

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. :444 of 2006 alongwith CWP
Nos. 454, 455, 459 and 460 of 2006.

Reserved on: 29.11.2007.

Decided on: 11.01.2008.

CWP No. 444 of 2006.

Daya Nand.	...	...	Petitioner.
Versus			
State of H.P. & Another.	...	...	Respondents.

CWP No. 454 of 2006.

Dhyan Singh.	...	...	Petitioner.
Versus			
State of H.P. & Another.	...	...	Respondents.

CWP No. 455 of 2006.

Dutt Ram.	...	...	Petitioner.
Versus			
State of H.P. & Another.	...	...	Respondents.

CWP No. 459 of 2006.

Daulat Ram.	...	...	Petitioner.
Versus			
State of H.P. & Another.	...	...	Respondents.

CWP No. 460 of 2006.

Balbir Singh.	...	...	Petitioner.
Versus			
State of H.P. & Another.	...	...	Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?¹ Yes.

For the Petitioners (in all the Mr. Tek Chand Sharma, Advocate.
Petitions):

For the Respondents (in all the Mr. M.A. Khan, Deputy Advocate General.
Petitions):

Rajiv Sharma, Judge:

Since common questions of law and facts are involved in these petitions, the same are disposed of by a common judgment.

Whether reporters of local papers may be allowed to see the judgment? Yes.

CWP No.444 of 2006:

The brief facts of the case necessary for the adjudication of this petition are that the petitioner was enrolled as a Home Guard volunteer in 7th Battalion of Home Guards, Kullu with effect from 25.4.1974. He was given the honorary rank of Section Leader with effect from 1.8.1980. He was given the honorary rank of Company Havaladar-Major with effect from 1.9.1983 and the honorary rank of Platoon Commander with effect from 31.1.1990. He was given the honorary Senior Platoon Commander rank with effect from 25.4.1992 and the honorary rank of Company Commander with effect from 1.7.1999. He has assailed the order dated 19th May, 2006 whereby his services were called off.

CWP No.454 of 2006:

The brief facts of this petition are that the petitioner was enrolled as Home Guard volunteer in the 7th Battalion of Home Guards, Kullu with effect from 7.4.1981. He was given the honorary rank of Section Leader with effect from 1.6.1984, the honorary rank of Platoon Havaladar with effect from 1.9.1985, the honorary rank of Senior Platoon Commander with effect from 19.2.1992 and the honorary rank of Company Commander with effect from 1.7.1999. His services were called off vide letter dated 19th May, 2006.

CWP No.455 of 2006:

The brief facts of this petition are that the petitioner was enrolled as a Home Guard volunteer in the 7th Battalion of Home Guards, Kullu with effect from 25.4.1974. He was given the honorary rank of Section Leader with effect from 1.3.1978, the honorary rank of Platoon Havaladar with effect from 1.5.1979, the honorary rank of Senior Platoon Commander with effect from 1.10.1985 and the honorary rank of Company Commander with effect from 24.4.1992. He has assailed the order dated 19th May, 2006 whereby his services were called off.

CWP No.459 of 2006:

The facts in brief of this petition are that the petitioner was enrolled as a Home Guard volunteer in the 7th Battalion of Home Guards, Kullu with effect from 25.4.1979. He was given the honorary rank of Section Leader with effect from 1.11.1976, the honorary rank of Platoon Havaladar with effect from 1.6.1984. The petitioner was given the honorary rank of Platoon Commander with effect from 18.10.1985. He has assailed the order dated 19th May, 2006 whereby his services were called off.

CWP No.460 of 2006:

The facts in brief of this petition are that the petitioner was enrolled as a Home Guard volunteer in the 7th Battalion of Home Guards, Kullu with effect from 7.4.1981. He was given the honorary rank of Section Leader with effect from 1.9.1981, the honorary rank of Platoon Havaladar with effect from 1.9.1985, the honorary rank of Senior Platoon Commander with effect from 12.4.1993 and the honorary rank of Company Commander with effect from 1.7.1999. He has also assailed the order dated 19.5.2006 whereby his services were called off.

