

No. PER (AP)-C-F (1)-1/2005
Government of Himachal Pradesh
Department of Personnel (AP-III)

Dated Shimla-171002, the 7th September, 2007.

From

The Chief Secretary,
Himachal Pradesh.

To

1. All the Principal Secretaries/
Commissioners-Cum-Secretaries/Secretaries/
Joint Secretaries/Deputy Secretaries and Under
Secretaries to the Govt. of Himachal Pradesh.
2. All the Heads of Departments in Himachal Pradesh.
3. All the Deputy Commissioners in H.P.
4. All the Chairmen / Managing Directors / Secretaries/
Registrars of all the Public Sector Undertakings
etc. in H.P.

Subject:- Implementation of Constitution (85th Amendment)
Act, 2001 and assignment of Seniority to SC/ST
Government servants on promotion by virtue of rule
of reservation / roster.

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Sir,

I am directed to say that pursuant to coming into force "The Constitution (Eighty Fifth Amendment) Act, 2001" with effect from 17th day of June, 1995 and subsequently upholding the Constitutional validity of aforesaid Amendment Act by the Constitution Bench of the Hon'ble Supreme Court vide judgment dated 19.10-2006 in case **M. Nagaraj and others Vs. Union of India and others (AIR 2007 SC. 71)**, the matter regarding implementation of Constitution (Eighty Fifth Amendment) Act, 2001 was under active consideration of the State Government for quite some time past. The Government has now decided to implement the same with effect from 17.6.1995 retrospectively, according to which State Government has been authorised to make any provision for reservation in the matters of promotion, with

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consequential seniority, to any class or classes of posts in the services under the State in favour of Schedule Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State. Thus as a result of this decision of State Government to implement the aforesaid amendment with effect from 17.6.1995, State Government employees belonging to Scheduled Castes and Scheduled Tribes shall also be entitled to consequential seniority on promotion by virtue of rule of reservation. However, controlling factors or compelling reasons, namely, backwardness and inadequacy of representation which enable the State to provide for reservation keeping in mind the over all efficiency of State administration under Article 335 will continue to apply with mandatory compliance of Constitutional requirement of Ceiling limit of 50% quantitative limitation. **Moreover it is made clear that in the State of Himachal Pradesh the State Government has already made provision for reservation in promotion after due consideration prior to 19.10.2006, thus, collection of data as mandated by para 124 of the judgment in M. Nagaraj case (AIR 2007 SC. 71) is not required.**

2. In the matter of reservation policy, the State Government has been following the reservation policy of the Central Government as amended from time to time but with judgments of the Hon'ble Supreme Court in cases **Virpal Singh Chauhan (AIR 1996 SC. 448)**, and **Ajit Singh Juneja (AIR 1996 SC. 1189)**, the State Government issued its own instructions dated 27.5.1996 as different from Central Government which were later clarified vide instructions dated 27.3.1997 for determining the question of seniority between general candidates and reserved candidates. However, these instructions to some extent stand negated with the enactment of Constitution (Eighty Fifth Amendment) Act, 2001 to be effective from 17.6.1995 amending Article 16 (4A) of the Constitution of India.

3. The instructions dated 27.5.96 and 27.3.1997 not only provide for principles of determining seniority between Scheduled Castes/Scheduled Tribes and general category candidates in

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promoted post, but also embodied the principles as to how the rule of reservation / roster was to be implemented in actual practice as per the law laid down by the Hon'ble Supreme Court in case **R.K. Sabharwal and others Vs. State of Punjab (AIR 1995 SC. 1371)**. The principles for determining the question of seniority between SCs/STs and general category candidates in promoted post as embodied in instructions, dated 27.5.96 and 27.3.97 now stand negated with the coming into force the Constitution (Eighty Fifth Amendment) Act, 2001 w.e.f. 17.6.95 and decision of the State Government to implement the same. The principles laid down by the Hon'ble Supreme Court on the question of implementation of rule of reservation and roster in case **R.K. Sabharwal and others Vs. State of Punjab (AIR 1995 SC 1371)** has neither been negated by the aforesaid Constitution Amendment nor by the Hon'ble Supreme Court in **M. Nagaraj and others Vs. Union of India (AIR 2007 SC. 71)** and still hold good and has to be retained under these instructions also.

