

CWP No.19616 of 2017 (O&M)

Sr.No.219

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.19616 of 2017 (O&M)

Date of Decision: 21.12.2022

Dr. Virender Kumar & others

...Petitioners

Versus

State of Haryana& others

...Respondents

CORAM : HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr. Abhishek Sethi, Advocate
for the petitioners.

Mr. Saurabh Mohunta, D.A.G., Haryana.

Mr. GauravVir Singh Behl, Advocate for
Mr. S.S. Behl, Advocate
for respondent No.13.

Mr. Sunny Singla, Advocate for
Mr. Abhinav Jain, Advocate
for respondent No.25.

ARUN MONGA, J.(ORAL)

Petition herein, *inter alia*, is for issuance of a writ in the nature of Certiorari for setting aside the Tentative Seniority List (Annexure P-12) as well as order dated 10.08.2017 (Annexure P-14), whereby the representation of the Petitioners regarding implementation of Tentative Seniority List of the year 2012 was rejected.

2. Succinct facts first, as pleaded by the Petitioners.

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2.1. Petitioners are Government doctors now posted with the Directorate ESI Health Care under the control of the Secretary to Government in the Labour Department. Initially, they were appointed on regular basis and had joined as Medical Officers in the Haryana Civil Medical Service in the Health Department on various dates specified in para 3 of the petition between 1997-2004. At that time, ESI Wing was also a part of the Health Department and their Government Doctors are now posted as Medical Officers with the Directorate of ESI Health Care under the control of Labour Department of the State Government. Initially, they had been appointed to and joined the Haryana Civil Medical Services on regular basis in the Health Department between 1997-2004 on the recommendations of Haryana Public Service Commission. They are aggrieved with change of seniority as in the Gradation List of 2012 to their detriment by lowering it in the Gradation List 2017 circulated by the Respondent Department. Their respective seniority number in the Gradation Lists circulated by the Respondent Department in the year 2012 and he changed seniority shown in 2017 of each of the Petitioners is shown as under:-

Sr.No.	Name of the Petitioner	Date of Initial Joining on Regular Basis	Seniority in 2012 Gradation List	Seniority in 2017 Gradation List
1.	Dr. Virender Kumar	17-08-2004	142	230
2.	Dr. Rajinder Singh	26-05-1997	74	149
3.	Dr. Balwant Rai	06-01-1998	78	153
4.	Dr. Bhupinder Singh	20-05-1997	67	139

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2.2. Background of the present case is that vide Notification dated 16.05.2007 (Annexure P-1), the Govt. of Haryana separated the ESI Wing from the Health Department and created a new Directorate of ESI Health Care, Haryana under the administrative control of Secretary to the Govt. of Haryana, Labour Department. As per the said Notification, the Medical/Paramedical and Ministerial Staff was to be taken from the Health Department on absorption/deputation/transfer basis and shortfall will be met by direct recruitment or on contract basis and by engagement of services on panel basis. It was provided in the said Notification that after the final allocation of the staff, either on permanent absorption or transfer of incumbent staff of Health Department or by direct recruitment, the allocated staff shall constitute a separate non-transferable cadre. It was also mentioned in the said Notification that the Service Rules, Standing Orders and orders on the files applicable to service conditions in the Health Department would continue to be applicable to the staff of the Department of Employees State Insurance Health Care, Haryana till the new Department formulates its own Service Rules.

2.3. Pursuant to creation of the new Directorate of Employees State Insurance Health Care, Haryana, Respondent No.2 invited applications from officers/officials working on the same posts or eligible for promotion and in the consideration zone in the Health Department on transfer basis for permanent absorption in the newly created Directorate of Employees State Health Insurance Health Care, Haryana. A cut-off date was set up i.e. 15.07.2007 for receipt of options of the employees concerned for absorption/transfer on permanent basis in the new Department. It was categorically mentioned in the relevant letter dated

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27.06.2007 (Annexure P-9) addressed by respondent No. 2 to the Director General of Health Services, Haryana that options received after 15.07.2007 would be summarily rejected. Respondent No. 2 also issued similar Advertisement (Annexure P-2) specifically stating that options received after 15.07.2007 would be summarily rejected.

