

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU.**

SWP NO. 1635/08, SWP NO. 1644/08
SWP NO. 1708/08 AND SWP NO. 3/2009
Contempt Petition Nos. 19/09 AND 6/2001

Dr. Shabir Ahmed and Ors.	Vs. State and Ors.
Mohd. Younis Malik	Vs. State and Ors.
Dr. Davinder Kour	Vs. State and Ors.
Dr. Sajid Iqbal Malik	Vs. State and Ors.

Coram:

Hon'ble Mr. Justice Sunil Hali, Judge.

Appearing counsel:

For the petitioner(s): M/s M.K. Bhardwaj, Niten
Bhasin, Surinder Kour
and S.S. Ahmed, Advocates

For the Respondent(s): Mr. D.C. Raina, Senior
Advocate with Mr. F.A.
Natnoo, Advocate.

i) Whether to be reported in
Press/Journal/Media : Yes/ No

ii) Whether to be reported in

Digest/ Journal.	:	Yes/ No
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Petitioners claim relaxation of upper age limit for seeking appointment as Dental Surgeon in the Health and Medical Department. They claim to be in service candidates working on adhoc/contractual basis from various dates. Vide notification dated 18-2-2008 issued by respondent -2, applications were invited for appointment as Dental Surgeons in the Health and Medical Education Department. The upper age limit prescribed for seeking appointment to the said post was 37 years for direct recruits and 40 years for the persons who were already in service. The petitioners admittedly on the basis of aforesaid notification could not seek appointment as they had crossed 40 years of age. They could claim appointment only if the age was relaxed in their

favour, which seems to have not been done, as a result of this, they are before this court.

They petitioners claim to have been appointed on adhoc basis on 30-11-2000 initially for a period of 89 days but this order has been continued till date. On the day of notification, the petitioners were 41 years and some months old. . They claim that the note appended to the aforementioned notification regarding age indicates that the age could be relaxed in case of persons who possess exceptional qualification relevant in the concerned subject. It is contended that because of their continuance on adhoc basis for more than eight years, they had exceptional qualification for purpose of seeking relaxation in age. It is further contended by the petitioners that for in-service candidates, upper age limit of 45 years is provided under Rule -10 of the

J&K Medical (Gazetted) Service Recruitment Rules, 1970.

On the other hand, stand of the respondents is that the petitioners are not eligible, to seek appointment, as they have already crossed the age of 40 years provided for the in-service candidates. The age relaxation cannot be provided by taking recourse to the note appended to the aforementioned notification, as gaining experience on the post does not mean acquiring exceptional qualification. The qualification is to be acquired not by experience but by qualifying certain courses. In nutshell, the case of the respondents is that they are not eligible for appointment and no relaxation can be granted to them for relaxing the upper age limit.

I have heard the learned counsel for the parties and perused the record.

Before adverting to the controversy raised in this petition, it is important to take note of the fact that the appointments are required to be made for the posts of Dental Surgeons in the Health and Medical Education Department. There are two services in the State; one is called Medical Gazetted Service and the other is J&K Medical Education (Gazetted) Service. The schedule appended to the aforementioned rules indicates the cadre strength and the designation of the persons who are borne on the cadre of both the services. The post of Dental Surgeon finds its place in the J&K Medical (Gazetted) Service Recruitment Rules, 1970. The post of Dental Surgeon is Class-IV in the aforesaid schedule. There is no post of Dental Surgeon in the J&K Medical Education Service. At serial no. 25 of Schedule-II appended to the J&K Medical

Education (Gazetted) Service Recruitment Rules, 1979, there are posts of Professor, Associate Professor, Assistant Professor and Lecturer in the subject of Dentistry. There is no post of Dental Surgeon in the aforesaid schedule. The post of Dental Surgeon is borne on the cadre strength of J&K Medical (Gazetted) Service.

Vide SRO 260 dated 14-8-2006, Medical Gazetted Service has been re-constituted and accordingly the rules have been framed thereafter. It is now called as Jammu and Kashmir Health and Family Welfare (Gazetted) Service Recruitment Rules, 2006. In the new rules, the upper age limit provided for seeking appointment by a person who is in service, is the same as is provided under the General Rules. It is however, provided that in case the post, which carries higher degree of

specialization and or experience, the Government may prescribe higher age limit. The import of the aforementioned Rules reveals that upper age can be relaxed if a candidate has higher degree of specialization or experience.

