

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

+ **WRIT PETITION (CIVIL) No. 2740/2014**

% **Reserved on:** 16th February, 2016
Date of Decision: 30th May, 2016

DR. RICHA DEWANPetitioner
Through Mr. Shankar Raju, Advocate.

Versus

UNION OF INDIA & OTHERS.Respondents
Through Mr. Rajesh Kumar, Advocate for respondent
No. 1.
Mr. Anuj Aggarwal, Advocate for respondent Nos. 2, 3
and 4.

WRIT PETITION (CIVIL) No. 3117/2014

NEELAM BALA VAIDPetitioner
Through Mr. Prashant Sivarajan, Advocate.

Versus

UNION OF INDIA & OTHERS.Respondents
Through Ms. Arti Bansal, Advocate for UOI.
Mr. Vinod Kumar Bhati, Advocate for Mr. Devesh
Singh, ASC.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.

This common judgment would dispose of the aforementioned two writ petitions filed by Dr. Richa Dewan and Dr. Neelam Bala Vaid. The petitioners are aggrieved by a common impugned order dated 26th April,

2014 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi (Tribunal, for short) in OA No. 3632/2013 filed by Dr. Richa Diwan and OA No. 992/2013 filed by Dr. Neelam Bala Vaid. The impugned order dismisses the aforesaid Original Applications and rejects the challenge to the Office Memorandum dated 24th February, 2012 that the position/designation of Head of the Department in specialties is an administrative position and, therefore, cannot be held by specialists of the teaching sub-cadre after they attain the age of 62 years. Dr. Neelam Bala Vaid has also challenged OM dated 14.03.2013 directing that she could not continue as the Head of Department to avail the benefit of age of superannuation of upto 65 years.

2. The contention of the petitioners is that they are entitled to continue and hold the designation of the Head of the Department even after completion of 62 years since their age of superannuation as per the Fundamental Rules is 65 years. The petitioners submit that they are senior and the age of superannuation of specialists in the teaching sub-cadre being 65 years, they should not be denied and deprived of the position that they were already holding as the Head of the Department. It is submitted that the respondents cannot by way of an OM opine and direct that the designation of the Head of the Department is an administrative post.

3. In order to understand the controversy and the submissions made by the petitioners, we would like to reproduce a portion of the written submissions submitted by Dr. Richa Dewan, which reads:-

- A. “Because as per amendment under Proviso to Article 309 of the Constitution in FR-56(bb), continuance of Specialist in Teaching Sub-Cadre of CHS beyond 62 years and upto 65 years was subjected to condition precedent that the incumbent should not occupy administrative post.
- B. Because HOD is neither a post either under CHS Rules 1996 as admitted by the Ld. Tribunal in para 25 of the impugned order nor HOD Medicine involves any administrative position. Rightly so, in OM 24.4.2009, there is no mention of HOD being an administrative position or post. Yet, usurping its jurisdiction and delegated legislation vide OM dated 24.2.2012, respondent No.1 included the status of HOD as an administrative post. This could not be possible without amending the CHS Rules, 1996. To nomenclature a post no administrative instruction could be issued but an amendment is to be carried out. Since HOD is not an administrative post inclusion of it as a post in OM dated 24.2.2012 amounts to supplanting FR-56(bb). HOD has been defined in Rule 2(i) of CCS (CC&A) Rules, 1965 which includes exercise of power of appointing disciplinary, appellate authority and requires a declaration of HOD under FR. Since it has not been done and there is no amendment in the CHS Rules or FR, HOD cannot be treated as a post or an administrative position.
- C. Because the petitioner was part of MAMC and LN hospital since attaining of 62 years, she relinquished this charge as Medical Superintendent. HOD in MAMC is only Dean of the College. Moreover, it is the practice to nominate senior-most position in a discipline as HOD by virtue of designating Dr.Naresh Kumar Gupta as HOD Medicine, the respondents have made the

petitioner to work under junior which is not congenial to the administration. Moreover, extension of age of superannuation upto 65 years will not change the status of the petitioner. She is still remains as part of CHS. The petitioner does teaching and clinical work which includes lecture in MAMC, research and teaching of undergraduate and PG students writing thesis. On clinical side in hospital, the petitioner imparts bed side teaching and see patients in OPD, ward as well as emergency. The APAR of the petitioner are written by Dean and, HOD of the hospital is Medical Superintendent (MS) and for college its Dean.