Mr. Tek Chand Sharma had strenuously argued that the petitioners were required to be served with a notice before calling of their duties as per the impugned order dated 19.5.2006. He further contended that the persons junior to the petitioners have been retained while calling off the petitioners. He then contended that the petitioners have put in long years of service in the Home Guard Organization and their working conditions are required to be improved.

The learned Advocate General had strenuously argued that the services of the petitioners were not terminated since they are offered the work on rotational basis as per the Home Guard Act and the Rules framed

thereunder. He also contended on the basis of the reply filed that the petitioners will be offered employment on rotational basis.

I have heard the learned counsel for the parties.

After the judgment was reserved, the respondents had filed a CMP bearing No.3458 of 2007 in CWP No.444 of 2006 mentioning therein that the petitioner will be called out for duty for the forth-coming election of Vidhan Sabha with effect from 12.12.2007 and thereafter in rotation as and when his services would be required. This application was disposed of by this Court on 1.1.2008 since the elections were already over, but the petitioner could not join his duties. During the course of hearing, the learned Deputy Advocate General had assured that the stand of the State qua the other petitioners was also the same that they will be called out for duties on rotational basis as and when their services are required.

It is evident from the combined reading the Himachal Pradesh Home Guards Act, 1968 read with the Himachal Pradesh Home Guards Rules, 1971 that the appointments of the petitioner are voluntary in nature and they are called out for duty as and when their services are required. There is no permanency attached to their appointments. The detailed procedure for calling out of Home Guards has been prescribed in the Himachal Pradesh Home Guards Rules, 1971 which reads thus:-

“(i) Subject to the over-all directions of the Commandant General, the Commandant shall have the powers to call out a Home Guard or an officer or officers of the Home Guards under their control for the following purposes:-

- (a) For training at such places and for such period as may be authorised by the Commandant General;**
- (b) For duties connected with training, administration, security of arms, ammunition, ceremonial occasions etc. according to the scale and period as may be authorised by the Commandant General.**

- (c) For operational duty for the protection of life and property from natural calamities or anti-social elements, maintenance of essential services, suppression of disturbances, control and regulation of traffic and assemblies and prevention of commission of military, Civil authorities or the Police in the interest of national security.**
 - (d) Any other duty authorised by the Commandant General in public interest.**
- (ii) Provided that any Home Guard Officer of the rank not below the rank of Company Commander may call out any number of Home Guards under his command for operational duties in an emergency, provided further that if there is insufficient time to obtain the orders of the Commandant of his Battalion for purposes mentioned in clauses (a), (b), (c) and (d) above. Any such action taken by him shall however, be reported immediately to the Commandant;**
- (iii) The District Magistrate in his discretion may issue directions to the Commandant to call out Home Guards for operational duties for purposes mentioned in clause (c)."**

The volunteers serving in the Home Guards Organization are paid the honoraria only plus travelling allowances etc. as admissible to them.

It is evident from the bare reading of Section 4 of the Himachal Pradesh Home Guards Act, 1968 that the Home Guards is voluntary body for the protection of persons, security of property and the public safety etc. The appointment of the members of the Home Guards is regulated under Section 5 of the Act. Their Lordships of the Hon'ble Supreme Court have held in the following judgments that the members of the Home Guards Organization are not entitled to be treated at par with the regularly appointed employees.

