

GOVERNMENT OF ODISHA
ST & SC DEVELOPMENT, MINORITIES & BACKWARD CLASSES
WELFARE DEPARTMENT

No. 9838 /SSD Bhubaneswar,
STSCD-RP-POLICY-0012-2013

Dt. 06.05.2024

From

Ms. Roopa Roshan Sahoo, IAS
Commissioner-cum- Secretary to Government

To

The Additional Chief Secretaries/ Principal Secretaries/ Commissioner-cum-Secretaries to Government
All Departments

Sub:-Clarification on the concept of 'own merit' in direct recruitment/promotion

Madam/Sir,

In inviting a reference to the subject mentioned above, I am to say that a clarification was sought from the Law Department w.r.t the concept of 'own merit' in promotion to the unreserved vacancies from among the reserved category candidates in the gradation list. The Law Department, after taking into consideration the various case matters has elucidated in detail the above point. The detailed views of the Law Department issued on 27.02.2024 is enclosed herewith for inference, and necessary action of all Departments.

Further, DoPT, Govt. of India vide OM No.36012/16/2019-Estt. (Res.) dated 12.04.2022 (copy enclosed) has clarified that in the judgment dated 28.01.2022 in the case of Jarnail Singh and Ors. V. Lachhmi Narain Gupta and Ors, which currently holds the field, the Supreme Court has set out conditions that are to be satisfied by the Government in order to implement the policy of reservation in promotions. The same has to be ensured before the DPC, by all the Departments for avoiding any legal complications in future.

This is for your kind information and necessary action.

Yours faithfully,


Commissioner-cum-Secretary to Government

NOTE SHEET

Spl. Secretary Law

LAW DEPARTMENT

The A/D has endorsed the file seeking views of this Department to clarify the present status of own merit in direct recruitment/promotion in light of Para-3, 4 of the judgment rendered by Hon'ble Supreme Court of India in R.K. Sabharwal & others Vrs. State of Punjab & others and the recent clarifications issued by DoPT after taking into account the latest judgment rendered by Hon'ble Supreme Court in the case of Jarnail Singh & others Vrs. Lachhmi Narain Gupta & others.

The current position of law as is as given as below:

In Indra Sawhney v. Union of India, Hon'ble Constitution Bench of Hon'ble Supreme Court held that "Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion", 1992 Supp (3) SCC 217.

Parliament through Constitution (Seventy -Seventh Amendment) Act, 1995, and Constitution (Eighty-First Amendment) Act, 2000 inserted Articles 16(4-A) (Reservation in matters of promotion with consequential seniority) and 16 (4-B) (Carry forward rule) respectively. The above-mentioned amendments were held constitutional by Hon'ble Apex Court in the case of M. Nagaraj v. Union of India, (2006) 8 SCC 212... In the case of Jarnail Singh Vrs. Lachhmi Narain Gupta decided vide Order dtd.26.09.2018 in SLP No.30621 of 2011, Hon'ble Apex Court again held that the judgment in Nagraj Case does not need to be referred to a seven-judge bench.

27/2/2024

- 21 -

NOTE SHEET

The five Judges Constitutional Bench of Hon'ble Supreme Court of India in the case of R.K.Sabharwal & others Vrs. State of Punjab & others have observed the followings:

"When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. 1995 AIR 1371.

To the question " Are reserved category candidates free to contest for vacancies in general category", Hon'ble Supreme Court in the case of M.Nagaraj & Others vs Union Of India & Others observed that,

"In Indra Sawhney, Reddy, J. noted that reservation under Article 16(4) do not operate on communal ground. Therefore, if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in R.K. Sabharwal the Supreme Court held that while general category candidates are not entitled to fill the reserved posts; reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of backward class have been appointed/promoted against general seats in the State service may be a relevant factor for the State Government to review the question of continuing reservation for the said class." (2006) 8 SCC 212

In Akhil Bharatiya Soshit Karmachari Versus Union of India, Hon'ble Supreme Court have held that "That apart in a particular cadre after following the roster meant for reserved category

NOTE SHEET

candidate, there is absolutely no bar to fill up the vacancies in the general category even in favor of the reserved category candidate in a particular cadre after following the prescribed roster for the reserved category candidate, if the said reserved category candidate is entitled for the same. The same is true on the basis of his general seniority."AIR 1996, Supreme Court 3534.

In the case of Jarnail Singh vs Lachhmi Narain Gupta Hon'ble Apex Court held that :

"Two points came up for consideration before this Court in the said judgment, the first being that in case more than 14 per cent of the Scheduled Caste candidates are appointed/promoted in a cadre on their own merit/seniority, then the purpose of reservation having been achieved in the said cadre, the Government instructions providing reservations would become inoperative. The second point on which arguments were heard is that roster cannot operate once the posts earmarked for the SCs, STs and Backward Classes are filled. Any post falling vacant in a cadre, thereafter, is to be filled from the category - reserved or general - due to retirement etc. of whose member the post fell vacant. The first point raised by general category candidates was rejected by this Court by holding that reserved category candidates can compete for non-reserved posts and in the event of their appointment to the said posts, their number cannot be added and taken into consideration for working out the percentage of reservation. This Court was of the opinion that Article 16(4) of the Constitution of India enables the State Government to make provision for reservation in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the services. The percentage of posts reserved for Backward Classes, as prescribed by the State has to be strictly followed and cannot be varied or changed simply because some members of the Backward Class have already been appointed/promoted against the general seats". SLP 30621 of 2011 Order dtd.26.09.2018.