- D. Because the petitioner by virtue of her being senior-most Director Professor in Medicine without enjoying any administrative position is to hold the status of HOD in Medicine despite teaching upto 65 years of age. No other person could be treated as HOD since it is not a post and status of HOD does not occupy any administrative position as per CCS (CC&A) Rules, 1965 and GFR.”

(HOD, stands for the Head of the Department)

(emphasis supplied)

4. We would begin by referring to Fundamental Rule 56(A), which is relevant and reads:-

“F.R. 56(A) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attain the age of sixty years.

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service,

shall retire from the service on expiry of his extended period of service.

Or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

(bb) The age of superannuation in respect of specialists included in the Teaching, Non-Teaching and Public Health Sub-cadres of Central Health Service shall be 62 years.

“Provided that for the specialists included in the Teaching sub-cadres of the Central Health Service who are engaged only in teaching activities and not occupying administrative positions, the age of superannuation shall be sixty-five years.”

Provided further that such specialists of the Teaching sub-cadre of Central Health Service who are occupying administrative positions shall have the option of seeking appointment to the teaching positions in case they wish to continue in service up to sixty-five years.”

The said Rule stipulates that Government servants would retire at the age of 60 years. However, clause (bb) states that age of superannuation of specialists, including teaching and non-teaching and public health sub-cadres of Central Health Service would be 62 years. The first proviso extends the age to 65 years for specialists included in the teaching sub-cadres of the Central Health Service, and restricts it to those engaged in teaching activities and not occupying administrative positions. The second proviso stipulates that specialists in the teaching sub-cadre of Central

Health Service, who at the age of 62 years occupy administrative positions, shall have the option to seek appointment to teaching positions in case they wish to continue in service upto the age 65 years. The two provisos are not under challenge and the stipulations mentioned in the provisos are agreeable to the petitioners, who accept that the said stipulations are binding. The first and the second proviso make it clear that specialists in the teaching sub-cadre of the Central Health Service can continue till the age of 65 years, provided they are engaged only in teaching activities and do not occupy or hold administrative positions. To this extent there is no dispute or controversy.

5. The expression “administrative position”, it is accepted, is not defined in the Fundamental Rules. However, the expression “Head of the Department” is defined in Rule 2(i) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (1965 Rules) issued under Article 309 and Clause (5) of Article 148 of the Constitution. The said definition clause reads as under:-

“2.(i) “head of the department” for the purpose of exercising the powers as appointing, disciplinary, appellate or reviewing authority, means the authority declared to be the head of the department under the Fundamental and Supplementary Rules or the Civil Service Regulations, as the case may be;”

The definition clause does not precisely define the said position or designation and refers to “Head of the Department” as having an

officer/post exercising powers of appointing, disciplinary, appellate or reviewing authority, and means the authority declared to be the Head of the Department under the Fundamental or Supplementary Rules of Civil Service Regulations, as the case may be. This definition clause states that the Head of the Department is an administrative position because it refers to the appointing, disciplinary, appellate or reviewing authority and an authority so declared as per the Fundamental or Supplementary Rules of Civil Service Regulations. We shall elucidate on this definition once again when we examine the contention of the petitioners that the post/designation held by them as the Head of the Department is not the same as defined in Rule 2(i) of the 1965 Rules.

6. At this stage, however, it would be more appropriate for us to refer to OM dated 18th June, 2013 and the OM under challenge dated 24th February, 2012. The OM dated 18th June, 2013 reads as under:-

“No.A-28012/11/2011-CHS V
Ministry of Health and Family Welfare
(CHS Division)

Nirman Bhawan, New Delhi
Dated 18th June, 2013

To

All Participating Units of Central Health Service

Subject: Levels of Reporting and Reviewing Officers for the purpose of Annual Performance Appraisal Reports (APARs) of Officers of Central Health Service (CHS)-Reg.

Sir,

In continuation of this Ministry's letter of even number dated 29th March, 2012 and 22nd June, 2012 on the above subject, the Competent Authority has approved the following amendments to the existing level of Reporting Officers and Reviewing Officers for CHS Officers:-

“In so far as Teaching sub-cadre of CHS cadre is concerned, Director-Professors and Professor of Excellence, who occupy administrative positions up to the age of 62 years and thereafter join back Medical Colleges/Teaching Institutions to avail the benefit of enhancement of age of superannuation upto 65 years, the level of Reporting Officers for the purpose of Annual Performance Appraisal Reports (APARs) in their cases will remain the same as has been when they were occupying administrative positions before attaining the age of 62 years.

