

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No. 395 of 2008**

Dr. Amita Jha W/o Shri Dr. D.K.Jha, Medical Officer, Civil Hospital,
 Mana Camp, Raipur **---- Petitioner**

Versus

1. State Of Chhattisgarh, By:Secretary, Health & Family Welfare Deptt.
 Mantralaya Raipur
2. Dr. C.K. Chandravanshi, Community Health Centre, Bhatapara, Raipur
3. Dr. Smt. Shanti Pandey, Distt. Hospital, Bastar
4. Dr. Rajkumar Paliwal, Community Health Centre, Pali, Korba
5. Dr. J. Tripathi, Community Health Centre, Sarangarh, Raigarh
6. Dr. Smt. Meera Baghel, Distt. Hospital, Kawardha
7. Dr. Roja Toppo, Community Health Centre, Patthalgaon, Jashpur
8. Dr. Chandramohan Tiwari Distt. Hospital, Janjgir
9. Dr. Mayarani Dubey, Distt. Hospital, Bilaspur
10. Dr. Kirticharan Uraon, Distt. Hospital Rajnandgaon
11. Dr. Kiranlata Thakur, Distt. Hospital Kanker **---- Respondents**

For Petitioner	:	Mr. Raja Sharma, Advocate
For Respondent/State	:	Mr. Majid Ali, Dy. G.A.

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****01/05/2018**

Heard.

1. By this petition, under Article 226 of the Constitution of India, the petitioner calls in question correctness and validity of the respondent's action in promoting junior of the petitioner and subjecting the petitioner to supersession by not promoting her to the higher post of specialist (gynecology).

2. At the time of filing this petition, the petitioner was posted and working as Medical Officer in Senior Grade of Class-II post. The petitioner's seniority as per the gradation list is stated to be a serial No.292 whereas that of respondents No.2 to 12 below the petitioner. In this regard, a detailed chart has been submitted in the petition itself in para 5.3 of the petition.

3. Vide order dated 06.02.2007, number of Medical Officers including respondents No.2 to 12 were promoted as Specialist giving rise to the petitioner's grievance.

4. Learned counsel for the petitioner would submit that the promotion to the post of Specialist would be governed by criteria laid down in the Chhattisgarh Public Service (Promotion) Rules, 2003 (for short 'the Rules of 2003'), wherein in the matter of promotion from Class II to Class I post, the criteria of seniority-cum-fitness has been applied. It is submitted that according to the criteria, the senior person is entitled to promotion only subject to fitness i.e. no adverse material in the service record or adverse remark or penalty or any other adverse material.

5. Learned counsel for the petitioner would submit that this issue has been decided by this Court in the case of other similarly situated Senior Medical Officer, though in different discipline, in WPS No.637 of 2007 (B.R. Kosaria Vs. State of Chhattisgarh and others) and WPS No.3128 of 2007 (Dr. Gyanesh Kumar Chaubey Vs. State of Chhattisgarh and others) wherein, this Court has held that the criteria adopted by respondent amounted to criteria of seniority-cum-merit which is not permissible.

6. Referring to the averments made in the return would submit that the petitioner's case was considered but the petitioner was not found fit for promotion applying the criteria, therefore, the petitioner has been rightly superseded.

7. There is no representation made by any of the private respondents.

8. The issue as to what is criteria in the matter of promotion of Medical Officers to the higher post of Specialist was considered by this Court in the case of B.R. Kosaria and Dr. Gyanesh Kumar Chaubey (supra) with reference to the provision contained in the Rules of 2003 as below :

“The promotion in Public Service is governed by Chhattisgarh Public Service (Promotion) Rules, 2003 (for short, 'the Rules, 2003'). Rule 4 provides for determination of basis for promotion as below :-

“Rule 4 provides for determination of basis for promotion as below -

4. **Determination of basis of promotion**—(1) Promotion from Class IV to higher pay scale of Class IV, Class IV to Class III, Class III to higher pay scale of Class III, Class III to Class II, Class II to higher pay scale of Class II and Class II to Class I shall be made on the basis of “seniority subject to fitness”.

(2) Promotion from Class I to higher pay scale of Class I posts shall be made on the basis of “merit-cum-seniority”.

8. From the aforesaid statutory prescription, it is clear that in the matter of promotion from the post of Assistant Surgeon to Specialist i.e. for promotion from Class II gazetted post to Class I gazetted post, the rules prescribes criteria as seniority-cum-fitness. The criteria of seniority-cum-fitness, in the absence of there being any specific meaning assigned to it under the rules, which construed as a criteria as entitlement for promotion of an employee on the basis of seniority unless there is anything adverse against him. Thus, fitness would mean that there is nothing adverse against the employee in the sense that there is no adverse remark, no departmental enquiry pending or any penalty imposed or any other verified complaint of such a nature which constitutes an element of unfitness for promotion. If that is not there, the officer will have to be held fit for promotion.