4. Thus, keeping in view the above narration, the State Government, in continuation of its earlier instructions issued vide letters No. PER. (AP-II)-F (1)-1/87, dated 31.1.89, No. PER. (AP)-C-B(12)-1/98 dated 20.8.1998 and in supersession of instructions issued vide letter No. PER. (AP) C-F(1)-1/95 dated 27.5.96 and letter of even number, dated 27.3.97 has decided to issue the following consolidated instructions :-

(1) The instructions issued vide letter No. PER. (AP-II) F. (1)-1/87 dated the 31st January, 1989 shall continue to be in force. However, keeping in view the law laid down by the Hon'ble Supreme Court of India in case **R.K. Sabharwal and others Vs. State of Punjab and others, AIR 1995 Supreme Court 1371** (Civil Writ Petition No. 79 of 1979), the following procedure shall continue to be operative to supplement the instructions, dated 31.1.1989: -

Once the number of posts reserved for being

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filled by reserved category candidates in a cadre, category or grade (Unit for application of rule of reservation) are filled up under the roster then the object of rule of reservation should be deemed to have been achieved. Thereafter, the roster cannot be followed except to the extent indicated in para 5 of **R.K. Sabharwal case AIR 1995 Supreme Court SC. 1371**, which is being reproduced for convenience.

“Para-5: We see considerable force in the second contention raised by the learned Counsel for the Petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of “running account” is to make sure that the Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of “running account” in the impugned instructions has to be so interpreted that it does not result in excessive reservation. “16% of posts-----” are reserved for the members of Scheduled Castes and Backward classes. In a lot of 100 posts those falling at serial numbers 1,7,15,22,30,37,44,51,58,65,72,80,87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to Schedule Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the

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impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and Backward Classes are filled the percentage of reservation provided for reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled, the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward classes in the State services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with the application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1,7,15 retire then these posts are to be filled from amongst the persons belonging to Scheduled Castes. Similarly, if the persons holding posts at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be short fall nor excess in the percentage

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of reservation. Provided that while determining the said number the candidates belonging to the reserved category but selected/promoted on their own merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.”

(2) Where in a cadre there is only one post, there shall be no reservation with reference to that post either at initial stage or for filling up future vacancy in respect of that post. The Law laid down by the Hon'ble Supreme Court of India in case **Dr. Chakradhar Paswan Vs. State of Bihar and others (AIR 1988 SC. 959)** is beyond doubt. The Hon'ble Supreme Court has held in the above case that “no reservation could be made under Article 16 (4) so as to create a monopoly otherwise, it would render the guarantee of equal opportunity contained in Article 16 (1) and 16 (2) wholly meaningless and illusory. If there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Article 16 (4) pre-supposes the availability of at least more than one post in that cadre.”

(3) Further, where a cadre consists of only two posts, the roster prescribed shall come into operation and according to the roster the first vacancy will go to the share of Schedule Caste candidate and the second post will fall in the share of general candidate. Normally the operation of the roster in such a cadre will pose no difficulty if both the posts manned by a member of Schedule Caste and general category candidates are vacated subsequently because the post vacated by general candidate will go to the share of general candidate falling at roster point No. 3 and the

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post vacated by the Schedule Caste candidate will go to the share of Scheduled Tribe candidate falling at roster point No. 4 but an extra-ordinary situation may arise where the member of Scheduled Caste already manning the post falling at Sr. No. 1 of the roster do not vacate the post and subsequently vacancy which arose in the cadre on the vacation of post by general candidate and if according to the roster point No.4 it is given to the share of Schedule Tribe then it will amount to 100% reservation. The Hon'ble Supreme Court of India in the case **Indra Sawhney Vs. Union of India AIR 1993 SC. 477** has laid down that "reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but Constitutional philosophy being against proportional equality the principle of balancing equality ordains reservation, of any manner not to exceed 50%. The Hon'ble Apex Court has further held that the reservation contemplated under Article 16 (4) or under Article 16 (1) and (4) should not exceed 50% ordinarily in a grade, cadre or service barring certain extraordinary situation but at the same time such reservation made either under Article 16(4) or under Article 16(1) and (4) can not be extended to the totality of 100%". Thus, in a cadre of 2 posts one post will always have to be reserved to the reserved category candidates in order to maintain balance between reserved category and general category by extending permissible limit upto 50% reservation provided candidate belonging to Schedule Caste/Scheduled Tribe fulfilling the eligibility criteria prescribed in the relevant Recruitment and Promotion Rules are available within the zone of consideration. Provided further that where there is very small cadre consisting of 2 or 3 posts and posts are to be filled up 100% by promotion and no

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candidate belonging to Scheduled Caste / Scheduled Tribe is available in feeder category for promotion to that cadre, then the posts in such small cadre shall be filled up without resorting to the rule of reservation. If at a given point of time one post is manned by the candidate belonging to Scheduled Caste or Scheduled Tribe candidates by the operation of rule of reservation according to prescribed roster and if any further resultant vacancy arose in such a cadre of two posts then notwithstanding the fact that such vacancy according to the roster falls to the share of Scheduled Tribe or Scheduled Caste, shall be filled up from the general category candidate in order to ensure that reservation made either under Article 16(4) or 16(1) and (4) does not extend to the totality of 100%. In such extra ordinary situation the Scheduled Tribe or Scheduled Caste candidate shall be entitled to the post only when one post in the cadre already manned by reserved category candidate is vacated and till then the point reserved for the Scheduled Caste or Scheduled Tribe according to the prescribed roster shall be deemed to have been carried forward. The similar principle shall be applicable in the cadre of three posts. However, where the cadre consists of four and more posts, the posts shall be filled-up in accordance with the rule of reservation and the roster prescribed in this behalf by the State Government. This procedure governed the cases only prior to issuance of the instructions by the Government vide Department of Personnel letter No. PER. (AP)-C-B(12)-1/98, dated 20th August, 1998 regarding post based roster system, whereas the subsequent cases are to be governed under the instructions, dated 20-8-1998.