Yours faithfully

(R. Prem Anand)

Under Secretary to the Government of India”

And the OM dated 24th February, 2012 reads as under:-

“No.A-11016/1/09-CHS V
Ministry of Health and Family Welfare

Nirman Bhawan, New Delhi
Dated 24th February, 2012

OFFICE MEMORANDUM

Subject: Re-designation of doctors of Teaching sub-Cadre after attaining the age of 62 years reg.

In supersession of this Ministry's OMs of even number dated 24.04.2009, 16.08.2011 and DGHS OM No.A12034/6/09-MH(I) dated 30.06.2009, the undersigned is directed to convey the following

instructions with the approval of the competent authority.

- i) CHS officers of Teaching sub-cadre who are occupying the administrative positions would have the option of seeking appointment to teaching position in case they wish to avail the benefit of enhancement of age of superannuation upto 65 years.
- ii) The posts of Director, Principal, Dean, Medical Superintendent & Addl. Medical Superintendent of medical colleges/medical institutions & Head of Department of their specialty manner by Specialists of Teaching sub-cadre would also be treated as administrative posts and general rule of keeping them upto 62 years on these posts will be followed. However, they will be allowed to go back to their respective specialty of Medical Colleges/Institutions and continue upto 65 years, which would be their age of superannuation. Moreover, these posting will not be vacancy based & their pay/perks, being drawn against administrative post should be protected.
- iii) The SAG level officers in the post of Director-Professor occupying the administrative positions and willing to avail the benefit of enhancement of age of superannuation will retain their teaching designation on joining back the Teaching Institutions after 62 years of age.
- iv) The Officers of HAG level of joining back the teaching institutions in their respective specialty will be designated as “Professor of Excellence”.
- v) Such Director Professors and Professors of Excellence will not function as heads of Department and will be fully engaged in only teaching and teaching related work. Besides their academic work, they will, however, do all the

clinical work as it is also a part of the academic work.

These instructions will have effect from the date of issue.

(V.P. Rana)
Deputy Secretary to the Government of India
TELEFAC-2306-2550”

The first OM dated 18th June, 2013 is not under challenge and in fact protects the petitioners and others who avail benefit of the enhanced age of superannuation of 65 years in the teaching sub-cadre of Central Health Service. The said specialists have been designated as “Director-Professors” and “Professors of Excellence”. It stipulates that the reporting officer in their cases for the purpose of ‘Annual Performance Appraisal Report’ would remain the same as when they were occupying administrative positions before attaining the age of 62 years. In other words, their reporting authority would not change in spite of the fact that they do not hold the administrative positions any more. The reason, it is apparent is that administrative positions in many cases could be occupied by those who were their juniors. The petitioners may well have filled or written appraisals of those who would occupy the administrative positions. This OM affirms the policy integral to clause (bb) of FR 56(A), i.e., it ensures that specialists belonging to the teaching sub-cadre are entirely and exclusively involved in teaching activities and do not undertake any

administrative work. Knowledge, experience and expertise of specialists would be employed and utilized for teaching and disseminating knowledge to others. They are not to be involved and associated with administrative work. This was the perceptible objective and purpose behind the extension of the age of superannuation in the teaching sub-cadre.

7. The second OM dated 24th February, 2012 in the first portion substantially reiterates clause (bb) of FR 56(A) and the earlier OMs that Central Health Scheme officers of teaching sub-cadres, who occupy administrative positions, have the option to seek appointment in teaching positions if they want to avail and take advantage of the enhanced age of superannuation of upto 65 years. The second paragraph states that the posts of Director, Dean, Medical Superintendent, Additional Medical Superintendent, etc. and the Head of the Department in the specialty would be treated as administrative posts and, therefore, as a general rule these posts would be held by those under the age of 62 years. Officers who were holding these posts and seek benefit of enhanced age of superannuation of upto 65 years, would have to go back to their respective specialties in medical colleges/institutions. Posting after the age of 62 would not be vacancy based. The pay and perks that they were drawing at the administrative post would be protected. Officers of HAG level joining the educational institutions on attaining the age of 62 years, after the option is exercised to continue upto 65 years, in the respective specialties will be

designated as “Professors of Excellence” and those at the SAG level would be designated as “Director-Professor”. Both “Director-Professor” and “Professors of Excellence” would not function as the Head of the Department and will be fully engaged in teaching and teaching related works. Lastly, it is clarified that they are entitled to do academic work, which includes clinical work as it is a part of the academic work.

