

No.A.12026/1/2017-P&AR(GSW)
Government of Mizoram
Department of Personnel and Administrative Reforms
(General Service Wing)

Mizoram Secretariat, MINECO
Aizawl, the 9th Oct, 2024.

OFFICE MEMORANDUM

Subject: Adherence to legal and procedural requirements in public employments/ recruitments/ appointments in Government service.

The Department of Personnel and Administrative Reforms, Government of Mizoram has received numerous references, proposals and applications in various forms from several departments and other quarters on matters relating to public employments/ appointments in Government service. Many of these references, proposals, and applications frequently fail to meet the fundamental requirements for public employment/recruitment/appointments in Government service as outlined in the Constitution. As a model employer, the Government cannot entertain such submissions. Moreover, the Government cannot exercise its constitutionally vested powers based on misplaced sympathy. To condone such irregularities would be to perpetuate illegality in public appointments. Notwithstanding the foregoing, it is evident that a misconception persists that such references, proposals, and applications can be regularized through the exertion of undue influence on the decision-making authority, including by obtaining the approval of the Government in the Department of Personnel and Administrative Reforms. It is categorically stated that any appointment not made in strict conformity with the statutory framework and constitutional mandates is void *ab initio* and cannot be subsequently validated by any authority. It is axiomatic that no authority is above the law. It has also been observed that there can be a lack of clarity among the competent authorities, those delegated by the Government to make appointments, on the concepts of "illegal and irregular" appointments in their true sense.

2. It is therefore felt necessary to clarify the concepts of public employments/ recruitments/ appointments in Government service and the importance of adherence to legal and procedural requirements in order to remove all doubts on the matter.

3. The established procedures for filling vacant positions through direct recruitment begin with obtaining approval of the concerned administrative department, followed by approval from DP&AR (ARW) and Finance Department. Thereafter, the recruiting agency/department concerned, as the case may be, undertakes the actual recruitment during the validity period of the approval, after inviting applications from the open market and also from Employment Exchange, through a duly constituted Departmental Promotion Committee to select the qualified candidates. The Government has time and again issued instructions to ensure that all appointments to Government positions are made in a fair and transparent manner by requiring all departments to advertise vacancies through Employment Exchanges and newspapers widely and to conduct written tests and/or interviews as per established guidelines. It also prohibits the issuance of appointment orders without the recommendation of the DPC.

4. The basic principles as laid down in the Constitution of India and in some of the important judgments of the Supreme Court of India are hereby circulated for information and strict compliance of all concerned.


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- a) All employments/ recruitments/ appointments in Government service must strictly adhere to the provisions of the Constitution of India, especially articles 14, 16, and proviso to article 309, which ensure equality of opportunity and prescribe the conditions of service.
- b) Rule of law is the basic structure of the Constitution, and no authority is above the law. Article 14 of the Constitution provides for equality of opportunity, and each and every state action is to be tested on the touchstone of equality. In addition, Article 16 has specifically provides for equality of opportunity in matters of public employment. Any appointment made in violation of the mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained.
- c) Service Rules/Recruitment Rules or any Scheme for appointment to public services and posts in connection with the affairs of the States are normally framed under proviso to Article 309 of the Constitution. When statutory rules are framed under proviso to article 309 which are exhaustive, then the Government can make appointments only in accordance with that rules. The Constitution does not envisage any employment outside the constitutional scheme and without following the requirements set therein. Any appointment made in violation of the Statutory Rules as also in violation of articles 14 and 16 of the Constitution would be a nullity. Adherence to articles 14 and 16 of the Constitution is a must in the process of public employment.
- d) Article 13 (2) of the Constitution provides that no law can be enacted which runs contrary to the fundamental rights guaranteed under Part III of the Constitution. Thus, the rules framed under article 309 must be in conformity and consonance with the fundamental rights guaranteed under the Constitution. There is no basis for the misconception that incorporating article 309 into rules or notifications can rectify past illegal or irregular appointments. Article 309 explicitly stipulates that rules shall be framed only within the constitutional framework. Consequently, no authority possesses unfettered discretion to formulate rules under proviso to article 309 and employ them to regularize appointments made in contravention of constitutional provisions and established procedures. Accordingly, all government entities/departments must refrain from such misconceptions and practices, including the improper utilization of recruitment methods like 'absorption', 'provincialization', and the like, to validate past appointments that contravene constitutional provisions and established procedures. Rules framed under proviso to article 309 or notification cannot be employed as a device to circumvent established statutory procedures under any circumstances. Such actions would constitute a grave irregularity and illegality in the appointment process, which cannot be condoned. The exercise of powers by an authority cannot be unguided or unbridled as the Constitution prescribes the limitations for each and every authority and therefore, no one, howsoever high he may be, has a right to exercise the power beyond the purpose for which the same has been conferred on him. Thus, the powers have to be exercised within the framework of the Constitution and legislative provisions, otherwise it would be an exercise of power in violation of the basic features of the Constitution.
- e) The following four essential ingredients must exist for making appointment in a regular/permanent basis:-
- 1) There must be sanctioned post(s);
 - 2) Vacancy/Vacancies must exist in such sanctioned post(s);
 - 3) Eligibility criteria as specified in the recruitment rules or other applicable

