

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-5048 of 2016

Date **Order with signature of Judge**

Present

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Abdul Maalik Gaddi

Azhar Jawaid.....Petitioner

Vs.

Federation of Pakistan & others.....Respondents

Date of hearing: 31.10.2016 & 11.11.2016.

Mr. Khalid Jawed Khan, Advocate for the Petitioner.

Respondent No.4 appeared in person.

Sheikh Liaquat Hussain, Standing Counsel.

Muhammad Ali Mazhar, J: This petition has been brought to challenge recommendation of Federal Public Service Commission (FPSC) for the induction of respondent No.4 in the Service of Pakistan in PSP Group.

2. The short-lived facts of the case are that the officers serving in the Armed Forces of Pakistan are eligible for induction in the Service of Pakistan in the three Occupational Groups i.e. District Management Group (DMG), Foreign Service of Pakistan (FSP) and Police Service of Pakistan (PSP) on recommendation of respondent No.2 in terms of Office Memorandum (O.M.) No.10(1)/91-CP/I dated 09.09.1991 (S1. No.244, Estacode). The petitioner claims that on the basis of an unapproved and illegal proposal recorded in the minutes of the meeting dated 10.09.1991,

the respondent No.2 has recommended the name of the respondent No.4 for selection in the Service of Pakistan in PSP Group in violation of law and the merit list where the petitioner was placed above the respondent No.4. The petitioner was short listed by Pakistan Navy for consideration and induction in the civil service by the respondents Nos.1 and 2. He participated in the tests and merit consideration against the seat reserved for Sindh (Urban). It was recently discovered to him that the basis for denial to the petitioner is a proposal that was made in the meeting held on 10.9.1991. The representative of respondent No.3 had proposed that one seat each may be allocated to the candidates/officers from Pakistan Navy and Pakistan Air force while the remaining seats may be allocated to the officers of Pakistan Army.

3. The respondent No.1 admitted O.M No.10(1)/91-CP-1 dated 09.09.1991 as basis for induction of officers of Armed Forces in the Federal Civil Services. They also pleaded no deviation from O.M No.10(1)/91-CP-1 dated 09.09.1991 with further statement that the policy was approved by the Prime Minister, being the competent authority. It is further stated that appointment letter of the respondent No.4 was issued on 9.9.2016 and he accepted the offer and joined the services on 10.9.2016 before passing interim orders by this court on 16.9.2016.

4. The respondent No.2 in their comments taken the position that unless the alternate statutory remedies of representation and review petition before the Commission and then appeal to the High Court under Sub-Section (3) of Section 7 of the Federal Public Service Commission Ordinance, 1977 are availed, the petitioner cannot invoke

extra ordinary jurisdiction of this court. The petitioner's representation before the Commission, received on 05.09.2016 was under process but during pendency, he filed this petition without waiting the outcome of representation which was rejected by the Commission after due deliberation on 06.10.2016. The Establishment Division conveyed 9 vacancies pertaining to three Occupational Groups/Services (PAS, PSP and FSP) against 10% Armed Forces quota on the basis of vacancies for CSS 2015 for their bifurcation and recommendation in line with the policy. The policy of induction of Armed Forces is being regulated by the respondent Commission on two instruments i.e OM dated 09.09.1991 issued by the Establishment Division and Minutes of the meeting dated 10.09.1991. In pursuance of said decision 09 vacancies were earmarked by the Commission for the three forces (Army=7, Navy=1 and Airforce=1) and forwarded to Ministry of Defence and Establishment Division for confirmation and nomination of panel of officers. One vacancy reserved for Pakistan Navy was allocated to Lt. Tariq Masroof (PN) who secured the highest marks while Capt. Syed Aqeel Hussain from Pakistan Army (Respondent No.4) was recommended to one of the seven vacancies reserved for army out of total 9 vacancies.

5. The learned counsel for the petitioner argued that Clause (g) of SI.No.244 provides for selection by FPSC on the basis of psychological test, viva voce and regional/provincial quota. There is no inter services quota therefore seats cannot be reserved in favour of Army, Navy and Air Force in the form of quota. All candidates were competent to be selected for the post subject to regional/provincial quota. The allocation of quota in terms of O.M. dated 10.09.1991 is

illegal. The petitioner being bypassed in violation of SL.244 merely on grounds of unapproved minutes/inter services apportionment challenged the same and also filed representation to respondent No.2/FPSC dated 01.09.2016. Having received no response within 15 days, the petitioner filed this petition seeking enforcement of SI.No.244 and challenging the minutes of meeting/apportionment formula. The petitioner is neither aggrieved by the decision of FPSC nor it could seek redressal from FPSC by filing any review against its memorandum dated 06.10.2016 under Section 7(3)(b) of the FPSC Ordinance, 1977. The remedy of representation, review and then appeal to the High Court under Section 7(3)(b) of the Ordinance, 1977 is applicable only when a candidate is aggrieved by anything done by FPSC in respect of his individual selection and could be rectified by FPSC. Where the criteria for selection is challenged, FPSC cannot redress the grievance as it merely follows the criteria adopted by Establishment Division. Thus, admittedly the remedy in this case does not lie with FPSC but lies to this court for seeking annulment of illegal criteria/apportionment formula adopted on 10.09.1991 in violation of the Rule/SI.244 dated 09.09.1991. It was further averred that Rules/Estacode cannot be diluted by executive decision/minutes unless the Rule/Estacode is duly amended in the prescribed manner. In support of his contention, he cited judicial precedents for instance **2002 CLC 1642 (Ameer-ur-Rehman Khan versus Federal Public Service Commission), PLD 1964 SC 21 (The Province of West Pakistan versus Ch. Din Muhammad and Zafar Ali Shah & others), PLD 1988 SC 131, (Fazal-I-Qadir versus Secretary, Establishment Division), PLD 1999 Karachi 76 (Collector of Customs (Appraisement) versus Messrs.**

**Saleem Adaya, Karachi) and PLD 1999 Karachi 238
(Messrs Polyron Ltd. versus Government of Pakistan).**

6. The learned standing counsel argued that recommendation was subject to merit and regional/provincial quotas. Nine vacancies were forwarded by Establishment Division for induction of Armed Forces Officers in the civil service against PAS, PSP and FSP. As a matter of fact, a meeting was held on 10.09.1991 in pursuance of the order of the Government contained in Establishment Secretary letter dated 08.09.1991 to formulate the modalities regarding induction of Armed Forces Officers in the Civil Service with eligibility criteria. The sub-allocation of 09 vacancies amongst the three forces in the ratio of one vacancy each may go to an officer of the Navy and Air Force and remaining to Army was made by the respondent Commission in accordance with the minutes of the meeting held on 10.09.1991 which was subsequently approved by the Establishment Division and Ministry of Defence. The vacancies meant for induction of Armed Forces officers in civil service are provided by the Establishment Division to the FPSC on the basis of regional/provincial quota and sub-allocation of vacancies among the three forces and recommendation was forwarded to the Establishment Division and Ministry of Defence for consideration and approval. This exercise is carried out on yearly basis. The vacancies for CSS-2015 were bifurcated/distributed by the FPSC according to the OM dated 09.09.1991 and minutes of the meeting dated 10.09.1991. The recommendation of Syed Aqeel Hussain (Respondent No.4) to one of the vacancy reserved for Sindh (Urban) quota is according to the OM dated 09.09.1991 and Minutes of the meeting dated 10.09.1991.

7. Heard the arguments. Intrinsicly, the petitioner relied on SL-244 Estacode. He has claimed his induction as a vested right in the Police Service of Pakistan. For the ease of reference, SL-244 Estacode is reproduced as under:-

“Sl. No. 244

Induction/Re-Employment of Armed Forces Officers into Civil Posts

The methodology of induction of officers of the armed forces in civil remained under active consideration of the Establishment Division. The issue was also examined thoroughly by the Recruitment Policy Committee. On the recommendations of the Recruitment Policy Committee, the Prime Minister has been pleased to approve as under:-

- (a) Officers of the armed forces, irrespective of their rank, will be eligible for induction in the civil to posts in pay scale 17 only provided-**
 - (i) their overall service record in the armed forces is not below “High Average” and**
 - (ii) they are below 32 years of age.**
- (b) Induction will be allowed only in the following occupational groups:-**
 - (i) District Management Group**
 - (ii) Foreign Service of Pakistan**
 - (iii) Police Service of Pakistan**
- (c) Induction will be equal to 10% of annual vacancies in each of these groups with a minimum of 2 vacancies in each group.**
- (d) Induction/allocation to various Occupational Groups will be through FPSC instead of Defence Services Officers Selection Board (DSOSB).**
- (e) Each Service Headquarter shall have a Board which will examine the cases of officers willing to be considered for induction in civil and who fulfill the conditions indicated above.**
- (f) Each Board shall recommend to the Ministry of Defence names equal to double the number of available vacancies.**

- (g) **The FPSC will select officers and allocate them to occupational groups on the basis of psychological test, viva voce and regional/provincial quota. [Emphasis applied].**
- (h) **[Re-employment of the retired officers of the armed forces in civil besides Office Management Group, Secretariat Group, Foreign Service of Pakistan and Information Group has also be extended upto 10% of the annual vacancies in Ministries of Health, Education, Communications and intelligence Bureau. There will be no re-employment in ***Accounts Group in future]**

2. Policy governing induction/re-employment of the officers of armed forces in civil stands amended to the extent discussed above.

