

17. Mr. Waize Ali Noor explains that the OSCE is not a theory examination. Normally, the candidates are provided a simulated image of a patient which they are required to study, after which certain questions are put to the candidates with respect to individual organs of the patient. As such, these questions, he submits, are framed by experts and, given the limited and circumscribed nature of the OSCE, the number of questions which can be asked are also limited. As such, he submits that, in order to maintain objectivity in the examination process and ensure that the examination remains as competitive as possible, a policy decision was taken not to release the questions that are put to the candidates in the OSCE.

18. The decision not to release the OSCE questions is, therefore, a carefully reasoned and informed one, over which this Court cannot sit in appeal. The prevailing philosophy behind the decision not to release the OSCE questions is to maintain maximum level of competitiveness so that students who under the OSCE later are not forewarned with the questions which were asked in earlier OSCEs. This, again, is informed by the consideration that the number of questions which can be asked in the OSCE, given the very nature of the examination, is limited.



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19. This Court is entirely incompetent to subjectively evaluate this decision. Suffice it, therefore, to say that the contents of paras 18 to 24 of the counter-affidavit disclose justifiable grounds for maintaining confidentiality in respect of the OSCE component of the DNB Final practical examination.

20. The challenge to Clause 9.7 must also, therefore, fail.

Clause 6.6

21. Clause 6.6 merely says that there is no provision for reevaluation, rechecking or re-totaling of the answer sheets. This, again, is a matter of examination policy.

22. Mr. Yadav has not been able to draw my attention to any decision which says that re-evaluation is a matter of right. In fact, there are several judicial pronouncements⁴ which clearly hold that where there is no provision of re-evaluation, neither is it open for a candidate to seek, from the Court, a direction to have his paper re-evaluated, nor is open to the Court to so direct. Any scope for judicial interference arises only if there exists a provision for re-evaluation which is being arbitrarily implemented.

23. As there is no inherent right to re-evaluation, the challenge to Clause 6.6 of the Information Bulletin must also fail.

⁴ Refer **CBSE v. Khushboo, (2014) 14 SCC 523 ; Pramod Kumar Srivastava v. Bihar Public Service Commission**



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Conclusion

24. Accordingly, the writ petition is dismissed, with no order as to costs.

C. HARI SHANKAR, J.

FEBRUARY 8, 2024

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Click here to check corrigendum, if any