

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

**C.P. No.D-446 of 2018**

**Present**

**Mr. Justice Muhammad Iqbal Kalhoro  
Mr. Justice Adnan-ul-Karim Memon.**

Muhammad Ayoub Afridi ..... Petitioner

Vs.

Federation of Pakistan & others ..... Respondents

Date of Hearing: 23.01.2019

Syed Muhammad Saulat Rizvi, advocate for the petitioner.  
Mr. Fayaz Ahmed Leghari, advocate for respondent /PEPCO.  
Mr. Aslam Pervaiz Khan, Assistant Attorney General for Pakistan.

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**JUDGMENT**

**ADNAN-UL-KARIM MEMON-J:** - The petitioner has impugned the office order dated 31.01.2018 issued by Pakistan Electric Power Company (PEPCO) whereby they have withdrawn the office order dated 16.10.2017, regarding Time Scale Up-gradation from BPS-19 to 20, allowed to petitioner w.e.f. 24.10.2015 due to pending audit para.

2. Brief facts of the case as per pleadings of the parties are that the petitioner is an employee of Hyderabad Electric Supply Corporation (HESCO), initially he was appointed as Assistant Director (Admn) WAPDA Lahore on 01.09.1987 and thereafter he was promoted as Additional Director General (HRM). The petitioner has averred that respondents HESCO vide order dated 24.10.2014 promoted and posted him as Manager (Adm) HESCO, thereafter the respondent-PEPCO vide Notification dated 11.04.2017, constituted Senior Selection Board for considering the cases of the officials for Time Scale Up-gradation from 19 to 20. Petitioner has submitted that in

terms of the aforesaid notification, he gave undertaking on 13.04.2017 with the assertion that that there is/was no penalty or enquiry/disciplinary proceedings pending against him; that after completing all the codal formalities he was allowed Time Scale Up-gradation w.e.f. 24.10.2015 vide office order dated 16.10.2017. Petitioner has submitted that all of sudden respondent PEPCO vide impugned order dated 31.01.2018 has withdrawn the up-gradation of the petitioner due to pending Audit-Para against him and recovery of certain amount. The petitioner has submitted that one Senior Engineer Malik Imtiazul Haque has been promoted as Superintendent Engineer vide office order dated 29.12.2016, though against him Audit Paras are also available but his up-gradation has not been withdrawn, as this is sheer discrimination which has been meted out to him, which is not sustainable in law. Petitioner being aggrieved by and dissatisfied with the impugned office order has filed the instant petition on 15.02.2018.

3. Upon notice, the Respondents have filed Para wise comments in which they have controverted the stance taken by the Petitioner.

4. Syed Muhammad Saulat Rizvi, learned counsel for the petitioner has argued the impugned order is result of personal grudge and departmental intrigues. Even otherwise there is no reason to withdraw the office order dated 16.10.2017, which is lawful and has been issued after completing all the formalities; that prior to issuance of impugned office order no inquiry was conducted, no opportunity of hearing was given to the petitioner, as such, impugned order is not lawful, non-speaking order thus not sustainable in law; that discrimination has been meted out with the petitioner; that retrospective action of the respondents is illegal; that no enquiry, NAB Reference or FIA case is pending against him and amount of audit para pendency has been recovered from the salary of the petitioner. He lastly prayed for allowing of instant petition.

5. Mr. Fayaz Ahmed Leghari, learned counsel for respondent /PEPCO has raised the preliminary objection with respect to the maintainability of the instant Petition. Learned counsel has contended that the Respondent-Company is incorporated under the Companies Ordinance 1984 and relationship between the Petitioners and the Company is that of “master and servant” as such the instant petition is not maintainable. Learned counsel next contended that the petitioner has no cause of action as he has already been dealt with in accordance with law as the Respondent Company is non-statutory body having non statutory rules of service and therefore, the instant petition under Article 199 is not maintainable; that inquiry committee was constituted by HESCO in the light of Special Audit Report for the period from 01.02.2014 to 10.02.2015; that up-gradation orders were withheld on reasonable and relevant ground of pending/ outstanding recovery of Rs.4,363,592/- which was foremost ground in way of his up-gradation in terms of para-v of O.M. dated 27.05.2010, para-iv of O.M. dated 17.08.2010 and 06.10.2011 which described that up-gradation will not be admissible conforming upon pendency of enquiry/departmental proceedings/ audit para against the officer; that the competent authority decided his case on merits without any discrimination purely in accordance with rules/ policy; the up-gradation orders were withdrawn due to recovery of aforesaid amount on account of fraudulent adjustments through major repair of vehicles under Transport Section HESCO and not due to pending disciplinary proceedings; that it was categorically mentioned in the impugned up-gradation order dated 16.10.2017, that in case of any discrepancy, the case be referred to the office for necessary modification; that , when it was pointed out at later stage that a huge amount worth of millions was recoverable from the petitioner, his up-gradation orders were withdrawn; that the petitioners record is not clear therefore cannot be placed at par with those who have unblemished service record; that the main