- guidelines/circular must be fulfilled by the candidate(s); and
- 4) There must be competition among the candidates by calling the candidates by advertisements in newspapers and through Employment Exchange.
- f) The equality clause enshrined in article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit. The constitutional principle of providing equality of opportunity to all mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible candidates; thereby the right of equal opportunity is effectuated. Consequently, the dissemination of vacancy notifications through office notice boards, local newspapers with limited circulation, and department websites accessed by a limited segment of the population fails to guarantee maximum participation from eligible candidates and does not comply with the principles of open advertisement. The equality of opportunity in the matter of employment would be available to all eligible candidates.
- g) Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others. Further, It is well-settled in service jurisprudence that the authority cannot fill up more than the notified number of vacancies advertised, as the recruitment of candidates in excess of the notified vacancies, would be violative of articles 14 and 16(1) of the Constitution.
- h) If advertisements are issued not for permanent appointment in the regular posts, and advertisements are issued only for contractual appointments or ad hoc appointments or temporary appointments, then persons who are appointed by such appointments cannot be regularized.
- i) Unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract. If it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. No temporary employee would be entitled to be absorbed in regular service or made permanent if the original appointment was not made by following a due process of selection as envisaged by the relevant rules and established procedures in public appointments.
- j) The initial engagement of provisional and contract employees covered by state regularization schemes must also meet these constitutional requirements. No law or procedure can subsequently cure an initial appointment that is inherently illegal or irregular.



5. With a view to providing more clarity on the matter, some of the Supreme Court's important judgments are listed below for reference:

- (1) The Apex court in its judgment in the case of **M.P. State Coop. Bank Ltd. v. Nanuram yadav, C.A. No. 4481 of 2007 decided by Supreme Court on 25.09.2007** has laid down the principles to be followed in public appointments.

"It is clear that in the matter of public appointments, the following principles are to be followed:

- i) *The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14&16 of the Constitution of India, 1950.*
- ii) *Regularisation cannot be a mode of appointment.*
- iii) *An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualifications would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.*
- iv) *Those who come by back door should go through that door.*
- v) *No regularization is permissible in exercise of the statutory power conferred under article 162 of the Constitution Of India, 1950 if the appointments have been made in contravention of the statutory Rules.*
- vi) *The Court should not exercise its jurisdiction on misplaced sympathy.*
- vii) *If the mischief played is so widespread and all-pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.*
- viii) *When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."*

- (2) A Constitution bench of the Supreme Court in "**Civil Appeal No. 3595-3612/1999 etc, in the case of Secretary, State of Karnataka and Ors. Vs. Uma Devi and others**" has reiterated that any public appointment has to be in terms of the Constitutional scheme only. Important aspects of the judgement may be enunciated for the purpose of clarity-

- i) *Equality of opportunity is the hallmark for public employment and it is in terms of the Constitutional scheme only (Para 1).*
- ii) *The filling of vacancies cannot be done in a haphazard manner or based on patronage or other considerations (Para 2).*
- iii) *The State is meant to be a model employer and can make appointments only in accordance with the rules framed under Article 309 of the Constitution (Para 5).*
- iv) *Regularization is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution of India, or any body or authority governed by a statutory Act or the Rules framed thereunder.*



Regularization, furthermore, cannot give permanence to an employee whose services are ad hoc in nature. The fact that some persons had been working for a long time would not mean that they had acquired a right for regularization. (Para 27).

- v) *Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (Para 30).*
- vi) *if it is a contractual appointment, the appointment comes to an end at the end of the contract (Para 34).*

- (3) The Supreme Court in its judgement in the State of Karnataka vs M.L Kesari dated 03.08.2010, **Civil Appeal No of 2010 [arising out of SLP (C) No.15774/2006]**, the Hon'ble Supreme Court had clarified 'illegal and irregular appointment' as

'The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.'

- (4) **Appointment made de hors the rules cannot be justified on grounds of equity and compassion. Arms of law cannot be bent for adjusting equity.**

"If the reasoning given by the Tribunal is accepted, the statutory recruitment rules would become nugatory or otiose and the department can favour any person or appoint any person without following procedure provided in the recruitment rules which would lead to nepotism and arbitrariness. Once the consideration of equity in the face of statutory rules is accepted then eligible and qualified persons would be sufferers as they would not get any chance to be considered for appointment. The result would be that persons lesser in merit would get preference in the matter of appointment merely on the ground of equity and compassion. It is therefore not safe to bend the arms of law only for adjusting equity." [Ahmedabad Municipal Corporation v. Virendra Kumar Jayantibhai Patel, AIR 1997 SC 3002: (1997)6 SCC 650].