Their Lordships of the Hon'ble Supreme Court have held in ***State of W.B. and Others versus Hari Narayan Bhowal and Others (1994) 4 SCC 78*** as under:-

“On plain reading of the different provisions referred to above, it appears that West Bengal National Volunteer Force is a force of volunteers. When called upon for duty, the volunteer has to discharge such functions in relation to protection of persons, the security of property and preservation of the public peace in any area within West Bengal and such other functions as may be assigned to him. Any citizen of India or any person having a permanent domicile in West Bengal may offer himself for enrolment in the force and if he satisfies the prescribed conditions, he may be enrolled by the prescribed authority for such period not exceeding 5 years. Every person enrolled as volunteer under the said Act, on expiration of the period for which he had been enrolled or even prior to the expiration of the said period be discharged in accordance with the procedure prescribed under sub-section (4) of Section 8. It is true that such volunteer force has to perform when called upon, the duties of the police force while maintaining law and order. But according to us, the whole concept of the National Volunteer Force, is different from that of the police force. In respect of the volunteers, it can be said that it is a standby force, not only for law and order, but for different emergencies, to aid and help the regular police force or members of the other services.

The same is the position here. On the material on record, it is difficult to hold that the respondents who had been enrolled as volunteers under the West Bengal National Volunteer Force Act, belong to the class of Constables, under the West Bengal Police Force and to treat them separately in matters of fixation of scale of pay, amounts to violating Article 14 of the Constitution. According to us, they form two different classes in public service. In this background, the High Court was in error in treating them on a par with the Constables of the West Bengal Police Force.”

Similarly, their Lordships of the Hon'ble Supreme Court have held in *State of W.B. and Others versus Jiban Krishna Das and Others*, (2002) 4 SCC 721 as under:-

“Section 4 says that a volunteer of the Force when called upon for duty, shall discharge such functions in relation to the protection of persons, the security of property and the preservation of the public peace in any area within West Bengal and such other functions as may be assigned to him under the Act. The Act further provides that every volunteer shall undergo preliminary training and every person enrolled as a volunteer under the Act is entitled to receive a certificate of discharge in the prescribed form on the expiration of the period for which he was enrolled. Section 8(5)(a) says that the prescribed authority can suspend, discharge, dismiss or remove any volunteer from his office and the prescribed authority can also disband any unit constituted under the Act. Section 10 prescribes the mode in which the prescribed authority may at any time call upon any volunteer for discharging any function assigned to him anywhere in West Bengal and the Commissioner of Police in Calcutta or the District Magistrate elsewhere may, at any time, call upon the District or Unit Commandant to mobilize any unit or a detachment of a unit for the purpose of maintenance of law and order.

On a close perusal of the provisions of the Act and Rules, it is clear that the members of the West Bengal National Volunteer Force were recruited to create a Volunteer Force and the provisions of the Act never intended to give permanency to the members of the Force. Their services were in fact required to meet emergent situations. Merely because the members of the Force have to be treated as public servants and their duties are to be regulated by some prescribed code of conduct, it cannot be said that they will have to be treated as Constables of the Police Force. Therefore, the direction of the Division Bench to give status and other benefits as employees of the State Government was not legal. It is also not correct to say that

the members of the West Bengal National Volunteer Force are entitled to get permanency. As per the provisions of the Act, the members of the Force can continue up to the age of 60 years, provided their services are required by the authorities.

Therefore, the direction of the Division Bench that the members of the National Volunteer Force are entitled to get status and other benefits as employees of the State Government is not correct and the members of the National Volunteer Force are not entitled to get the service benefits which are available to the employees of the State Government.”

However, their Lordships of the Hon'ble Supreme Court in *State of West Bengal and others v. Pantha Chatterjee and others*, AIR 2003 SC 3569 have issued the following directions to the State of West Bengal and Central Government to take effective steps for improving the conditions of service for the members of the volunteer organization, i.e. BWHGs as under:-