8. When we read the written arguments quoted above, we can perceive the reluctance of the petitioners in giving up the post/designation of the Head of the Department, though it is claimed that the said post is not the same as defined in clause (i) to Rule 2 of the 1965 Rules. It is apparent to us that this reluctance arises from the fact that the post of the Head of the Department is perceived and regarded to be a post held by the head of the particular department who is the administrative head and exercises administrative control. It is interesting to refer to ground (k) in the writ petition filed by Dr. Neelam Bala Vaid, where she asserts that the seniormost person in the respective discipline is called the Head of the department for the sake of conscience (sic. convenience) “so that each discipline may function smoothly.....they only see day-to-day functioning of the disciplines and their juniors report to them, who are then assigned duties”. Another objection or contention is that Director-Professor/Professors of Excellence cannot be asked to function under the administrative control of their juniors. However, this would be necessary

and is obvious, if after the age of 62 years a specialist can do teaching work and not hold any administrative post. Someone junior to them in age and below the age of 62 years, would hold and exercise administrative control. The argument that if Director-Professor/Professors of Excellence are not given the charge as the Head of the Department, and there is bound to be interference by those holding the post of the Head of the Department, also reflects the desire to hold and continue as the administrative head. In the aforesaid, we regret and express our inability to accept the said contentions, for the petitioners want to directly and indirectly assert that they would like to continue and hold on to the designation of the Head of the Department for then they would exercise administrative authority and control. This would be contrary to Clause (bb) of FR 56(A), which is not under challenge. This clause specifically stipulates that specialists exercising the option to continue after the age of 62 years to superannuate at the age of 65 years, will only engage and do teaching or academic work, which includes clinical work. They shall give up and forego their earlier role in all administrative capacities. The rationale is that students, doctors and patients in the hospital and colleges can take advantage and benefit of the specialists and their expertise in medical science after they have attained the age of 62 years and have opted to continue in teaching or academic work upto 65 years. They must not be involved or get associated

with administrative work. They must disconnect and dissociate themselves from administration and administrative work.

9. The contentions raised before us do reflect that in spite of submissions to the contrary, there is reluctance to give up the designation of the Head of the Department as it is in fact akin to the post of the Head of the Department as defined in clause (i) of Rule 2 of the 1965 Rules. If Rule 2(i) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 is held to be applicable, the petitioners certainly cannot hold the said designation. If we accept that the designation/post of the Head of the Department is not a statutory designation under the aforesaid Rule 2(i) and is a mere designation that has gained recognition and acceptance as a convention, our conclusion would not be any different. The purpose and intent apparent from clause (bb) of FR 56 (A) and OM dated 24th February, 2012 is that specialists who want to continue beyond the age of 62 years and superannuate at 65, must fully devote themselves to academic work including clinical work, and they should not get involved and get associated with the administration in any department or institution. Administration and problems relating to day to day working etc. should be left for others to handle.

10. The object behind the impugned OM is to clearly differentiate and demarcate what constitutes teaching and non-teaching work. The said demarcation can be by way of administrative instructions and is not

required to be by way of rules framed under Article 309 of the Constitution. In fact, there is a contradiction in the contention raised by the petitioners. Once they accept that there is no statutory rule for creation and fixing duties and functions for the post of Head of Department, then their grievance questioning the administrative order in the form of OM dated 24th February, 2013 on the ground that for such stipulation a statutory rule is mandated or a must, lacks substratum and merit. The designation of Head of Department over the years has gained recognition even when it is not a statutory post and position. The appointment is by way of convention, and is not regulated by any statutory rule or regulation. In such circumstances, administrative decision can be taken, for this would fall in the realm of policy. The OM in question has been issued in exercise of executive power, which vests with the Executive. The said instructions nowhere contravene any statutory rule or regulation.