- (5) **Widespread irregularities in selection process - appointments made cannot be sustained - show cause notice to individuals not necessary.**

"If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such cases it will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection." [Union of India v. O. Chakradhar, Civil Appeal No. 1326 of 2002, decided by Supreme Court on 19.2.2002].


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(6) **Appointment de hors the rules, even though on compassionate ground, is illegal.**

"It appears that the appellant was appointed as Supervisor in third respondent Bank by the President of the Bank on a consolidated pay of Rs.2,500 by an order dated 5.3.2001. Her appointment is said to have been made on compassionate ground on the plea that her husband had deserted her. It has not been shown before us that there exists a Scheme in terms whereof deserted woman can be appointed on compassionate grounds. Even such appointment in our opinion, would be illegal." [A. Umarani v. Registrar, Co-operative Societies, 2004 AIR SCW 4462, para 65]. In para 67 of the judgment the Court observed - "In a case of this nature this Court should not even exercise its jurisdiction under Art. 142 of the Constitution of India on misplaced sympathy."

(7) **Irregular Appointments by the authorities - effect on those who are employed.**

(a) *The case related to the appointment of Class IV Civil Court employees in the district of Sitamarhi in 1985. The High Court had issued a directive in 1984 that for appointment of Class IV staff in the Civil Courts notices should be placed on the Notice Board of the respective Civil Court and in the local daily newspaper. This directive was binding on the District Judge but in the instant case no advertisement was issued in any newspaper, in some cases there was no evidence of notice having been put on notice board also. The Supreme Court held that the appointments could not be upheld as the instructions of the High Court were disregarded with impunity and procedure evolved for appointment which cannot be said to be in any way fair or above-board. The Court also observed that without adequate notice or advertisement no fair opportunity was given to others who might have applied. The Court also refused to condone the irregularity in the appointment on the plea that they had been working for fifteen years. [Binod Kumar Gupta v. Ram Ashray, 2005 AIR SCW 1872, para 13].*

(b) *No rights or status can accrue from an order made by an authority not legally competent to make it. Where appointment/promotion is made in contravention of rules or by an authority not competent to make it or irregularity in making it goes to very root, for instance, there was no vacancy, there is no legal foundation of order and no rights are created. [State of Punjab v. Jagdip Singh, (1964)4 SCR 964: AIR 1964 SC 521].*

(c) *In our opinion, where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status." [State of Punjab v. Jagdip Singh, AIR 1964 SC 521 Constitution Bench].*

6. The preceding cases are some of the Apex Court's decisions on public employment and are not exhaustive. Competent authorities to whom the Government has delegated the authority to make appointments must adhere to the Government's established procedures and the Constitutional provisions. Authorities bypassing the established procedures, committing infractions of the rules, and breaching constitutional provisions will be liable for disciplinary and legal action under extant rules.



7. All administrative departments, constitutional and statutory authorities, boards, corporations, societies, public sector undertakings, and Government-funded autonomous entities are impressed upon to scrupulously adhere to the tenets of the Constitution in undertaking public appointments and recruitments. It is imperative to emphasize that no authority possesses the jurisdiction to effectuate appointments that contravene the provisions of the Constitution. The Constitution being the supreme law, no authority can lawfully undertake appointments that are inconsistent with its provisions. Therefore, all Government entities and departments are requested to expeditiously undertake a thorough review of all notifications, schemes, and rules framed under proviso to article 309 or any other Act that may contravene the constitutional framework governing public appointments. The purpose of this review is to ensure that all such instruments are in complete alignment with the provisions of the Constitution and established statutory procedures in public appointments. It is recommended that this review be undertaken in close consultation with the Department of Personnel and Administrative Reforms (DP&AR) and the Law and Judicial Department. Any provisions found to be inconsistent with the aforementioned constitutional and statutory requirements in public appointments shall be amended or rescinded as necessary.

8. All administrative departments are requested to disseminate this memorandum to all subordinate offices, constitutional and statutory authorities, boards, corporations, societies, public sector undertakings, and Government-funded autonomous entities falling within their administrative purview.

sd/-K. Lalthawmmawia
Commissioner & Secretary to the Govt. of Mizoram

Memo No.A.12026/1/2017-P&AR (GSW) : Aizawl, the 9th Oct, 2024

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2. Commissioner & Secretary to Chief Minister.
3. P.S. to Speaker/ Ministers/ Leader of Opposition/ Deputy Speaker/Ministers of State/ Vice Chairman, State Planning Board/Deputy Govt. Chief Whip.
4. All Members of Legislative Assembly.
5. Chief Executive Member, MADC/LADC/CADC
6. Sr. P.P.S to Chief Secretary.
7. All Heads of Administrative Departments.
8. Director General of Police, Mizoram
9. Secretary, Mizoram Legislative Assembly Secretariat.
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(H. Lalrinpuia)

Deputy Secretary to the Govt. of Mizoram.