“It appears that necessity was felt for raising of Border Wing Home Guards Battalion in the States of Assam, Meghalaya, Tripura and West Bengal so as to strengthen the measurers against infiltrations of foreigners from across the borders. With that view, the Government of India, Ministry of Home Affairs promulgated a scheme by means of Memo No.1/17/75-DGCD (HG) dated October 15, 1976 Government of India, Ministry of Home Affairs. It was addressed to the Chief Secretaries to the Government of Assam, Meghalaya, Tripura and West Bengal. It is indicated in the scheme that the President had sanctioned the raising of one Border Wing Home Guards Battalion with immediate effect. The Battalion was to be raised, as far as practicable, from within a belt zone of 30 miles along with border, any slight variation, if necessary, could be permissible by the Ministry of Home Affairs. The strength of the Border Wing Home Guards Battalions was to be within the existing allocated strength of States concerned. The preference was to be given to the Home guards

Organisation already on the rolls but it was to be ensured that they were available for duty during emergencies both for long and short durations. They were to conform to the required qualifications/standards. With a view to raise the Battalion speedily, permanent staff was provided to be taken on loan or retired defence, police personnel could also be taken in the Battalion. BWHG were to be utilized for the jobs assigned to them but the State Government could also deploy them for its purpose with prior clearance from the Home Ministry, Government of India. The expenditure incurred in payment of salary etc. for implementing the scheme was to be met by the Government of India. The initial expenditure on setting up the Battalion was to be incurred by the State Government itself. In case of urgency, if the State deployed the BWHG for its own purpose, the expenditure for such deployment was to be met by the State Government.

There is no dispute about the fact that there has been disparity in emoluments and other working conditions, between the part time BWHGs and the BWHGs on the permanent staff although both have been deployed for performing the same date of duties and have been working for the same duration in the same conditions but one of them with and the other without the necessities of the job, facilities and benefits of the service. It is true and rightly held that BWHG could not compare themselves with BSF personnel but the difference between the permanent staff and the part time staff which had been made in the scheme was obliterated and rendered ineffective. There is no real distinction between the two, namely, the permanent BWHG and the part time BWHG in absence of non-release of the latter after three months of the appointment, as per the Scheme. It has not been indicated by the appellants or the Union of India that the petitioners were never disengaged of their assignment temporarily or the State Government had availed of their services after due and prior permission of the Central Government, or they were ever freed to resume their old vocational pursuits. It is in the affidavit of the authorities that BWHGs are under operational

command of B.S.F. Authorities, when deployed for patrolling along Indo-Bangladesh border. In the background of what has been indicated above, in our view the findings arrived at by the High Court cannot be faulted with.

On the first date of hearing in this matter the learned Additional Solicitor General appearing for the Union of India urged that the State of West Bengal could not argue the matter in a manner so as to fasten the liability upon the Central Government, since the Union of India was impleaded only as a pro forma respondent. Therefore, it was not open for the appellant to take the Govt. of India by surprise and seek relief which may saddle the Central Government with financial liability or to say, that the petitioners-respondent are the employees of the Central Government. We find that in the appeal this aspect was considered by the High Court *vis-à-vis* these two parties viz. State of West Bengal and the Central Government. In any case so as to be able to argue the matter on merits and to have further instructions in that connection, from the Central Government, as prayed by the learned Additional Solicitor General the matter was adjourned. After having received the necessary instructions, the learned Addl. Solicitor General took up the stand that the petitioners will not be entitled to relief as granted by the High Court for the following reasons:

1. The petitioners have been members of a voluntary organization;
2. They were recruited under the State Home Guard Act by the State machinery;
3. Master and servant relationship of the petitioners existed only with the State Government; and
4. Central Government was liable to bear the financial liability as provided under the Scheme.

Surprisingly, the point of it being a voluntary organization is beaten time and again by the State as well

as by the Centre, despite their own admission that voluntary character of the Scheme was lost due to continuous deployment of the petitioners for long number of the years and their non-relieving after three months to enable them to go back to their vocational engagement. In that connection it may again be pertinent to reproduce Paragraph 4 of the counter-affidavit filed in this Court by the Central Government on 4-5-1998:

“The contents of Para 4 of the counter-affidavit needs no reply since matters of record. The present situation which led to BWHG volunteers claiming service benefits is due to the fact that voluntary concept which is back bone of home guards organizations was not followed in letter and spirit by the State Government. Due to continuous deployment neither the turnover of personnel was carried nor apparently mandatory training was imparted.....”

