

**HIGH COURT OF CHHATTISGARH, BILASPUR****WPS No. 2539 of 2020**

- Ayush Medical Association Through Member Dr. Mahendra Kumar Sao, (Central Council) Office New Sarkanda, Bandhwapara, Front Of Maharana Pratap Bhawan Bilaspur Chhattisgarh, Pin 495006

---- Petitioner**Versus**

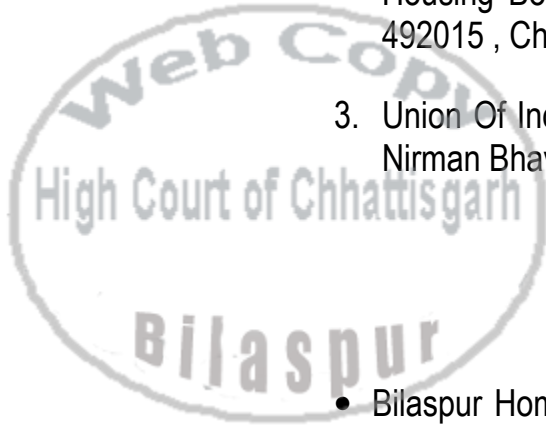
1. State Of Chhattisgarh Through Secretary, Health And Family Welfare And Medical Education, Mahanadi Bhavan, Naya Raipur District Raipur Chhattisgarh
2. National Health Mission Through Deputy Director, Third Floor, Chhattisgarh Housing Board Vyavasayik Parisar, Sector 27, Nava Raipur Atal Nagar, Pin 492015 , Chhattisgarh
3. Union Of India Through Secretary Department Of Health And Family Welfare, Nirman Bhavan New Delhi

---- Respondents**WPS No. 3107 of 2020**

- Bilaspur Homeopathic Chikitsak Sangh, Through Dr. Sanjay Kumar Sahu, S/o Shri Bhagwat Prasad Sahu, Aged about 28 Years, Joint Secretary of the Bilaspur Homeopathic Chikitsak Sangh, Office House No.14/451, Village Vidya Up Nagar L-3, Post Tarbahar, Tehsil & District Bilaspur (C.G.)

---- Petitioner**Versus**

1. State Of Chhattisgarh Through Secretary, Health And Family Welfare And Medical Education, Mahanadi Bhavan, Naya Raipur, District Raipur
2. National Health Mission Through Deputy Director, Third Floor, Chhattisgarh Housing Board Vyavasayik Parisar, Sector 27, Nava Raipur Atal Nagar, Pin 492015 Chhattisgarh
3. Union Of India Through Secretary, Department Of Health And Family Welfare, Nirman Bhavan New Delhi

---- Respondents



For Petitioners : Shri Vaibhav P. Shukla, Advocate
For Respondents/State : Shri Amrito Das, Addl. AG
For Respondent No.2 : Shri C.J.K. Rao, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order

13/08/2020

1. Heard.

2. Challenge in these petitions is to the advertisement dated 26.05.2020

(Annexure P-1) which was for appointment of Community Health Officer (hereinafter referred to as "CHO") under the National Health Mission in the State of Chhattisgarh. The relevant part of the advertisement with respect to the eligibility qualification and the part of advertisement which restricts the right to apply to the other degree holder apart from nursing is under challenge, the relevant part of the advertisement is reproduced hereinbelow:-

राष्ट्रीय स्वास्थ्य मिशन के अंतर्गत हेल्थ एण्ड वेलनेस सेंटर हेतु

06 माह के सामुदायिक स्वास्थ्य पाठ्यक्रम (सामुदायिक स्वास्थ्य अधिकारी / **Community Health Officer**) के लिए आवेदन आमंत्रित किये जा रहे हैं।

मिशन संचालक, राष्ट्रीय स्वास्थ्य मिशन छत्तीसगढ़ राज्य की ओर से ऐसे इच्छुक एवं उत्साही अभ्यर्थियों को आमंत्रित किया जाता है, जो समुदाय को अपने घर के नजदीक स्वास्थ्य सेवा उपलब्ध कराने के लिए "6 माह के "सर्टिफिकेट कोर्स इन कम्युनिटी हेल्थ" प्रशिक्षण जुलाई-2020 में आवेदन करना चाहते हैं। यह पाठ्यक्रम राष्ट्रीय स्वास्थ्य मिशन के अंतर्गत उपस्वास्थ्य केन्द्रों को हेल्थ एण्ड वेलनेस सेंटर के रूप में विकसित करने का एक अंग है। हेल्थ एण्ड वेलनेस सेंटर के रूप में विकसित उपस्वास्थ्य केन्द्रों में समग्र प्राथमिक स्वास्थ्य सेवायें प्रदान की जायेगी जिनमें बीमारियों से बचाव एवं हेल्थ प्रमोशन के कदम भी शामिल हैं। वे अभ्यर्थी जो इस पाठ्यक्रम को सफलतापूर्वक पूर्ण कर लेंगे, वे उपस्वास्थ्य केन्द्रों में पदस्थ होकर समग्र प्राथमिक स्वास्थ्य सेवा प्रदाय हेतु "मिड लेवल हेल्थ प्रोवाइडर" के रूप में सेवाएँ देंगे एवं अन्य मैदानी कार्यकर्ताओं जैसे -ए. एन. एम., एम. पी. डब्ल्यू. एवं मितानिन की टीम का भी नेतृत्व करेंगे। उपरोक्त नियुक्ति राज्य के किसी भी जिले