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(4) Further in order to implement the Constitution (Eighty Fifth Amendment) Act, 2001, the following procedure shall be followed: -

(a) Scheduled Castes/Scheduled Tribes Government servants shall, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority with effect from 17.6.1995 retrospectively **without introduction of concept of creamy layer as per policy decision of Central Government, contained in Government of India Ministry of Personnel Public Grievances and Pensions, Department of Personnel and Training, letter No. 36036/2/2007-Estt. (Res.), dated 29.3.2007.**

(b) Seniority of Government servants already determined in the light of paras 5 and 6 of instructions dated 27.5.96 readwith instructions dated 27.3.1997 shall be revised as if said paras 5 and 6 of instructions dated 27.5.1996 and subsequent clarifications dated 27.3.1997 had never been in force.

(c) (i) On the basis of revised seniority, consequential benefits like promotion, pay, pension etc. shall be allowed to the concerned Scheduled Castes and Scheduled Tribes Government servants (but without arrears by applying the principle of "no work no pay").

(ii) For this purpose, the senior Scheduled Castes/Scheduled Tribes Government servants may be granted promotion with effect from the date of promotion of their immediate Junior general Government servants.

Notwithstanding any thing contained in sub clauses (i) and (ii) of clause (c) of sub para (4) of this para, the consequential benefits like promotions, pay, pension etc. as a result of revised seniority shall be subject to the principles laid down by the Hon'ble Supreme Court in para 5 of the judgment dated

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10.2.1995 in case **R.K. Sabharwal and others Vs. State of Punjab and others (AIR 1995 SC.1371)** as reproduced in para 4 (1) of these instructions.”

(iii) Such promotions of Scheduled Castes and Scheduled Tribes may be ordered with the approval of Appointing Authority, to which the Government servant is to be promoted at each level after following normal procedure of DPC. (including Consultation with the HP. Public Service Commission where required).

(d) Except seniority, other consequential benefits like promotion, pay etc. (including retiral benefits in respect of those who have already retired) allowed to general Government servants by virtue of implementation of earlier instructions, dated 27.5.1996 and 27.3.1997 and / or in pursuance of directions of HPAT / Courts should be protected as a measure personal to them.

(e) Necessary actions to implement the decisions contained in sub para (4)(b) supra may be completed within three months from the date of issue of these instructions and necessary action to implement the decision at sub para (4)(c) supra may be completed within six months from the date of issue of these instructions.

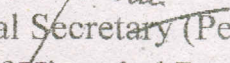
(f) As a result of promotion of SCs/STs incumbents on the basis of revised seniority pursuant to the implementation of Constitution (Eighty Fifth Amendment) Act, 2001 with effect from the date of promotion of their immediate junior general government servants on or after 17.6.1995 onwards retrospectively, no reversion of general category government servants will take place and to meet with

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such an eventuality, if required, supernumerary posts will be created.

5. All the Departments / Public Sector Undertakings / Corporations / Boards and Universities etc. are requested to bring the above decisions to the notice of all concerned for guidance and compliance.
6. These instructions shall be adhered to strictly.
7. Kindly acknowledge the receipt of these instructions.

Yours faithfully,


Principal Secretary (Pers.) to the
Govt. of Himachal Pradesh.

Endst. No. PER.(AP)-C-F(1)-1/2005, Dated Shimla-2, 7th September, 2007.

Copy forwarded for information and necessary action to :-

1. The Secretary, H.P. Vidhan Sabha, Shimla-171004.
2. The Registrar, High Court of Himachal Pradesh, Shimla-171001.
3. The Registrar, H.P. Administrative Tribunal, Shimla- 171002.
4. The Secretary, H.P. Public Service Commission, Shimla-171002.
5. The Secretary, H.P. Subordinate Services Selection Board, Hamirpur, H.P.
6. DLR-cum-Deputy Secretary (Opinion) to the Govt. of Himachal Pradesh, Shimla-171002.
7. All Section Officers in H.P. Secretariat, Shimla-171002.
8. Spare Copies 200.


Deputy Secretary (Pers.) to the
Govt. of Himachal Pradesh.