By whose fault this scheme lost character of Voluntary Nature is not relevant for the purpose of the petitioners. It was the Scheme of the Central Government, it should have monitored its implementation to see that it was being executed as framed. Then again, the BWHGs were deployed and continued by BSF authorities, who were authorised in that behalf by the Central Government. BWHG could not be left in a lurch after being engaged continuously for more than 10 to 15 years for patrolling the borders under the conditions worthy those who were doing the same job under the label of permanent staff. During all this period they were paid less and facilities and amenities were also almost nil. After suffering such a discrimination for a period of about a decade or more, when they approached the Court, then alone a decision is taken to disengage them for the reason that cases were being filed in the Court for being provided with similar conditions of service which were being enjoyed by their counter-part under the label of permanent staff. The Central Government could not hanker on technicalities of voluntary nature of their engagement despite their own admission of facts to the contrary. The stand of the State and the Central

Government both are not bona fide. It is not good for an ideal employer to avoid liability and deny to give, what is legally due to one. Defeating such genuine and legal claims on technicalities would only result in great injustice.

In the circumstances indicated above the High Court has rightly come to the conclusion that so-called part time Border Wing Home Guards could not be treated differently from the permanent staff of the BWHG. They have been rightly accorded parity with them.

The petitioners may not suffer any further because of any confusion or misunderstanding between the Central and the State Government, if at all, we, therefore, feel it necessary to observe that the Central Government must in all fairness accept its responsibility and make the necessary funds available for reimbursement, at the earliest. In this regard we make the specific directions to the effect: (1) The State Government shall carry out order passed by the High Court and clear all the consequential monetary benefits to the writ petitioner-respondents within a period of 3 months from today with Statement of account to be forwarded to the Central Government for reimbursement; (2) The Central Government within two months of the receipt of the said reimbursement statement shall reimburse the amount to the State of West Bengal; (3) In case there is any dispute or confusion in regard to the actual amount payable on account of reimbursement or otherwise, the same shall be sorted out between the State of West Bengal and the Central Government at the earliest but that would not be cause of delay in payment as indicated above; (4) that there shall be no delay in payment to be made as scheduled above by the State of West Bengal to the petitioners nor by the Central Government to the State of West Bengal on account of reimbursement which may be subject to final settlement; in case of any dispute or doubt about the same, to be sorted out sooner or later between them.”

Mr. Tek Chand Sharma had strenuously argued that the petitioners' services could not be terminated without issuing a show cause notice.

The learned Deputy Advocate General contended that the petitioners' were not terminated, but they were only called off and will be called out for duties on rotational basis as and when their services are required. He has assured on the basis of the instructions imparted to him by Mr. Chauhan at the time of disposal of CMP No.3458 of 2007 that the petitioners will be offered appointments on rotational basis in the month of February, 2008 itself. It has also come in the reply filed by the respondents that the petitioners will be called out for duties as and when they are required. The same stand has been reiterated in the averments contained in CMP No.3458/2007. Since the appointments of the petitioners are voluntary, no notice was required to be issued while calling off them from duties as per the impugned order. The employment is offered to the members of the organization on rotational basis as per the requirement. However, in the interest of justice, the respondents are directed to ensure that their conditions of service are improved as per the ratio of law laid down in ***State of West Bengal and others v. Pantha Chatterjee and others, AIR 2003 SC 3569*** and they are also called out for duties on rotational basis as and when they are required.

Consequently, the writ petitions are disposed of in view of the observations made hereinabove. There shall be no order as to costs.

January 11, 2008.
(sck)

(Rajiv Sharma),
Judge.