के चिन्हांकित उप स्वास्थ्य केन्द्रों में काउंसिलिंग के माध्यम से संविदा आधार पर राष्ट्रीय स्वास्थ्य मिशन, छत्तीसगढ़ के नियमानुसार की जायेगी।

चयनित उम्मीदवारों के लिए मानदेय एवं अन्य सुविधाएँ—

- प्रशिक्षण अवधि के दौरान 10000 रु. प्रतिमाह मानदेय आपके रहने एवं भोजन खर्च के लिए दिया जाएगा।
- राष्ट्रीय स्वास्थ्य मिशन छत्तीसगढ़ द्वारा इंदिरा गांधी राष्ट्रीय मुक्त विश्वविद्यालय (IGNOU) की फीस, फिल्ड में प्रैक्टिस एवं प्रशिक्षण संबंधी अन्य खर्च दिया जाएगा।
- मिड लेवल हेल्थ प्रोवाइडर के रूप में संविदा कार्य करने के दौरान प्रतिमाह 16,500 रु. वेतन एकमुश्त एवं साथ में कार्य—प्रदर्शन आधारित प्रोत्साहन राशि (Performance Based Incentive) प्रतिमाह अधिकतम 15000 रु. तक दी जायेगी तथा इस संबंध में मिशन संचालक, राष्ट्रीय स्वास्थ्य मिशन द्वारा समय—समय पर जारी दिशा—निर्देश लागू होंगे।

अनिवार्य योग्यता:—

- अभ्यर्थी छत्तीसगढ़ का मूल निवासी होना चाहिए। विज्ञापित जिलेवार पदों हेतु संबंधित जिले के अंतर्गत आने वाले जिलों के स्थानीय निवासी ही पात्र होंगे। जिले के स्थानीय निवासी नहीं मिलने की स्थिति में संबंधित संभाग के अन्य जिलों के अभ्यर्थियों को आरक्षण के आधार पर चयनित किया जावेगा।
- अभ्यर्थी को क्षेत्रीय एवं स्थानीय भाषा में दक्षता एवं ज्ञान हो।
- किसी भी मान्यता प्राप्त विश्वविद्यालय से नर्सिंग कोर्स – बी.एस.सी. (नर्सिंग), पोस्टबेसिक बी.एस.सी. (नर्सिंग), एवं जी.एन.एम. में उत्तीर्ण हो।
- अभ्यर्थी का छत्तीसगढ़ नर्सिंग काउंसिल में जीवित पंजीयन होना अनिवार्य है।
- अभ्यर्थी की आयु दिनांक 01.01.2020 को न्यूनतम 18 वर्ष तथा अधिकतम 35 वर्ष होना चाहिए। (अनुसूचित जाति एवं जनजाति हेतु अधिकतम आयु 40 वर्ष)

3. Learned counsel for the petitioners would submit that the scheme of the appointment for CHO is that certain prospective candidates having specified degree as laid down by the Central Government have to apply. Thereafter, they have to undergo a training from the Indira Gandhi National Open University (IGNOU) according to the National Health Policy, 2017 (Annexure P-2) and thereafter, the CHO are to be appointed according to the merit. It is contended that in the advertisement under challenge, the AYUSH doctors have been eliminated even to apply for the post, whereas the National Health Policy purports that for mid level service providers, the AYUSH doctors are also entitled to apply. It is further contended that on the earlier occasion too on



20.11.2019 an advertisement vide Annexure P-2 was for appointment of CHO, wherein also the AYUSH doctors were deprived to apply. The said advertisement was subject of challenge in WPC No.304 of 2020 (Annexure P-4) wherein notices were issued on 23.01.2020 and without filing reply in such petition again afresh advertisement has been made. It is stated again the petitioners, who are the AYUSH degree holders are deprived to apply for the post of CHO, therefore, the said advertisement is arbitrary as the National Health Policy allows the AYUSH degree holders to apply for the post of CHO. It is further contended that by such advertisement right to apply for particular post is illegally been taken away.