11. As noticed above, clause (bb) of FR 56 (A) is not under challenge. The said clause itself makes a distinction between teaching or academic work and administrative work. The Fundamental Rules, however, do not define and clearly demarcate what is teaching and administrative work. Statutory provisions are not violated for they do not provide and stipulate the distinction between teaching or academic activities and administrative positions or work. When the Fundamental Rules or other Rules are silent or not expressive, it is open to the Government to supplement the rules by

issuing an OM stating the posts or designations which are administrative posts and would be included and treated as academic or teaching work. We agree that the classification or differentiation by an OM, which is in the nature of an executive instruction should not be absurd, capricious and arbitrary. Once the said touchstone is satisfied, the court cannot interfere with the policy stated in the OM. The impugned OM opining that the 'Head of the Department' is an administrative post cannot be faulted on the ground of absurdity, capriciousness or arbitrariness. No such argument is raised. Even if raised, cannot be accepted. Further, why and for what reason specialists above the age of 62 years should not hold administrative positions though not challenged and questioned, falls within the domain of policy. Courts cannot substitute and override government policy. The reasons for the policy are perceptible, but need not be recorded for this is not a lis or the dispute raised. Once again we record that the petitioners do not dispute and have not challenged the provisos to clause (bb) to FR 56 (A). Courts can exercise power of judicial review and declare policy as violative of Articles 14, 16 or other fundamental rights or statutory rights when such rights are contravened or negated. In the present case, challenge to the OM dated 24th February 2014 is rather restricted and limited. The OM holds that designation as the Head of the Department would be given to those who are involved in administrative work. When it is accepted that specialists between 62 and 65 years have opted to continue

in the teaching sub-cadre and do academic work, we find it difficult to accept the position that they would like to exercise and yield administrative authority as the Head of the Department. The said contention is contradictory and should not be accepted.

12. The Supreme Court in ***Joint Action Committee of Airline Pilots' Assn. of India Vs. DG of Civil Aviation***, (2011) 5 SCC 435 had examined the scope and binding force of executive instructions issued by the Narcotic Bureau and observed that even though such instructions do not have force of law, they were intended to guide the officers to see that a fair procedure is adopted by them during investigation of crime. It was observed that an executive order can be used keeping in view the rules and executive business and they provide guidelines for all concerned, who would be bound. These executive or administrative instructions cannot amend or substitute the statutory rule but when the rules are silent on a particular point, the Government can fill up the gap and supplement the rule and issue instructions which are not inconsistent with the rules already framed.

13. Similar view has been taken by the Supreme Court in ***Bank of India Vs. T.S. Kelawala***, (1990) 4 SCC 744 asserting that the executive has the power to issue administrative instructions when the rules are silent and can fill up the gaps between the statutory provisions. In ***Union of India Vs. Ashok Kumar Aggarwal***, (2013) 16 SCC 147, the Supreme Court

explained the scope of circulars issued by the Ministry observing that they are binding on the officers of the department, particularly when recommendations are made by the Central Vigilance Commission. More appropriate and to the point are the observations of the Supreme Court in ***Union of India Vs. Amrik Singh***, (1994) 1 SCC 269, wherein the Supreme Court had examined the scope of executive instructions issued by the Comptroller and Auditor General for making appointments under the provisions of the Indian Audit and Accounts Department Recruitment Rules, 1964. It was held that the said authority had necessary competence to issue departmental instructions on matters of conditions of service of persons serving in the department, being the Head of the Department, though there were statutory rules also in existence. Such administrative instructions would be valid and binding, if they are not inconsistent with the statutory rules. In this case, there was no specification with regard to the minimum length of service for promotion, which prescription was laid down by the administrative instructions, which were upheld.

14. Similarly, in ***Bank of India Vs. T.S. Kelawal***, (supra), it was held that so long as staff regulations were not framed, it was open to the Government to issue administrative circulars regulating service conditions, for they did not impinge upon any statutory regulations already framed.

15. On the question of scope of judicial review when examining the policy of the Government, the Courts do not act as appellate authorities

checking the wisdom, correctness or appropriateness of the policy. The Courts do not act as advisors. In such matters, the executive is entitled to formulate policies, which can be only struck down when they are manifestly arbitrary, capricious or is opposed to statutory provision or violates the Constitution. The wisdom or comparative merit etc. are not matters within the domain and scope of the judicial review.

16. In view of the aforesaid findings, we do not find any merit in the present writ petitions and the same are dismissed. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

MAY 30th, 2016
VKR