The rule does not provide for any particular criteria for adjudging fitness. In the absence of any special provision made under the rules, the criteria of seniority-cum-fitness has to be understood in the manner that if there is nothing adverse against an employee, he should be treated as fit for promotion.”

9. The petitioner being similarly situated as B.R. Kosaria and Dr. Gyanesh Kumar Chaubey was also entitled to be consideration by application of the same criteria meaning thereby that in the absence of there being any adverse material to render the petitioner unfit for promotion, on the basis of seniority, the petitioner was entitled to be promoted over and above her senior.

10. In the present case, the respondents have not placed before this Court any record of DPC or the Annual Confidential Report of the petitioner to submit that any of the ACRs of the last five years which were under consideration by DPC contained adverse remark against the petitioner or that the petitioner was imposed a penalty in a departmental enquiry currency of which was not over or there was any other adverse material to render the petitioner unfit for promotion.

11. However, it appears that on similar lines as in the case of B.R. Kosaria and Dr. Gyanesh Kumar Chaubey who were also working as Medical

Specialist but not granted promotion as Specialist in the same department, the petitioner was superseded by applying a criteria of fixing a minimum benchmark of merit which has resulted in petitioner supersession. In any case, in the absence of any material placed before the Court by the respondent, this Court has to hold that without there being any adverse material against the petitioner, the petitioner was illegally held unfit for promotion and subjected to supersession. In the case of B.R. Kosaria and Dr. Gyanesh Kumar Chaubey (supra), this Court had observed :

“10. Contention of learned State counsel that fitness was required to be assessed on the criteria of being possessed of gradings of a particular minimum merit, if accepted, would become an assessment based on merit. The distinction between a criteria of seniority-cum-fitness, seniority-cum-merit and merit-cum-seniority needs to be underlined.

As has been disclosed herein above, where the criteria for promotion is seniority-cum-fitness, fitness is to be judged by considering whether there is any adverse material like the adverse entry, penalty, departmental enquiry, serious complaint which have been verified etc. This may also include the case of doubtful integrity. If there is no adverse material, the only natural conclusion would be that the officer is fit for promotion.

Where the criteria for promotion is seniority-cum-merit, the minimum benchmark of merit is required to be prescribed and all the officer who fulfill minimum benchmark of merit have to be considered for promotion in the order of their seniority.

In a case where promotion is based on merit-cum-seniority, more meritorious officer, though junior, march-past his seniors and supersedes them because in this case, selection is based on comparative merit assessment and not merely on fitness or based on any minimum benchmark of merit. That is how the three criteria of promotion differ from each other. For this conclusion, this Court placed reliance on the decision of the Supreme Court in the case of **B. V.Sivaih and ors. v. K. Addanki Babu and ors., AIR 1998 SC 2565.**”

12. From the aforesaid well settled legal position, this Court further went on to hold as below :

“11. What has been submitted by learned State counsel and has also borne out from the photocopy of the minutes of meeting, a minimum benchmark of merit was fixed as a criteria for promotion by prescribing that the ACR grading should be atleast “Good”, grading of the last year should be atleast “ख” or better grading and the minimum benchmark of 10 to be secured. This kind of criteria is essentially a criteria of seniority-cum-merit. The criteria of seniority-cum-merit was not intended to be applied under the Rules of 2003 in the matter of promotion from Class II to Class I post, as per the provisions contained in Rule 4 of the Rules of 2003.

12. In the absence of there being any adverse material against the petitioner, there is nothing to say that the petitioner was not fit for promotion. Prescription of minimum benchmark of merit was clearly a transgression of statutory prescription. The DPC seems to have evolved its own minimum criteria of merit, contrary to the mandate of the rules.”

13. In view of the above, I have to hold that supersession of the petitioner was illegal and in violation of the prescribed criteria for promotion laid down under the Rules. Therefore, the official respondents are directed to consider the petitioner's case for promotion on the basis of their ACR as on the date the DPC was constituted earlier on the basis of which promotion order of junior of the petitioner was issued vide impugned order dated 06.02.2007. The DPC shall consider the case of the petitioner according to the criteria of seniority-cum-fitness and the scope of consideration would be whether there is any adverse material against the petitioner. If no adverse material is found against the petitioner in the service record and the ACR for the relevant five years preceding the date of DPC do not contain any adverse remark, the petitioner shall be granted due promotion from the same date from which respondents No.2 to 12 were promoted by impugned order dated 06.02.2007 with all consequential benefits. Considering that the petitioner, during the pendency of the petition, has already been granted officiating promotion, I am not inclined to direct reversion of any of junior officers.

14. The petition is accordingly allowed. No costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge