

ORDER SHEET
THE HIGH COURT OF SINDH, AT KARACHI

Constitutional Petition No.D-4082 of 2019

Order with signature of Judge(s)

1. For hearing of CMA No.19301/2020 (Stay)
2. For hearing of main case

15.2.2022

Petitioner present in person
Mr. Muhammad Nishat Warsi, DAG
Mr. Altamash Arab, advocate for respondent No.3

At the outset, we queried from the Petitioner as to how this Petition is maintainable in its form against the National Command Authority (NCA) by the National Command Authority (Amendment) Act, 2016, envisaging Master-Servant relationship for the employees of organizations under NCA and ousting the jurisdiction of this court from the entertaining petition of employees.

Petitioner, who is present in person, has submitted that he applied for the job of Junior Executive-I,(Accounts/SPS-7) K-2/K-3 through a competitive process in November 2014 at that time he was not an employee of National Development Complex (**NDC**); that according to advertisement NOC had to be submitted by an employee already employed in Government / Semi-Government Organization at that time of test/interview; that petitioner's test was conducted by Pakistan Atomic Energy Commission (**PAEC**) on 22.5.2015 and interview on 06.8.2015 and at the relevant time he was not an employee of any organization. Petitioner has submitted that despite a clearance certificate issued by the authority concerned in National Development Complex, Islamabad, the Chairman Pakistan Atomic Energy Commission terminated and removed him from PAEC service, which is illegal, unlawful, and contrary to law. Petitioner has averred that he is not in a position to work elsewhere on account of these harsh original order dated 01.08.2018 and appellate order dated 13.05.2019, which ought not to have been passed because of the clearance certificate of the previous employer i.e. NDC. Petitioner has referred to various documents attached with the memo of the petition and submitted that he has been punished twice by the respondents on account of the same charges. He referred to office order No.2036/2017 dated 28.11.2017, whereby the respondents imposed upon him the minor penalty of censure under rule 5(a)(i) of National Command Authority Employees (Efficiency and Disciplinary) Rules, 2010. Petitioner has further averred that the respondents continued to perpetuate the illegalities by issuing another show cause notice dated 25.4.2018 on the same charges, which was replied vide letter dated 14.5.2018 with the defense that he resigned from NDC on 25.6.2016. Petitioner also referred to Office Order

No.1522/2018 dated 01.08.2018, whereby his services were dispensed with under rule 5(b)(3)(d) of NCA Employees Efficiency and Disciplinary Rules, 2010. Per petitioner, he filed Constitutional Petition No.D-5627/2018 before this Court which was disposed of vide order dated 15.4.2019 with direction to the Chairman PAEC to decide his departmental appeal, which has now been decided vide impugned order dated 13.5.2019, however, they have taken the same stance as highlighted in the original order dated 01.08.2018. Per petitioner, both orders are a nullity in the eyes of law, thus liable to be set aside.

On the maintainability of this petition, he has averred that the rules framed under Sections 7,9 & 15 of the National Command Authority Act, 2010, are statutory, he referred to section 13 of the Pakistan Atomic Energy Commission Ordinance 1965 as well as section 2 (C) of the NCA Act, 2010 and submitted that all employees of (PAEC), now in (NCA) are entitled to be treated under the law; that the rights and benefits of the employees including Petitioner were protected under the proviso of section 9 of Act 2010, thus no further deliberation is required on the subject; the impugned major penalty of compulsory retirement from service imposed upon the petitioner in the year 2013 was in gross violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. Further that the action on the part of Respondent Authority was arbitrary and capricious thus untenable in law; that Section 24- A of the General Clauses Act, 1897, obliges every person exercising powers conferred by a statute, to act "reasonably, fairly, justly and for the advancement of the purpose of the enactment". It also stipulates that the person making any order under the power conferred by any enactment shall, so far as necessary or appropriate, "give reasons for making the order". Therefore, unreasoned orders of compulsory retirement, without providing Appellate forum as provided under section 11 of the Act, 2010 is violative of various provisions of the Constitution and law; that impugned action was much before amendment brought into the Act,2010, therefore for all practicable purposes the case of Shafique Ahmed Khan (supra) is fully applicable in the case of the petitioner; that there is no other efficacious and adequate remedy available with the Petitioner but to invoke the Constitutional Jurisdiction of this Court for the relief(s) as prayed in the Memo of Petition, therefore, it is in the best interest of the justice that the matter may be decided on merit. He lastly prayed for setting aside the order passed by Chairman, PAEC dated 15.5.2019 and reinstatement of his service with back benefits.

On the contrary, learned counsel raised the question of the maintainability of the instant petition and supported the impugned appellate order. learned Counsel further argued that the PAEC employees are legally deemed to be NCA Employees under section 9 of the NCA Act 2010; that this Court lacks jurisdiction under Section 22 of NCA, Act 2010 to try the instant case; that the relationship of Respondents No.2 and 3 with the Petitioner is that

of Master and Servant; that in the exercise of powers conferred under section 7, Sec 9(2) read with Section 15 of the NCA, Act 2010, the Authority has framed the NCA, Employees Services Rules-2011, quite under the NCA, Act 2010;

Learned DAG has supported the stance of learned counsel for the respondents

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

In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution, 1973. The issue of maintainability of the captioned Constitutional Petition has been raised. The Honorable Supreme Court in the case of *Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others* (**PLD 2016 SC 377**), unreported order dated 21.1.2020 passed by the Hon'ble Supreme Court of Pakistan in **Civil Petitions No.1762 and 1763 of 2016** (*Administrative of KCP Workshops (PAEC), Khushab and another v. Nazir Ahmed and others*), has settled the aforesaid proposition and held in *Shafique Ahmed Khan's* case that "the rules framed under Sections 7, 9 and 15 of the Act are statutory on all accounts and by every attribute. They are thus declared as such". Besides, on the subject issue we seek guidance from the judgments rendered by the Hon'ble Supreme Court of Pakistan on the issue maintainability of the petitions on the ground of statutory and non-statutory rules of service and maintainability on the point of violation of law in the cases reported as *Pakistan Defence Officers' Housing Authority v. Lt. Col. Syed Jawaid Ahmed*, **2013 SCMR 1707**, *Anisa Rehman v. P.I.A.C.*, **1994 SCMR 2232**, *Pakistan International Airlines Corporation, through MD, Karachi v. Nadeem Murtaza Khan*, **2007 PLC (CS) 334**, *Pakistan International Airlines Corporation (Piac) v. Nasir Jamal Malik*, **2001 SCMR 934**, *Administrator/Pakistan Defence Officers Housing Authority Karachi v. Ghulam Mustafa Khan*, **2011 SCMR 480**, *Ejaz Akbar Kasi v. Ministry of Information and Broadcasting and others*, **2011 PLC (CS) 367**, *Federal Government Employees Housing Foundation v. Muhammad Akram Alizai, Deputy Controller, PBC, Islamabad*, **PLD 2002 SC 1079**, *Karachi Development Authority and another v. Wali Ahmed Khan and others*, **1991 SCMR 2434**, *Muhammad Rafi and others Vs. Federation of Pakistan and others*, **2016 SCMR 2146**, *The Director-General, National Commission for Human Development and another v. Ambreen Ansari and another*, **2015 SCMR 1188**, *Zarai Taraqiati Bank Limited and others v. Said Rehman and others*, **2013 SCMR 642**, *Pir Imran Sajid and others Vs. Managing Director/General Manager Telephone Industries of Pakistan and others*, **2015 SCMR 1257**, *Maj. (retd.) Syed Muhammad Tanveer Abbas and another v. Federation of Pakistan*

through Secretary, Ministry of Interior and another, **2019 §CMR 984**, Government of Pakistan through Director-General, Ministry Of Interior, Islamabad v. Farheen Rashid, **2011 §CMR 1**, Tariq Aziz-Ud-Din and others: in re Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009, **2010 §CMR 1301**, CORRUPTION IN HAJJ ARRANGEMENTS IN 2010: In the matter of Suo Motu Case No.24 of 2010, **PLD 2011 §C 963**, JUSTICE KHURSHID ANWAR BHINDER and others v. FEDERATION OF PAKISTAN and another, **PLD 2010 §C 483**, Warid Telecom (Pvt.) Limited and 4 others v. Pakistan Telecommunication Authority through Chairman, **2015 §CMR 338**, Azad Government Of the State of Jammu and Kashmir v. Javed Anwar, **2015 PLC (CS) 354**, Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines Corporation; Karachi and others, **2002 PLC (CS) 1083**.

Progressing further, we have noticed that the (Amendment) Act, 2016, and the decision of Honorable Supreme Court in the case of Shafique Ahmed Khan and others supra came on 21st January 2016, which clarified the status of NCAES Rules, 2011 of National Command Authority. Therefore, there is no further discussion on the aforesaid proposition is required on our part. Our view is further cemented by the various decisions rendered by the Honorable Supreme Court as discussed supra. The first decision of a five Member Bench of the Honorable Supreme Court in the case of Pakistan Defence Officers' Housing Authority supra after examining the statute through which the Respondent-Authority and other statutory bodies were established and functioning, in Para-27 of its judgment, held them to be statutory bodies performing some of the functions of the Federation/State and, therefore, "person" within the meaning of Article 199(1)(a)(ii) read with Article 199 (5) of the Constitution and if their actions or orders are violative of the statute creating those bodies or of rules/regulations framed under a statute, the same could be interfered with by the High Court under Article 199 of the Constitution. References are being made to the other decisions rendered by the Honorable Supreme Court in cases of Ramna Pipe and General Mills (Pvt.) Ltd. v. Sui Northern Gas Pipe Lines (Pvt.) [**2004 §CMR 1274**], Abdul Wahab, and others Vs. HBL and others [**2013 §CMR 1383**], Khawaja Muhammad Asif v. Federation of Pakistan [**PLD 2014 §C 206**], Pakistan Telecommunication Employees Trust vs. Muhammad Arif and others [**2015 §CMR 1472**], Shafique Ahmed Khan and others versus NESCOM through Chairman Islamabad and others [**PLD 2016 §C 377**], P.T.C.L. and others vs. Masood Ahmed Bhatti and others [**2016 §CMR 1362**], Muhammad Rafi and others Vs. Federation of Pakistan and others [**2016 §CMR 2146**], Muhammad Zaman, etc. versus Government of Pakistan through Secretary, Finance Division (Regulation Wing), Islamabad [**2017 §CMR 571**],

Pakistan Defence Housing Authority Vs. Mrs. Itrat Sajjad Khan and others [2017 §CMR 2010], Airline Pilots Association and others Vs. Pakistan International Airline Corporation and others [2019 §CMR 278].

Having dilated upon on the aforesaid proposition, the instant Petition relates to the service of the Petitioner, whereby Respondent-Authority firstly awarded a minor penalty of censure and subsequently, on the same charges major penalty of removal from service, on the allegations that he did not inform about his previous service, without holding regular inquiry proceedings, and was found guilty of the charge of Misconduct, his appeal was also dismissed on the same analogy, which he is asking for setting aside both decisions, through the instant Petition. An excerpt of the Office Orders dated 28.11.2017, 01.08.2018, and the appellate order dated 13.05.2019 are as under:

"No.E&D:22(468)/2017

Dated: 28.11.2017

OFFICE ORDER NO.2036/2017

Subject: DISCIPLINARY PROCEEDINGS AGAINST MR. MUHAMAD HANEEF, (PIN-69477) JR. EXECUTIVE-I (ACCOUNTS) C& F BRANCH (DGTP) KARACHI

Consequent upon receipt and examination of his defence reply dated 11-5-2017 to the Show Cause Notice of even number dated 2-5-2017 and personal hearing on 13-9-2017, Mr. Muhammad Haneef, Jr. Executive-1 (Accounts) C&F Branch (DGTP) Karachi is informed that his defence version has not been found satisfactory and the charge of "misconduct" i.e. concealment of previous service in NDC, stands proved against him. The Competent Authority has, however, taking a lenient view decided to impose upon him a minor penalty of "Censure" under Rule 5(a)(1) of NCA Employees Efficiency & Disciplinary Rules, 2010."

"No.E&D:22(468)/2017

Dated: 01-08-2018

OFFICE ORDER NO.1522/2018

Subject: DISCIPLINARY ACTION AGAINST MR. MUHAMAD HANEEF, (PIN-69477) JR. EXECUTIVE-I (ACCOUNTS) K-2/K-3 KARACHI

Consequent upon receipt and examination of his defence reply dated 14-5-2018 to the Show Cause Notice of even number dated 25-4-2018, Mr. Muhammad Haneef, Jr. Executive-1 (Accounts/SPS-7) K-2/K-3 Karachi is informed that his defence version has not been found satisfactory and the charge of "misconduct" (i.e. upon his removal from NDC service in the light of Rule-5(b)(3)(d) of NCA Employees (E&D) Rules 2010 he cannot be retained in PAEC service) stands proved against him. The Competent Authority has, therefore, decided to impose upon him a major penalty of "Removal from PAEC Service" with immediate effect under Rule 5(b)(3)(d) of NCA Employees Efficiency & Disciplinary Rules, 2010."

"Dated:13.05.2019....."

8. After having heard the petitioner and having gone through the record/rules on the subject it is evident that the appellant Mr. Muhammad Haneef, Ex-Jr. Executive-I (Accounts/SPS-7), -3 Karachi did not disclose his service with NDC during/after employment process at PAEC, and he was also removed from NDC service. In the light of Rule-5(b)(d) of NCA employees (E&D) Rules, 2010 he cannot be retained in PAEC service. Thus, following NCA Employees (E&D) Rules, 2010, he has been "Removed from PAEC Service" vide PAEC HQ O.O. No.1522/2018 dated 1-8-2018 which commensurate to the gravity of the offence and rules/laws on the subject. Therefore, his

departmental appeal dated 26-9-2018 against said order is bereft of any legal justification, has no merit consideration and consequently the same is rejected.”

So far as the punishment is concerned, the petitioner was inflicted the extreme punishment of removal from service for the alleged sin of not disclosing factum of the previous service. The above circumstances would strike to any ordinary prudent man that the extent of the above misconduct would never warrant any severe punishment more so the removal from service. It shows the law and standards of justice that are being applied by the Honorable Supreme Court, regarding the imposition of the punishment, have been forgotten. Besides that justice, equity, and fair play demand that the punishment must always be commensurate with the gravity of the offense charged. The punishment imposed on the petitioner is disproportionately excessive and it is not within the reach of natural justice for the simple reason that the petitioner explained his position by placing on record that he informed the respondents by showing clearance certificate and other documents placed on record.

There is, however, unanimity of judicial opinion that two punishments for the same misconduct cannot be imposed. Besides that, the major punishment has been awarded stigma without holding a regular inquiry. Learned counsel for the respondents has, however, not been able to bring to our notice any case in which two punishments could be inflicted upon the public servants. Prima facie, firstly the censure has been ordered as a minor punishment, and besides, another major punishment of removal from service has been imposed upon the petitioner without assigning any reason.

One of the settled principles of law is that no one can be subjected to two punishments for the same misconduct or offense. There appears to be an error committed by the appellate authority on this behalf and obviously, it has been done in unawareness of the legal position.

The view that we have taken, however, leads us to conclude that besides the minor punishment of censure, no other major punishment of removal from service could have been imposed upon the petitioner under the circumstances of the case.

In view of the above, we are inclined to set aside the impugned original dated 01.08.2018 and appellate order dated 13.05.2019 passed by the Chairman PAEC and direct the competent authority of respondents/Chairman PAEC for payment of the full-back benefits, besides the reinstatement of the petitioner in service on his original position, within two weeks from the date of order. Let a copy of this order be transmitted to the respondents for compliance.

JUDGE

JUDGE