case is still pending for adjudication, as such payment of arrears on account of up-gradation to BPS-20 will be subject to final outcome of the case; that no any discriminatory treatment has been meted out with the Petitioner; that Audit objection, Enquiry recommendation are on record; that the matter does not pertain to the impugned certificate dated 13.04.2017 regarding recovery of Rs.192, 600/- on account of TA. In fact, the basis for withdrawal of his time scale up-gradation order is recovery of an enormous amount of Rs.4,363,592/- on account of fraudulent adjustments through major repair of vehicle under Transport Section HESCO, which was ordered on the recommendations of Enquiry Committee, constituted in the light of Special Audit Report for the period from 01.02.2014 to 10.02.2015; that the petitioner by plotting with concerned staff deliberately concealed the real facts with regard to gigantic recovery of Rs.4,363,592/- just to make possible his up-gradation through illegal mean in sheer violation of prescribed procedure/ rules. For this purpose, he also gave distorted undertaking with malafide intention that no enquiry/ audit para is outstanding against him, despite of the fact that said Enquiry Committee was finalized in the month of April 2016; that the factum of wrong declaration regarding pending enquiry/ audit para resulted into inappropriate pronouncement of his up-gradation to BPS-19 by relying upon imprecise information from petitioner as well as field formation; that this irregularity came into knowledge of the office upon receipt of HESCO letter dated 31.10.2017 wherein it was highlighted that discrepancies and illegal payments on account of repair of vehicles have been pointed by the Special Audit Team in its report for the period from 01.02.2014 to 10.02.2015 and pursuant to observations raised by the Audit Team, an Enquiry Committee was constituted on 22.02.2016 to probe into the audit observations, consequently, the Enquiry Committee recommended to recover the amount of Rs.29,641,647/- from the following officers:-

Sr. No.	Name of Officer	Designation	Amount recoverable (Rs.)
1.	Mr. Amir Naveed Memon	Dy. Director (Transport)	15,701,215.00
2.	Mr. Muhammad Ayub Afridi	Manager (Admn)	4,363,592.00
3.	Mr. Usman ul Haq Ansari	Finance Director	1,454,530.00
4.	Mr. Deen Muhammad	Manager Finance	1,454,530.00
5.	Mr. Zahoor Ahmed Shaikh	Supervisor(Transport)	4,956,637.00
6.	Mr. Juma Khan	Accounts Assistant	117,761.00
7.	Mr. Ghulam Sarwar Jafri	Supervisor (Transport)	1,155,420.00
8.	Mr. Aijaz Khan	Vehicle Driver	186,550.00
9.	Mr. Nusrat Ali	Vehicle Driver	150,800.00
10.	Mr. Imdad Ali	Vehicle Driver	140,590.00,
		Total:-	29,641,647.00

It is further contended by the learned counsel that as and when the aforementioned ambiguity came into knowledge of the office through HESCO letter dated 31.10.2017, the office immediately reacted and corresponded with Chief Executive Office HESCO through speaking letter dated 22.11.2017 followed by subsequent reminder dated 01.01.2018 with the request to verify the contents of their letter dated 31.10.2017 and to fix the responsibility upon the delinquents for providing such ambiguous information, leading to wrong declaration of time scale up-gradation order of the petitioner; that consequently, HESCO vide letter dated 27.02.2017 verified the contents of their earlier letter dated 31.10.2017 by explaining that position of pending enquiry was concealed by the then Admn & HR Director HESCO as well as by the petitioner himself despite knowing that both enquiry/ audit para was pending against him. He lastly prayed for dismissal of the instant petition.

6. Mr. Aslam Pervaiz Khan, Assistant Attorney General for Pakistan has adopted the arguments of the learned counsel for Respondents.

7. We have heard learned counsel for the parties and perused the material available on record.

8. In the first place, we would like to examine the following issues:-

- (i) Whether (PEPCO) is discharging functions in connection with the affairs of Federation or a Province within the meaning of clause 5 of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973?
- (ii) Whether up-gradation of the petitioner was rightly cancelled by (PEPCO) on the basis of Audit Para on the ground of pending/ outstanding recovery of Rs.4, 363,592/- against the petitioner?

9. In order to deal with the above postulations, it is essential to make reference to scheme and framework of Water and Power Development Act, 1958 (hereinafter referred to as WAPDA Act), which provides for unified and coordination developments of the water and power resources of Pakistan. Under section 3 of the WAPDA Act, 1958 an authority known as Pakistan Water and Power Development Authority (WAPDA) was established as a body Corporate and the Federal Government has the power to issue such directives as it may consider necessary on matter of policy from time to time. Under Section 4 and 6 of the WAPDA Act, the Chairman and 6 Members of WAPDA are to be appointed by the Federal Government.

10. We have noted that PEPCO and other distribution companies were created to effectuate the devolution of powers. Though these companies are distinct corporate entities incorporated under the Companies Ordinance, 1984, however, they are performing the same functions as once allocated to WAPDA under the WAPDA Act. Secondly, the plans for development and utilization of water and power resources of Pakistan on unified and multi-purpose basis are also approved by the Federal Government.

11. While dilating the question as to whether PEPCO is "person" within the meaning of Article 199(1) (a) (ii) read with Article 199(5) of the Constitution

we refer to the test amenable to judicial review which has been generally classified by the Courts as the "Functional Test". If the functions of these companies/institutions have an element of public authority or if they are performing public or statutory duties and carrying out transactions for the benefit of the public at large and not for private gain or benefit, then their action will be amenable to judicial review. The Honorable Supreme Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), held that two factors are most relevant that is, the extent of financial interest of the State/Federation in an institution and the dominance in the controlling State/Federation in an institution and the dominance in the controlling affairs thereof. The case of Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244), the Honorable Supreme Court laid down similar test to assess whether a body or authority is a person within the meaning of Article 199 of the Constitution.

12. As per the profile of PEPCO, it is a state enterprise. The Government owns the majority of shares. The Chief Executive of the Company is a nominee of the Government of Pakistan and has been delegated with such powers by the Board of Directors as are necessary to effectively conduct the business of the Company. In view of the above background and legal position, PEPCO/HESCO can ordinarily be regarded as a "person" performing functions in connection with the affairs of the Federation under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution. Thus, the High Court has jurisdiction to exercise judicial powers in the subject affairs of PEPCO/HESCO under the Constitution. The objection on the maintainability of the captioned Constitution Petition is not sustainable in law and is accordingly rejected.

13. Precisely, the case of the petitioner is that the petitioner was recommended by the departmental authority for Time Scale Up-gradation

from BPS-19 to 20 and allowed to the petitioner with effect from 24.10.2015 vide order dated 16.10.2017, but later on, the Notification with regard to his Up-gradation was withdrawn vide order dated 31.01.2018 on the ground of pending/ outstanding recovery of Rs.4, 363,592/- against the petitioner. The aforesaid action was taken by the competent authority of PEPCO on the basis of Audit Para, which was principally not disclosed by the officials of the HESCO before acting upon the Time Scale Up-gradation of the petitioner.

14. The perusal of the record reveals that the recommendations of the departmental authorities vide memo dated 16.10.2017 in regard to Up-gradation of the petitioner was not acted upon as the petitioner was allegedly involved in the act of misappropriation and disciplinary proceedings were initiated against him. Prima facie evidence in respect of the allegations, leveled against the petitioner was found to be available in a preliminary probe as such the decision was taken by the authorities to withdraw his promotion.

15. Record further reflects that the letter dated 21.04.2016 issued by the respondents clearly depicts the grant of time scale up-gradation from BPS-19 to 20 of the Officers of HESCO which was subsequently withdrawn on account of recoverable amount from HESCO employees including petitioner received fraudulently on account of repair of Vehicles-RS.30.09 million.

16. We have noticed that in HESCO, some irregularities were committed by Transport Section, during process of estimates for repair of vehicles total damaged / burnt by Protestants in riots, in shape of unjustified/ bogus major and minor repair work. For this purpose an amount of Rs.30.09 million was received by staff of transport section fraudulently through hand receipts. The matter was inquired through an inquiry committee who recommended to recover the amount of Rs.30.09 million from HESCO employees received

fraudulently on account of repair of vehicle up to the financial year 2016- 17  
as per details below:

S.No.	Name of Employee	Designation	Amount Rs.
1.	Mr. Amir Naveed Memon	Dy. Director	16,112,348.00
2.	Mr. Muhammad Ayub Afridi	Manager (Admin)	4,363,592.00
3.	Mr. Usman ul Haq Ansari	Finance Director	1,454,530.00
4.	Mr. Deen Muhammad	Manager Finance	1,454,530.00
5.	Mr. Zahoor Ahmed Shaikh	Supervisor Tpt	4,956,637.00
6.	Mr. Juma Khan	Account Assistant	117,761.00
7.	Mr. Ghulam Sarwar Jafri	Supervisor Tpt	1,155,420.00
8.	Mr. Aijaz Khan	Vehicle Driver	186,550.00
9.	Mr. Nusrat Ali	Vehicle Driver	150,800.00
10.	Mr. Imdad Ali	Vehicle Driver	140,590.00
		<b>Total:-</b>	<b>30,092,758.0</b>

17. We have also noted that the case of up-gradation of the petitioner was based upon his undertaking, which he gave on 13.04.2017 on the premise that no any inquiry or disciplinary proceedings is/was pending against him whereas, the contrary position has been revealed that the department has initiated departmental proceedings against the petitioner and recommended for certain action against the petitioner. Apparently there is no evidence of any act of discrimination, malice and/or breach of law/rules, except bald accusation of mala fide by the petitioner.