2.4. All the Petitioners exercised and submitted their options for permanent absorption on transfer basis in the new Directorate of Employees State Insurance Health Care, Haryana before the cut-off date i.e. 15.07.2007. Their options found favour with the Government and the petitioners were permanently absorbed in the new Directorate.

2.5. However, even after the cut-off date i.e. 15.07.2007, Respondent No.2 kept accepting applications of Doctors working with the Health Department, Haryana for their permanent absorption on transfer basis with the newly created Directorate. As per the Petitioners, this was done in contravention of the letter dated 27.06.2007 (Annexure P-9) and Advertisement (Annexure P-2) without issuance of any Corrigendum in this regard. Private respondents had submitted their options after the prescribed cut-off date of 15.07.2007. Still these were accepted and they were absorbed on transfer basis with the newly created Directorate as shown by absorption order dated 11.03.2008 (Annexure P-4).

2.6. Absorption of Doctors from the Health Department after the cut-off date created an anomaly in fixation of seniority of the Doctors/Staff in the new Directorate. Respondent No.2 circulated a Tentative Seniority List of Medical Officers in the ESI Health Care, Haryana and invited objections from the Doctors/Staff against the Tentative Seniority List. In the said Tentative Seniority List, the Doctors

who had given their options for permanent absorption on transfer basis after the cut-off date as well as the doctors, who had never given their options but were permanently absorbed on transfer basis, were treated at par with the Petitioners and Seniority of all the Doctors was determined on the basis of their respective seniority in the Parent Department i.e. the Health Department, Haryana.

2.7. As per the Service Rules of the Health Department, the seniority, *inter-se* of the members of the Haryana Civil Medical (Group A) Services is determined by Rule 11 of Haryana Civil Medical (Group-A) Services Rules, 2014 (*hereinafter referred to 'Rules, 2014'*).

The said Rules, 2014 along with omitted part is as under:-

“11. Seniority, inter-se of the members of the Service shall be determined by the length of their continuous service on any post in the Service.

Provided that in the case of members appointed by direct recruitment, the order of merit determined by the Commission shall not be disturbed in fixing the seniority:

Provided further that in the case of two or more members appointed on the same date, their seniority shall be determined as follows:-

(a) a member appointed by direct recruitment shall be senior to a member appointed by promotion or by transfer;

(b) a member appointed by promotion shall be senior to a member appointed by transfer, and

(c) in the case of a member appointed by promotion or by transfer, seniority shall be determined according to the seniority of such members, in the appointments from which they were promoted or transferred.

(d) In the case of members appointed by transfer from different cadres, their seniority shall be determined according to pay preference being given to a member, who was drawing a higher rate of pay in his previous appointment; and if the rates of pay drawn are also the same, then by the length of their service in the appointments, and if the length of such service is also the same, the older member shall be senior to the younger member. (Emphasis supplied)”

2.8. Rule 11(d) *ibid* existed in the Haryana Civil Medical (Group-A) Services Rules, 1981 and the same was omitted in the Rules, 2014. The Directorate was created in the year 2007 and two Tentative Seniority Lists are under consideration i.e. of 2012 & 2017.

2.9. *Inter alia*, Dr. Anita Bala Sethi submitted her objections to the aforesaid proposed/Tentative Seniority List on the reason that Doctors who had given their option for joining the Directorate of E.S.I. Health Care after the cut-off date should be placed at the tail of the instant 'Proposed Gradation List'. Vide letter dated 25.01.2012 (Annexure P-5), the Respondent No.1 communicated the decision taken on the objections file by Dr. Anita Bala Sethi to Respondent No.2. It was stated therein that the seniority of the staff who had given options/applications for permanent absorption after the cut-off date be determined as per their date of joining with the new department. Pursuant thereto, the Respondent No.2 circulated another Tentative Seniority List in the year 2012, which as per the Petitioners, is correct.

2.10. Thereafter, vide letter dated 21.10.2013 (Annexure P-6), the Respondent No.2 informed Respondent No.1 that a few of the doctors who had moved applications for permanent absorption on transfer basis in the Directorate of E.S.I Health Care, Haryana had raised an objection that no condition regarding fixing of seniority was mentioned in the absorption letters (Annexure P-4). The Respondent No.1 vide letter dated 28.02.2014 (Annexure P-7) then wrote to Respondent No.2 that the seniority of the Medical Officers working with the Directorate of E.S.I. Health Care be determined as per their seniority with the Health

Department.

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2.11. Respondent No.2 wrote letter dated 07.01.2015 (Annexure P-8) to Respondent No.1 opining that the direction in his letter dated 28.02.2014 Annexure P-7 for determining the seniority of the Medical Officers working with the Directorate of E.S.I. Health Care as per their seniority with the Health Department, did not seem to be correct and requesting respondent No.1 to reconsider the matter as per instructions/Rules. In the said letter, respondent No. 2 also cited his office letter dated 27.06.2007 (Annexure P-9) addressed to the Director General, Health Services, Haryana, wherein it was specifically mentioned that the options of the officers/officials for permanent absorption on transfer basis with the Directorate of E.S.I. Health Care must reach the office of Respondent No.2 by 15.07.007 and that the options received after 15.07.2007 would be rejected summarily. It was also mentioned in the letter (Annexure P-8) by Respondent No.2 that after the constitution of the Department of E.S.I. Health Care, Haryana, Respondent No.2 as well as the Minister for Labour & Finance, Govt. of Haryana had decided vide letter dated 28.06.2007 (Annexure P-10) that it must be clarified to the Health Department that after the transfer requests were finalized by Respondent No.2, separate seniority of the staff would be maintained by Respondent No.2.

2.12. However, the Respondent No.1, without taking into consideration any of the issues raised by Respondent No.2 in its letter (Annexure P-8), reiterated his earlier decision taken vide letter (Annexure P-7) and communicated it to Respondent No.2 vide letter dated 17.11.2016 (Annexure P-11). Pursuant thereto, respondent No. 2 circulated the impugned Seniority List of 2017 (Annexure P-12).

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2.13. Aggrieved by the Seniority List (Annexure P-12), the Petitioner No.1 filed a writ petition bearing CWP No.13907 of 2017, which was disposed of vide order dated 03.07.2017 (Annexure P-13), whereby a direction was issued to Respondent No.2 to decide representation dated 22.05.2017 moved by the Petitioner No.1.

2.14. In compliance of the order (Annexure P-13), Respondent No.1 vide impugned order dated 10.08.2017 (Annexure P-14) rejected representation dated 22.05.2017 while justifying letter dated 28.02.2014 (Annexure P-7) mainly on the ground that the persons above whom Dr. Virender Kumar (petitioner No. 1 herein) was claiming seniority, were senior to him as Medical Officers in the Health Department; the Government had absorbed them all in the ESHIC Department by transfer from the Health Department and, therefore, he was not entitled to claim seniority over and above his seniors.

2.15. Hence, the present petition.

3. Respondents No. 1-2 filed written statement broadly admitting the factual averments in the petition including the objections filed by Dr. Anita Bala Sethi against the then proposed/Tentative Seniority List and the decision of respondent No. 1 thereon conveyed vide letter dated 25.01.2012 (Annexure P-5) to the effect that the seniority of the staff who had given options/applications for permanent absorption after the cut-off date be determined as per their date of joining with the new department. Pursuant thereto, the Respondent No.2 had circulated another Tentative Seniority List in the year 2012. Objections against it were received by respondent No. 2, who sent them to respondent No. 1 vide letter dated 21.10.2013 (Annexure P-6).

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Thereupon, respondent No.1 decided vide letter dated 28.02.2014 (Annexure P-7) that the seniority of medical officers who had given their options before 25.01.2012 be considered as per their seniority of the Health Department as any conditions had not been imposed in their appointment letters.

4. However, it was asserted that the petitioners' seniority has been rightly determined as shown in the impugned gradation list of 2017; the impugned order was correctly passed and petitioners' claim in the instant petition was rightly refuted.

5. Arguments have been addressed by the learned State counsel as also the learned Senior Counsel for the private respondents to defend the impugned order dated 10.08.2017 (Annexure P-14) and Seniority List of 2017 (Annexure P-12).

6. It has been argued that since all the Medical Officers came from the Health Department to ESI Health Care Department, the Government reiterated its decision vide Memo dated 17.11.2016 (Annexure P-11) to the Director, ESI Health Care Department that the order already issued vide letter dated 28.02.2014 (Annexure P-7) was justified wherein the Government gave concurrence to the proposal of the Department that seniority of the Medical Officers in ESI Health Care Department would be as per *inter-se* seniority in Health Department who had joined before 25.01.2012 since no specific condition regarding seniority has been mentioned in their appointment letter. However, it has not been denied by the learned State counsel and the learned Senior counsel for the private respondents that options given by some of the Medical Officers including the private respondents even after the cut-off

date were accepted though no new demand notice or advertisement was issued by the ESI Health Care Department in this regard after the cut-off date i.e. 15.07.2007. Further the learned State counsel has submitted that ESI Health Care Department has not framed any service rules so far. Therefore, the *inter-se* seniority of the Medical Officers of the Health Department is determined in terms of Rule 11 of Rules, 2014 *ibid* of the Health Department.

7. Learned counsel for the petitioners has countered by arguing that Rule 11(d) *ibid* existed in the Haryana Civil Medical (Group-A) Services Rules, 1981 and the same was omitted in the Rules, 2014. The ESHIC Directorate was created in the year 2007 and two Tentative Seniority Lists are under consideration i.e. of 2012 and 2017, as mentioned above. Therefore, *inter-se* seniority would have to be determined under Rule 11 (d) *ibid*.

8. I have heard the rival contentions of the learned counsel for the parties and so now deal with the same and render my opinion thereupon.

9. First and foremost, let us see as to which provisions and/or service rules are applicable to the case for determination of seniority. Till date the Department of Employees State Insurance Health Care, Haryana has not framed its own service rules despite its having been carved out from the Health Department way back on 16.05.2007. In the absence thereof, for an answer to the above question, we have first to look to the relevant terms and conditions about seniority in the orders for absorption of the petitioners and the private respondents in ESHIC. The same have

been quoted in the impugned order Annexure P-14 passed by respondent No. 1 as under:-

“It is relevant to submit that in the absorption letter of the petitioner and others, the following terms and conditions were specifically mentioned in their appointment letters:

- 1 That they will remain on probation for a period of one year from the date they join their new assignment. If in the opinion of the appointing authority, the work or conduct of an officer is found not satisfactory, they either can be repatriated their parent department or their probation period can be extended to not exceeding one year more.*
- 2 That the seniority amongst those who have tendered their options for permanent absorption will be determined as per settled rules and regulations issued by the Government from time to time.*
- 3 That the service Rules of Health Department will be applicable till the new service rules are notified by ESI Health Care Department, Haryana.”*

10. A rational, reasonable and fair conclusion deducible from a combined and harmonious reading of clause 2 and 3 of the above quoted text, in my view, is that in the present case, for the purpose of determination of seniority at the time of initial induction of the incumbents into the ESHIC cadre, clause 2 *ibid* specifically incorporated in the appointment letters would apply. If, as contended on behalf of the respondents, the service Rules of Health Department should be applicable for determination of the rival claims of seniority in present case, it would render clause 2 *ibid* in the appointment letters wholly meaningless and redundant. There seems no reason in the instant case for the Court to treat clause 2 *ibid* as wholly meaningless and redundant.

It is, therefore, held that on induction into the new cadre, the initial seniority of the petitioners and the private respondents was to be regulated by aforesaid clause 2 *ibid* specifically contained in the

appointment letters. In other words, it was to be determined as per settled rules and regulations issued by the Government from time to time.

11. Something needs to be said here about prescribing and adherence to time lines for submission of applications/options for inter-departmental appointment/absorption of candidates as same have considerable bearing on determination of *inter se* seniority of the persons concerned on appointment/absorption in the new Department/cadre.

12. The legal principles which govern the determination of a cut-off date are well settled. State is entitled to fix a cut-off date which depends on several factors, e.g. the number of vacancies in different disciplines, the need to fill up the posts, the availability of candidates, etc. Such a decision can be struck down only when it is arbitrary. Fixing and adherence to cut-off date is a strong preventive measure against nepotism and favoritism, malpractices and unscrupulous manipulations. It lends considerable even if not fool proof certainty, transparency and credibility to the process and fairness of selection/appointment of candidates. In the case in hand, there are no allegations regarding arbitrariness while fixing the cut-off date.

13. As noted above, the State itself fixed the cut-off date of 15.07.2007 for submission of options specifically mentioning in the requisition letter dated 27.06.2007 Annexure P-9 sent to the Director General, Health Services, Haryana and also in advertisement No. P-2 that the options received after 15.07.2007 would be summarily rejected. Yet, the options of private respondents received after 15.07.2007 were accepted by the official respondents. Absolutely no reasons are

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shown/disclosed either in the written statement or otherwise during arguments for acceptance of the options of private respondents after 15.07.2007 in contravention of the own prescription of respondents No. 1 & 2 in the letter dated 27.06.2007 Annexure P-9 and also in advertisement No. P-2 to the effect that the options received after 15.07.2007 would be summarily rejected. This was done even without issuing any further demand notice or corrigendum in this regard. This act of the official respondents obviously frustrated /defeated the very object sought to be achieved while fixing the cut-off date in the instant case i.e. 15.07.2007.

14. Thus, it is abundantly clear that there were two separate and distinct categories of candidates, who had sought appointment/absorption in the ESIHC Department/cadre by transfer from the Health Department – first category of those who had submitted their options by the cut-off date of 15.07.2007 and second category of those who submitted their options after the cut-off date of 15.07.2007.

15. It is not disputed that the petitioners had submitted their options pursuant to and in accordance with the advertisement Annexure P-1 within the prescribed time and they were inducted/absorbed in the ESHIC cadre by transfer from the Health Department in the normal and due course. In this view of the matter and the finding recorded in the earlier part of this order, it is held that on induction into the new cadre, the initial seniority of the petitioners was to be regulated by clause 2 specifically contained in the appointment letters. In other words, it was to be determined as per settled rules and regulations issued by the Government from time to time.

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16. The principles of Service jurisprudence and the intent/spirit pervading the rules and regulations issued by the Government are that in case of appointment by transfer from one and the same cadre Department to another cadre/Department in compliance with the normal course, the seniority in the new cadre/Department shall be determined according to the seniority of such members, in the appointments from which they were transferred.