4. Learned counsel for the petitioners refers to the similar like nature of advertisement by the State of Bihar, State of Maharashtra, State of Punjab, State of Madhya Pradesh and State of Jharkhand and would submit that in all the other states for appointment to the post of CHO, the AYUSH doctors have been allowed to apply for post of CHO and accordingly they were allowed to participate in the selection process. It is contended that in respect of State of Chhattisgarh depriving the AYUSH degree holders to apply for the post of CHO would be arbitrary and contrary to the national policy. He placed his reliance in the case of ***Asha Sharma Versus Chandigarh Administration and others*** ***{(2011) 10 SCC 86}***.

5. Per contra, learned counsel for respondent No.2 would submit that as per the ayushman bharat scheme, right has been given to the State to modify the staffing pattern at HWC i.e. Health & Wellness Center and PHC i.e. the Primary Health Center, on the basis of local needs. He would further submit that as per



List II, Seventh Schedule & entry 6 Public health and sanitation; hospitals and dispensaries, are within the domain of the State, therefore, though the scheme is by the Union, however, the State can very well lay down the criteria according to their need. He would further submit that in other states too according to the staffing need the advertisement has been made. He placed his reliance in the case of ***Maharashtra Public Service Commission THROUGH ITS SECRETARY Versus Sandeep Shriram Warade and others {(2019) 6 SCC 362}***.

6. I have heard learned counsel for the parties and perused the documents.
7. Perusal of the advertisement dated 26.05.2020 would show that for appointment to the post of CHO, the persons who are holding B.Sc. (Nursing), Post basic B.Sc. (Nursing) and G.N.M. have been allowed to apply. The advertisement necessarily excludes the AYUSH & other degree holders. This is not in dispute that the appointment to the post of CHO are made according to the scheme of National Health Policy. The National Health Policy, 2017 (Annexure P-2) is on record. In National Health Policy, 2017 for mid-level service providers, for which the dispute is to the fore, the requirement has been shown as under:-

11.4 Mid-Level Service Providers: For expansion of primary care from selective care to comprehensive care, complementary human resource strategy is the development of a cadre of mid-level care providers. This can be done through appropriate courses like a B.Sc. in community health and/or through competency-based bridge courses and short courses. These bridge courses could admit graduates from different clinical and paramedical backgrounds like “AYUSH doctors”, B.Sc. Nurses, Pharmacists, GNMs, etc and equip them with skills to provide services at the sub-centre and other peripheral levels. Locale based selection, a special curriculum of training close to the place where they live and work, conditional licensing, enabling legal framework and a positive



practice environment will ensure that this new cadre is preferentially available where they are needed most, i.e. in the under-served areas.

8. Likewise, in Ayushman Bharat operational guidelines, which is placed on record by both the petitioners & respondents, clause 4.1 of it reads as under:-

“4.1 Mid Level Health Provider

A key addition to the primary health team at the SHC-HWC, would be the Mid-level Health Provider (MLHP) who would be a Community Health Officer (CHO) – a Bsc.in Community Health or a Nurse (GNM or B.Sc.) or an Ayurveda Practitioner, trained and certified through IGNOU/other State Public Health/Medical Universities for a set of competencies in delivering public health and primary health care services.

The rationale for introducing this new cadre of health provider is to:

- Augment the capacity of the Health and Wellness Centre to offer expanded range of services closer to community, thus improving access and coverage with a commensurate reduction in OOPE.
- Improve clinical management, care coordination and ensure continuity of care through regular follow up, dispensing of medicines, early identification of complications, and undertaking basic diagnostic tests.
- Improve public health activities related to preventive and promotive health and the measurement of health outcomes for the population served by the HWC.

This will improve utilization of health services at primary care level, reduce fragmentation of care, and work load at secondary and tertiary care facilities. Districts will be encouraged to find MLHPs from within their district. However, since not all districts may have adequate availability of eligible candidates, it may be appropriate to plan MLHPs as a State cadre that will adhere to state specific cadre management rules. The state should make cadre rules and communicate to districts. States could also explore the possibility of creating a district cadre.”

Therefore, it would reveal that certain qualifications have been prescribed under the policy as to who would be eligible to apply for such post.





9. The documents which have been filed along with the petitions would show that in other states, for appointment to the post of CHO, the BAMS degree holders have not been eliminated. The document Ayushman Bharat Operational Guidelines, upon which the respondents have placed reliance, gives a power to the State that the State may choose to modify the staffing at HWC-PHC, based on local needs. In the instant advertisement, the advertisement has been made for 800 posts (Annexure P-1). In such advertisement, the BAMS degree holders have not been given the right to apply. Whereas the Ayushman Bharat Operational Guidelines and the National Health Policy do not deprive the BAMS degree holders to apply for the post of CHO. Ayushman Bharat Operational Guidelines, however, gives the power to the State to choose modifying the staffing pattern based on local needs. Meaning thereby, when the nurses are needed then they can stick to the fact that only nurses are required to be appointed likewise if the doctors are needed they can stick to the fact that only doctors are required to be appointed. In the instant advertisement only nurses are allowed to apply. The policy agenda of respondents to appoint the nurses alone as projected pulls out the opportunity of other eligible candidates to apply.