18. Indeed the writ jurisdiction was not meant to be exercised to compel the competent authority to promote a civil/public servant against whom prima facie evidence showing his involvement in the serious charges of misconduct was available, for the reason that any such direction would be disharmonious

to the principle of good governance and canon of service discipline. Rather causing undue interference to hamper smooth functioning of the departmental authorities. An excerpt of the letter is as under:-

- “2. As per the information provided by your office, Mr. Muhammad Ayub Afridi was considered for Time Scale Upgradation in the meeting of PEPCO Selection Board held on 11.10.2017 and was recommended for TSU in BPS-20 w.e.f. 30.10.2015. He was accordingly allowed Time Scale Upgradation in BPS-20 vide GM(HR)PEPCO office order 16.10.2017.
3. Now it has been informed vide letter No. CEO/HESCO/HR&Admn Dir/PA/03 dated 31.10.2017 that as per office record the special audit of transport office for the period of 01.02.2014 to 10.02.2015 was carried out by the audit team. The special audit party pointed out discrepancies and illegal payment on account of repair of vehicles and excess POL. In this regard an enquiry committee was constituted by your good self-vide letter dated 22.02.2016 to probe into the observations raised by the special audit party in its report.
4. The enquiry committee has recommended to recover the amount of Rs.2, 96, 41,647/- from the concerned officers / officials vide their report dated 05.04.2016. The enquiry committee has further recommended to recover Rs.43, 63,592/- i.e. 30% of the total loss of Rs.2, 96, 41,647/- on account of bogus repair of VIGO vehicles, major / minor repairs and excess POL from Mr. Muhammad Ayub Afridi, Manager (HRM) HESCO. As per record the Government Audit of Pakistan had taken the draft para against Mr. Muhammad Ayub Afridi the then Manager (HRM) HESCO and others.
5. The above position was brought into the notice of competent authority, who has taken serious notice of the issue. It has been desired that being competent authority as CEO, please to verify the contents of letter No. CEO/HESCO/HR&Admn Dir/PA/03 dated 31.10.2017 and in case the contents are found correct then responsibility should be fixed upon the officer / official at fault for forwarding wrong and incomplete information to this office vide letter No. CEO/HESCO/M(HRM)/HQ/CM/3522-30 dated 21.04.2017. A prompt action will be highly appreciated in order to proceed further in the matter.”

19. In view of such state of affairs the question arises as to whether a public servant against whom disciplinary proceedings is pending or certain

action has been proposed to be taken against him is entitled for the up-gradation BPS-19 or 20.

20. We have also noted that respondent-department vide letter dated 22.07.2009 adopted the revision of promotion policy of Government of Pakistan whereby in light of clause "C" an officer of the department can be deferred for the promotion on the following reasons:-

(c) CONDITIONS FOR DEFERMENT

An officer may be deferred for not conforming to at-least any of the following reasons:-

- (i) If officer has not undergone the prescribed training (where applicable).
- (ii) Non submission of ACRs by the concerned officer to his Reporting Officer(s).
- (iii) Where the Board considers the record as incomplete, or wants to further watch the performance of the officer or for any other reason to be recorded in writing.
- (iv) If disciplinary or departmental proceedings are pending against the Officer.
- (v) If the officer is on deputation abroad to a foreign government, private organization or international agency.
- (vi) Where the inter se seniority of the Officer is sub-judice.
- (vii) In case an officer is deferred from promotion but subsequently approved for promotion, the officer will regain his / her seniority with his / her original batch, however, date of promotion will remain the same on which officer was actually promoted.

21. In the light of forgoing rule position which clearly demonstrate that in case where an officer against whom an audit para is pending is proposed to be promoted the details of the para invariably be put up to the Promotion/ Selection Board it will then be for the promotion/ selection Board to take cognizance of the report and ask for progress report, postpone consideration of the case or ignore it but in present case the officer of the respondent-department did not disclose the aforesaid factum before considering the case

of the petitioner for up-gra`dation which is also a negligence on the part of respondent- department.

22. We are clear in mind that due to pendency of the disciplinary proceedings a final decision has been taken against the petitioner, therefore, respondents have rightly withdrawn the up-gradation order of the petitioner as audit report clearly reveals certain allegations against the petitioner and other officials of HESCO during their tenure of service, which is prima facie evidence against the petitioner.

23. In the light of above facts and circumstances of the case and reasons alluded hereinabove this petition is devoid of merits and is accordingly dismissed alongwith listed application(s).

**JUDGE**

**JUDGE**

Karar\_hussain/PS\*