The question that arises for consideration is whether the petitioners can claim to be the members of the aforesaid service. Two expressions have been used; one is member of the service and other is in-service candidate in terms of Government Order No. 102-GAD of 2007 dated 27-1-2007. There is no general provision in the J&K Health and Family Welfare (Gazetted) Service Recruitment Rules, 2006 for relaxing the rules. However, under Rule-9 of the aforementioned rules, relaxation can be ordered in case a person has higher degree of specialization or experience. Admittedly, in this

case, higher age limit has not been provided in the notification. Rule-5 indicates qualification and method of recruitments. It provides that no person shall be eligible for appointment or promotion to any post, class, category or grade in the service unless he possesses qualification as laid down in Schedule -II and fulfils the other requirements of recruitment as provided in the rules and orders for the time being in force. It emerges that no person shall be appointed unless he possesses requisite qualification as provided in the aforementioned rules. Rules emphasize that fulfillment of requirements of rules has to be followed. However, in case of persons with experience, the Government can provide upper age limit.

There is no provision in the J&K Medical (Gazetted) Service Recruitment Rules, 1970 and

J&K Health and Family Welfare(Gazetted) Service Recruitment Rules, 2006 for relaxing of the rules. However, Rule-11 of the said Rules deals with residuary matters, which envisages that any matter not specifically covered by these rules or by regulations or orders, shall be governed by the rules, regulations and orders applicable to the State Civil Services in general. So the power to seek relaxation is traceable under Rule-5 of the J&K Civil Services (Classification, Control and Appeal) Rules, 1956, which is applicable to the State Service in general. Rule-5 of the aforementioned rules is quoted hereinbelow:

“ 5. Any of these rules made under them, may for reasons to be recorded in writing, relaxed by the government in individual cases if Government is satisfied that a

strict application of the rule would cause hardship to the individual concerned on conferred undue benefit on him.”

The aforesaid rules envisages that for the reasons to be recorded, the Government can relax the rules if strict application of the same causes hardships to the individual concerned or confers undue benefit on him. The import of the aforementioned rules clearly envisages that the Government can relax strict application of the rule, which causes hardship to the individual. Power to relax age under the aforesaid rules cannot be treated as wide power to relax the rules of recruitment. Now the question that arises for consideration in the present case is, whether relaxation of upper age limit can be termed to be a condition of recruitment. In order to understand this expression, it is important to make mention of

various provisions of J&K Health and Family Welfare (Gazetted) Service Recruitment Rules, 2006. No persons shall be appointed to any post in the service unless he :

- i) possesses the qualification as laid down for the post in the schedule;
and
- ii) fulfils the requirements of recruitment as provided in the rules and orders for the time being in force.”

The import of the aforesaid rules reveals that no persons shall be appointed until and unless he possesses the qualification as laid down for the said post in the schedule and rules framed there under. Regarding the qualification, no relaxation can be permitted, which is clearly mandated by the language of aforesaid rule itself.

The Government Order dated 27-1-2007 envisages that Contractual Appointees shall be deemed to be in-service candidates so far as upper age limit prescribed for direct recruitment to Government Service is concerned, provided they subsist in contractual appointment as on the date of issue of the advertisement by the Recruiting Agencies. The adhoc appointees are at higher pedestal than the Contractual Appointee. Particularly when an adhoc arrangement is continued for a longer period of time. The petitioners can be construed to be in-service candidates. Regarding method of recruitment, it provides two sources and no relaxation is permitted in this respect. Exception provided under this rule that in case of a post which requires a higher degree of specialization and experience, the Government

may prescribe a higher age limit. Since there is no other power of relaxation of age contained in the rules, the application of Rule-5 of the J&K Civil Service(Classification, Control and Appeal) Rules, 1956 can be invoked in the present case. It can be invoked only in case where strict application of the rules causes hardship on the person seeking relaxation. The power to relax the rules have to be analysed on the touch stone, as to whether hardship is caused to the person while applying the rule strictly. Applying this principle in the present case, it is seen that the petitioners are in-service candidates and have been working on adhoc basis since 2000. The posts were not advertised and the status of the petitioners as adhoc appointee continued. The State was required to advertise the posts but the same was not done. The result of this

was that when the posts were advertised, the petitioners had crossed the upper age limit of 40 years. This ex facie and clearly takes away the right of the petitioners to be appointed as Dental Surgeon on regular basis for all times to come. Failure on part of the State to advertise the posts of Dental Surgeons before the petitioners could cross the upper age limit, is the basis for granting relaxation in such matters. It may be stated that there can be no relaxation for basic and fundamental rules of recruitment. Granting of relaxation in age, cannot be construed to be a basic and fundamental rules of recruitment. It is revealed from the notification that various ages have been prescribed for various categories of people for the same post, which is not the case regarding the basic qualification and method of recruitment. So, granting of relaxation in

age is not basic and fundamental rule of recruitment and relaxation in this respect can be made.

It has been reported by Mr. D.C. Raina, Senior Advocate appearing for the respondents that the selection process has not been concluded till date.

I, therefore, direct the respondents to accord consideration for the grant of relaxation in upper age limit in case of the petitioners and conduct their interview for the ensuing selection of Dental Surgeons.

Writ petitions alongwith connected CMPs are allowed.

(Sunil Hali)
Judge

Jammu: 31-7-2009.
RSB,Secy.