Dt 19
27/2/2024

NOTE SHEET

Government of Odisha in GA & PG Department vide Gazette Notification dt.12.10.2022 amended the OCS (Criteria for Promotion) Rules, 1992 to include the following:

"3-A Notwithstanding anything contained in the relevant recruitment rules, where the promotion is to be considered as per the post-based reservation (by way of replacement theory), the separate zone of consideration shall be applicable.

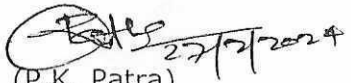
Provided that the Scheduled Caste or Scheduled Tribe candidates appointed on their own merit either by direct recruitment or by promotion and placed above the unreserved candidates in the merit list shall be considered and adjusted against the unreserved vacancies and such candidates are not to be counted within the percentage earmarked for reservation of their category".

In view of the above discussion the followings are emerged:

- i) Reserved category employees who have availed reservation in appointment and falling in seniority/merit above the last unreserved candidate could be promoted against unreserved vacancy treating them as own merit.
- ii) Reserve category candidates appointed on their own merit can be considered for promotion and adjusted against the unreserved vacancies. Similarly, reserve category candidates who have availed reservation in appointment and falling in seniority above the last unreserved candidate could be promoted against unreserved vacancy.
- iii) Senior reserved category candidates (not appointed on their own merit) in the gradation list would be considered in zone of consideration for unreserved vacancies.

For the above reasons, if the reserved category candidate is on the top of the gradation list over a general category candidate, the general category candidate cannot be promoted to the next unreserved category vacancy by-passing the reserved category candidate.

The A/D is advised accordingly.


(P.K. Patra)

ST & SC DEV. DEPTT.

L.R.-Cum-Spl. Secretary to Govt.
Law Department,
Odisha, Bhubaneswar

No.36012/16/2019-Estt. (Res.)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training
North Block, New Delhi-110 001
Date: 12th April 2022

Office Memorandum

Subject : Reservation in promotions – procedure to be followed prior to effecting reservations in the matter of promotions by all departments of the Central Government.

The undersigned is directed to bring to your notice the judgement dated 28.01.2022 of the Supreme Court of India in the case of **Jarnail Singh and Ors. V. Lachmi Narain Gupta and Ors.** (Civil Appeal No. 629 of 2022 arising out of SLP (C) No. 30621 of 2011) and other connected matters. Pursuant to this judgement, the Ld. Attorney General for India has rendered his considered opinion in the matter.

2. In the judgement dated 28.1.2022, the Supreme Court has set out the conditions that are to be satisfied by the Government for the purpose of implementing the policy of reservation in promotions. These conditions are :

- (i) Collection of quantifiable data regarding inadequacy of representation of Scheduled Castes and Scheduled Tribes;
- (ii) Application of this data to each cadre separately; and
- (iii) If a roster exists, the unit for operation of the roster would be the cadre for which the quantifiable data would have to be collected and applied in regard to the filling up of the vacancies in the roster.

This judgement currently holds the field.

3. All the Ministries/Departments are required to ensure that the above conditions are complied with before implementing the policy of reservation in promotions and carrying out any promotions based thereon.

4. For this purpose, all Ministries/Departments are also required to ensure the following:

- (a) In terms of DoPT OM No.43011/153/2010-Estt (Res.) dated 4.1.2013, the Liaison Officer shall ensure that the reservation rosters are strictly maintained as per the instructions/guidelines, laid down in DoPT OM No. 36012/2/96-Estt (Res.), dated 2.7.1997.
- (b) In order to ensure maintenance of efficiency of administration, the DPC shall carefully assess the suitability of the officers, being considered for promotion.



(c) The Appointing Authority shall issue the appointment/promotion orders only after satisfying itself that the conditions mentioned in paragraph 2 and sub-para (a) & (b) of this paragraph have been fully complied with.

5. Since the **Jarnail Singh** batch of cases is pending in the Supreme Court of India, any promotion order issued shall be subject to further orders that may be passed by the Supreme Court in the said batch of cases.

6. All Ministries/Departments are requested to urgently bring these instructions to the notice of all their attached/subordinate offices as also the Public Sector Undertakings and Statutory Bodies etc. for adherence and strict compliance.


(Sandeep Saxena)

Deputy Secretary to the Govt. of India

To

1. The Secretaries of all the Ministries/Departments of the Govt. of India for ensuring strict compliance of the above instructions.
2. The Secretary, Department of Financial Services, New Delhi.
3. The Secretary, Department of Public Enterprises, New Delhi.
4. The Secretary, Railway Board, Ministry of Railways, Rail Bhawan, New Delhi.
5. The Secretary, Union Public Service Commission
6. The Secretary, Staff Selection Commission
7. Office of Comptroller and Auditor General of India, 10, Bahadurshah Zafar Marg, New Delhi.
8. Supreme Court of India/Election Commission of India/ Lok Sabha Secretariat/ Rajya Sabha Secretariat/ Cabinet Secretariat/ Central Vigilance Commission/ President's Secretariat/ Vice President's Secretariat/ Prime Minister's Office/ Niti Ayog
9. National Commission for Scheduled Castes, Lok Nayak Bhawan, New Delhi
10. National Commission for Scheduled Tribes, Lok Nayak Bhawan, New Delhi
11. National Commission for Backward Classes, Trikoot-1, Bhikaji Cama Place, R. K. Puram, New Delhi
12. The Director, ISTM.
13. NIC, DoPT with the request to upload the same on the website of the Department.