

GOVERNMENT OF KERALA

Abstract

Health & Family Welfare Department – Judgments of the Hon'ble High Court in WP(C) No. 26289/09 and in 13510/10 – Directions complied with – Orders issued.

HEALTH & FAMILY WELFARE (J) DEPARTMENT

G.O.(Rt)No. 4771/2010/H&FWD

Dated, Thiruvananthapuram, 03/12/2010.

- Read:-
1. Representation dated 10/08/09 submitted by Dr. Bindu Pereira. S
(Ext. P4 in WP(C) No. 26289/09)
 2. Judgment dated 17/09/09 of the Hon'ble High Court in WP(C) No. 26289/09.
 3. Letter No. 3459/E1/09/GHMCT dated 01/02/09 from the Principal & Controlling Officer, Government Homoeopathic Medical College, Thiruvananthapuram
 4. Letter No. 405/E1/06/GHMCT dated 14/05/10 from the Principal & Controlling Officer, Government Homoeopathic Medical College, Thiruvananthapuram
 5. Judgment dated 25/05/10 of the Hon'ble High Court in WP(C) No. 13510/2010 filed by Dr. Uma. V.

ORDER

As per the judgment read as 2nd paper, the Hon'ble High Court has directed Government to take a decision on Ext. P4 after hearing the petitioner.

2. In Ext. P4 representation the petitioner has stated that she was appointed as Tutor in Forensic medicine and Toxicology at Government Homoeopathic Medical College, Kozhikode as per the advise memo dated 05/05/06 of Kerala Public Service Commission and joined duty at the college on 23/06/06. She was appointed against leave vacancy of one Dr. Sanil Kumar. M.C who had availed leave upto 31.10.2006. However her service was regularized with effect from 23/06/06 on the basis of the Police verification. She was ousted from service on 27.10.06 FN consequent on the rejoining by Dr. Sanil Kumar. M.C. Again she was joined in a leave vacancy in the Government Homoeopathic Medical College, Thiruvananthapuram on 15/10/07 and ousted from service on 15/05/08 consequent on the rejoining of service by the incumbent on expiry of the leave. Finally she was reappointed as Tutor in the Government Homoeopathic Medical College, Thiruvananthapuram against a vacant post of Lecturer. Since she is no way

responsible for the break of service happened in her service, she has requested Government to reckon her probation in the category of Tutor on 11/03/2009 FN.

3. The Principal & Controlling Officer in her letter read as 3rd paper has stated that the request of the petitioner for reckoning her period of break of service for declaration of probation is not admissible as per rules. However the actual duty performed by her can be reckoned for declaring her probation in the cadre of Tutor.

4. The petitioner was heard by the Under Secretary on 29.12.09 as authorized, in pursuance of the directions of the Hon'ble High Court in the instant judgment. During the hearing the petitioner submitted a statement in lieu of her oral deposition which is summarized below:-

(i) She was appointed as Tutor in Forensic Medicine based on the advice of Kerala Public Service Commission and as such the Rules in K.S.R and K.S&S.S.R are applicable to her like any other Government servants. So she was entitled to continue in Government service as long as a vacancy was available to accommodate her. The action of the former Principal & Controlling Officer in ousting her from service on 27.12.06 AN, when a vacancy was available to accommodate her at Government Homoeopathic Medical College, Thiruvananthapuram was a gross violation of the Rule 7, part II, K.S&S.S.R. She was reinstated on 15.10.07 FN based on the Court Order. She had quoted a portion from "Law relating to Civil Services in Kerala" edited by N. Sugathan and A.V.R. Panicker, Advocates wherein it was stated that *"A person who was wrongly prevented from continuing in service is entitled, on the wrong being rectified by virtue of the orders of the Court, for the restitution of the benefits which he would have enjoyed had he been continued in service as he should have been."*

(ii) Her case is exactly similar. The action of the former Principal & Controlling Officer, violating the service Rules deprived her of the service benefits that would have accrued to her in the normal course. So she has requested to count the breaks from 28.10.06 FN to 14.10.07 AN for all service benefits including probation so that natural justice is done.

5. The retrenchment of the petitioner from service was not fault of her, but due to the fault of the departmental authorities in having appointed the former against a leave vacancy without her knowledge. In these circumstances Government have taken a tentative decision to reckon the service rendered by the petitioner for the period from 23/06/06 to 27/10/06 and from 15/10/07 to 14/10/08 along with regular service started from 23/01/09 for the purpose of declaration of probation in relaxation of Rule 18(b) of KS&SSR 1958 by invoking Rule 39 of the statute. The tentative decision was communicated to the Principal & Controlling Officer, Government Homoeopathic Medical College, Thiruvananthapuram and requested to furnish objections if any to the above decision to Government along with his specific remarks on each objections.

6. The Principal & Controlling Officer, Government Homoeopathic Medical College, Thiruvananthapuram has furnished the objections vide letter read as 4th paper above. It is reported that no other persons except Dr. Sanilkumar and Dr. Uma have submitted petitions for raising their objections. According to the Principal & Controlling Officer, if Government take a decision to reckon the broken service rendered by Dr. Bindu Pereira for the purpose of declaring her probation in the cadre of Tutor, the above decision will not become any threat to Dr. Sanilkumar, since he is senior to Dr. Bindu Pereira. As regards the objection raised by Dr. Uma, the Principal & Controlling Officer has requested Government to take a suitable decision.