17. On to the situation in the case of private respondents. As already stated, it had been categorically mentioned in the relevant letter dated 27.06.2007 (Annexure P-9) addressed by respondent No. 2 to the Director General of Health Services, Haryana that options must reach the office of Respondent No.2 by 15.07.007 and that the options received after 15.07.2007 would be rejected summarily. In the advertisement (Annexure P-2) issued by respondent No. 2 also it had been specifically mentioned that options must reach the office of Respondent No.2 by 15.07.007 and that the options received after 15.07.2007 would be summarily rejected. Private respondents had submitted their options after the prescribed cut-off date of 15.07.2007. Still these were accepted and they were absorbed on transfer basis with the newly created Directorate. This was done though no new demand notice or advertisement was issued by the ESI Health Care Department in this regard after the cut-off date i.e. 15.07.2007. Learned State counsel as well as the learned Senior counsel for the private respondents have no answer to query as to under what circumstances the options had been accepted from the private respondents herein, who at the relevant time were borne on the strength of the Health Department even after the cut-off date. No premium ought to be given to

the private respondents for their having submitted options knowingly after the prescribed cut-off date and for the irregularity on the part of the official respondents in accepting those options without any justifiable cause instead of rejecting them in terms of their own prescription and to treat them at par with the petitioners, who had given their options in time. Doing so at the cost of petitioners would be highly unfair to the latter.

18. In these facts and circumstances, I am of the considered opinion that the absorption of the private respondents in the ESIHC cadre was otherwise than in the normal and due course of transfer from the Health Department and rather than that it was akin to appointment by direct recruitment.

19. For the purpose of determination of their seniority at the time of initial induction of the incumbents into the ESHIC cadre, clause 2 *ibid* specifically incorporated in the appointment letters would apply. It provides that their seniority in the new cadre will be determined as per settled rules and regulations issued by the Government from time to time.

20. The principles of Service jurisprudence and the intent/spirit pervading the rules and regulations issued by the Government are that in case of appointment to a service by direct recruitment, normally *inter-se* seniority of the members of the Service shall be determined by the length of their continuous service on any post in the Service irrespective of the length of any previous service and seniority in another Department/service, unless otherwise specified.

21. In view of the facts and circumstances of the instant case and legal position stated above, I am of the opinion that the formula/decision initially given by respondent No. 1 in his letter dated

25.01.2012 (Annexure P-5) was correct, according to which the seniority of the medical officers of the Health Department who had given their options upto 15.07.2007 for absorption in the ESIHC was to be determined as per their seniority in the Health Department and the seniority of those who had given options/applications for permanent absorption after the cut-off date of 15.07.2007, was to be determined as per their respective date of joining in the ESHIC cadre. It follows, therefore, that in subsequent letter dated 28.02.2014 an erroneous view was taken to the extent that the seniority of the Medical Officers (including the private respondents) in whose appointment letter no sort of condition had been put regarding determination of their seniority, be determined in accordance with their seniority in the Health Department.

22. I have held above and proceeded on the premise that the initial seniority of the petitioners was to be regulated by clause 2 specifically contained in the appointment letters. In other words, it was to be determined as per settled rules and regulations issued by the Government from time to time. That being so, there is no question of applicability of clause (d) of Rule 11 of the Haryana Civil Medical (Group-A) Services Rules, 2014 relied upon by the learned counsel for petitioners. Even otherwise, the plain language of clause (d) *ibid* shows that it applies only when several incumbents are appointed by transfer from different cadres. In the instant case, the petitioners and the private respondents all were inducted in the new cadre of ESIHC from the same cadre of the Health Department and not from different cadres.

23. As an upshot of the foregoing discussion, the petition is allowed, the impugned Seniority List circulated vide letter dated

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03.05.2017 (Annexure P-12) and order dated 10.08.2017 (Annexure P-14) are set aside. The official respondents are directed to finalise the seniority of the petitioners and the private respondents in terms of directions given by respondent No. 1 in his letter dated 25.01.2012 (Annexure P-5). It is further directed that in case any promotions are due, the official respondents shall consider and promote the eligible officers/officials as per such revised seniority list in accordance with prevalent service rules.

24. Pending civil miscellaneous application, if any, also stands disposed of.

December 21, 2022
ashish

(ARUN MONGA)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No