10. In order to lament the need of nurses alone, the respondents have placed reliance on Annexure R-2/3. Reading of the minutes of meeting of the said agenda dated 24.09.2018 shows that agenda 4 deals with subject, especially the minutes and its resolution, the same is reproduced hereunder:-

4. एजेंडा क. 4

प्रस्ताव:

हेल्थ एन्ड वेलनेस सेंटर हेतु 06 माह के सर्टिफिकेट कोर्स फॉर नर्सस हेतु राष्ट्रीय



स्वास्थ्य मिशन अंतर्गत विज्ञापन जारी किये जाने के संबंध में।

निर्णय:

1. स्टाफ नर्स के चयन के पश्चात् उनकी पदस्थापना आदेश जारी किया जावे, तदपश्चात् 6 माह के ब्रिज कोर्स (सर्टिफिकेट कोर्स फॉर नर्सस) प्रशिक्षण हेतु भेजा जावे।
 2. विज्ञापन जारी कर 300 मिड लेवल सर्विस प्रोवाइडर हेतु B.Sc. Nursing प्रशिक्षण प्राप्त अभ्यर्थियों को चयनित किया जावे तथा अनुभवी अभ्यर्थियों को अतिरिक्त अंक दिया जावे।
- (कार्यवाही— मिशन संचालक, राष्ट्रीय स्वास्थ्य मिशन)

11. After the aforesaid resolution, the respondents proceeded with the appointment & advertisement too in November, 2019. The advertisement dated 20.11.2019 (Annexure P-3) at earlier point of time for appointment was subject of litigation in WPC No.304 of 2020. In the advertisement Annexure P-3 dated 20.11.2019 the BAMS doctors were eliminated to apply. Therefore, prima facie reading of the agenda dated 24.09.2018, would show it is for appointment of 300 nurses. The said need of nurses alone, therefore, if any, was exhausted with the advertisement dated 20.11.2019 was made and the said advertisement too is a subject of litigation. The fresh advertisement again is made on 26.05.2020, which is under challenge. By this advertisement dated 26.05.2020, 800 posts of CHO are to be fulfilled. The advertisement only gives power to apply to the candidates having nursing degree. The petitioners are the Ayush degree holders. There is nothing on record to appreciate the fact that at present the State is only in requirement of nurses alone. When the Ayushman Bharat Policy and the National Health Policy, allow the BAMS degree holders to apply for the post of CHO, depriving those persons other than nursing without any sufficient reason would be arbitrary and the State action can only be appreciated on the basis of actual need of particular class of appointment. By





placing reliance on a resolution dated 24.09.2018, whereby 300 nurses were resolved to be appointed, which is superseded by earlier advertisement dated 20.11.2019, in fresh advertisement the AYUSH degree holder cannot be deprived to apply under the veneer of jaded need and rosy hued narrative of respondent, cannot be accepted.

12. With respect to the appointment, the Supreme Court in the case of ***Asha Sharma Versus Chandigarh Administration and others*** **{(2011) 10 SCC 86}** at para 12 & 14 has held thus:-

“12. Arbitrariness in State action can be demonstrated by existence of different circumstances. Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, such an action can normally be termed as `arbitrary'. Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness. Of course, sufficiency or otherwise of the reasoning may not be a valid ground for consideration within the scope of judicial review. Rationality, reasonableness, objectivity and application of mind are some of the pre-requisites of proper decision making. The concept of transparency in the decision making process of the State has also become an essential part of our administrative law.

14. Action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. Arbitrariness in State action, even where the rules vest discretion in an authority, has to be impermissible. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature. The standard of fairness is also dependent upon certainty in State action, that is, the class of persons, subject to regulation by the Allotment Rules, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Arbitrariness and discrimination have inbuilt elements of uncertainty as the decisions of the State would then differ from person to person and from situation to situation, even if the determinative factors of the situations in





question were identical. This uncertainty must be avoided.”

13. Applying the aforesaid dictum/ratio in the facts of these cases, even if it is considered the policy had given the discretion to the authority for particular class of appointment, this has to be justified and justification can only be assumed from the necessary documents and available data. In absence of the same, inference cannot be drawn in favour of the respondents. Under the circumstances, since the advertisement dated 26.05.2020 (Annexure P-1) causes a deprivation to a class of people to apply for post though they are otherwise eligible candidates, for the reasons narrated in foregoing paragraphs, the advertisement cannot be sustained and accordingly it is quashed. The necessary consequences would follow.

14. Both the petitions stand allowed to the extent indicated above.

Sd/-

Goutam Bhaduri
Judge

Ashu