7. Meanwhile Dr. Uma, Tutor, Forensic Medicine and Toxicology, Government Homoeopathic Medical College, Thiruvananthapuram has filed WP(C) No. 13510/10 and the Hon'ble High Court was disposed the WP(C) vide its judgment dated 25/05/2010 with a direction to the third respondent (State of Kerala) to issue notice and afford an opportunity for being heard the petitioner also while taking up Ext. P4 representation mentioned in Ext. P2 judgment filed by the 1st respondent (Dr. Bindu Pereira).

8. As per the Court Direction the petitioner Dr. Uma has been heard by the Under Secretary. During the hearing the petitioner has submitted a detailed argument which is summarised below:

- (1) There is no direction by the Hon'ble Court in the Writ Petition filed by Dr. Bindu Pereira to declare her probation in relaxation or Rules or by invoking Rule 39. Therefore the action of Government to declare her probation in relaxation of rules invoking Rule 39 is not just and proper.
- (2) Since the post of Tutors are declared as vanishing as per the order issued in G.O(MS). No. 27/2005/H&FWD dated 02/02/2005 and also as per the instructions in the letter dated 06/01/2006 there was no post to accommodate Dr. Bindu Pereira and hence the appointment given to her itself is not proper.
- (3) While appointing Dr. Bindu Pereira as per G.O dated 21/01/2009 there was no vacant post of Tutor, since both the post were occupied by Dr. Sanil Kumar and Dr. Uma. This is evident from the G.O itself that she was appointed as Tutor and accommodated against the vacancy of Lecturer.
- (4) Relaxation of Rule by invoking Rule 39 is not just and proper, since it will seriously affect the seniority of the petitioner.
- (5) She has pointed out two judgments namely, Asok Kumar Uppal Vs. State of J&K (1998) and Koit Joseph Vs. Subash George, stating that in those cases the Hon'ble Apex Court held that powers cannot be exercised to give undue

advantage or favour to an individual employee and that the power should not be exercised if it would be causing serious prejudice to the seniors.

- (6) During the period of Leave Without Allowance, she is undergoing PG Course which is helpful for her future service in the Department itself. She is rendering service in the Department during her course period also. Hence she is eligible to get the period counted for probation and if it is so her probation can be declared prior to the same of Dr. Bindu Pereira and the advice seniority of the Kerala Public Service Commission can be maintained.

For the above reasons she has requested not to declare the probation of Dr. Bindu Pereira reckoning the break period also as duty.

9. As regards the points raised by Dr. Uma, the position is as follows:-

- (i) It is true that there is direction only to consider and pass orders on Ext. P4 as per the judgment in the Writ Petition filed by Dr. Bindu Pereira. But Government is bound to consider all aspects while considering a representation as per law and if it is found that there is merit Government is free to allow the request.
- (ii) Eventhough the posts of Tutors are ordered as vanishing there were direction to fill up 17 vacancies including 2 posts of Tutor in the Department under question. Hence there were vacancies of Tutor posts when Dr. Sanil Kumar and Dr. Uma were on leave. Hence the contention is not sustainable.
- (iii) Government have the powers to relax rules by invoking Rule 39 of KS&SSR. Hence the contention raised is not sustainable.
- (iv) Since Dr. Uma was given Leave Without Allowance for study purpose under Appendix XII B, Part I, KSR she is not eligible for reckoning the period for any benefits.

10. The senior Dr. Uma has taken Leave Without Allowance from 10/06/06 to 15/05/08 under Appendix XII B of Part I, KSRs after joining duty on 24/04/06. From this it is evident that Dr. Uma can claim seniority in the cadre of Tutor only from the date of rejoining duty in that post (ie from 16/05/08) after availing Leave Without Allowance under Appendix XII B and hence Dr. Uma has to be considered as Junior to Dr. Bindu Pereira by the application of the said rules. Therefore the contention of Dr. Uma that declaration of probation of Dr. Bindu pereira by relaxing rules invoking Rule 39 of Part I, KS&SSR would adversely affect her seniority is not sustainable.

11. In the above circumstances Government have examined the matter in detail and are pleased to order that the Service rendered by Dr. Bindu Pereira for the period from 23/06/06 to 27/10/06 and from 15/10/07 to 15/05/08 along with her regular service started from 23/01/09 is reckoned for the purpose of declaring her probation in the cadre of Tutor in relaxation of Rule 18 (b) of Part II, KSRs by invoking rule 39 of Part II of the same rules.

12. The directions in the judgments read as 2nd and 5th papers above are complied with as above.

(By order of the Governor)

SUSY EAPEN

Joint Secretary to Government

To

Dr. Bindu Pereira. S, Tutor, Department of Forensic Medicine & Toxicology,
Government Homoeopathic Medical College, Thiruvananthapuram.

✓ Dr. Uma. V, Tutor, Department of Forensic Medicine & Toxicology,
Government Homoeopathic Medical College, Thiruvananthapuram.

The Principal & Controlling Officer, Government Homoeopathic Medical
College, Thiruvananthapuram.

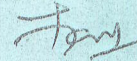
The Advocate General, Ernakulam (With C/L)

The Principal Accountant General (Audit), Kerala, Thiruvananthapuram.

The Accountant General (A&E), Kerala, Thiruvananthapuram.

SF/OC.

Forwarded/By order,



Section Officer.

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