3. The Prime Minister has desired that the nominations already forwarded by the Ministry of Defence for induction in the civil may be treated as the nominations for the year 1991 and forwarded to FPSC for consideration. The needful has been done.

4. The Majors nominated by the Ministry of Defence *vide* Annex-C to O.M.No.2/25/D-24(C.IV)/91, dated 6th July, 1991 will also be considered for induction provided they are below 32 years of age, their overall record in the armed forces is not below "High Average" and they are willing to be inducted in posts in BPS-17.

[Authority:- Esst. Division O.M.No. 10(1)/91-CP.I, dated 9-9-1991]

8. The alleged sticking point and or stumbling block is the impugned decision ensued in the meeting convened on 10th September, 1991 which was attended by the Chairman FPSC, Member FPSC, Additional Secretary, Establishment Division, Additional Secretary, Ministry of Defence, Deputy Secretary, Ministry of Defence and Deputy Secretary, Establishment Division. Essentially, this meeting was put in order to discuss the preliminary arrangements regarding induction of the officers from armed forces in the Central Superior Services through FPSC in terms of the order of Government contained in the Establishment Secretary's letter dated 8th September, 1991 addressed to the Chairman, FPSC. In fact this letter communicated that the methodology

of induction of armed forces in civil remained under active consideration and the issue was also examined by the recruitment policy committee and on their recommendation the Prime Minister has approved that the officers of the armed forces irrespective of their rank will be eligible for induction in the civil to posts in pay scale 17 provided their overall service record in the armed forces is not below the high average. It was further avowed that the induction will be equal to 10% of annual vacancies in each of the groups with a minimum of 2 vacancies in each group. Let us revert back to the minutes of meeting under discussion in which the representative of Ministry of Defence proposed that out of 6 vacancies, one each may be allocated to the officers belonging to the Navy and the Air Force and rest may go to the Army which was agreed in principle subject to the confirmation by the Establishment Secretary in consultation with the Ministry of Defence. In our outlook, paragraph 6 of the minutes of meeting is somewhat worth mentioning and also germane to the issue in hand which is reproduced as under:-

6. The representative of Ministry of Defence pointed out that previously out of 10 vacancies, one each used to be allocated to the Navy and the Air Force. He suggested that this pattern of sub-allocation amongst the three Services may be adopted while making selection through the FPSC as well. He further proposed that out of 6 vacancies, one each may be allocated to the officers belonging to the Navy and the Air Force and the rest may go to the Army. This was agreed to in principle by the meeting subject to confirmation by the Establishment Secretary in consultation with Ministry of Defence.

After due deliberation, the aforesaid meeting was recapitulated with the decision jot down in paragraph 10 of the minutes of meeting as under:-

10. To sum up the following conclusions were reached in the meeting:-

- (1) Officers whose names are given in the enclosed list were considered to be ineligible on the basis of being either (a) Over age or (b) having less than satisfactory record according to the standard laid down in Establishment Secretary's letter No.10(1)/91-CP.I dated 8.9.1991. Consequently, their names were omitted from the short list;**
- (2) List of remaining officers would be sent to the Establishment Secretary for being given a second look and for clearance in consultation with Ministry of Defence, with the request that process of consultation/clearance may be expedited and the finally approved list handed in to the FPSC within three to four days;**
- (3) The Provincial/Regional quotas may be observed with a slight modification to suit the limited number of vacancies available. Out of six expected vacancies, 3 should go to Punjab (50%); one to Sindh (19%), to be allotted on alternate years to Sindh (R) or Sindh (U) respectively; one to NWFP; and the sixth to officers from Balochistan, AJK and NAFTA grouped together;**
- (4) On a question raised by representative of Defence Ministry, regarding sub-allocation amongst the three services of the vacancies, it was agreed in principle that out of 6 vacancies, one each may go to an officer of the Navy and the Air Force respectively and the remaining four to the Army subject to confirmation/approval of the Government (i.e. Establishment Secretary in consultation with Ministry of Defence);**
- (5) Complete service record and ACRs of the officers (including assessment of their performance in training courses) should be made available to the FPSC earliest possible.**

9. The bone of contention is whether the Respondents can devise and contrive inter se quota for allocation of vacancies amongst the officers of armed forces or not? The learned counsel for the petitioner bring in much emphasis that under clause (g) of SL-244, the FPSC may only select officers and allocate them to occupational groups on the basis of psychological test, viva voce and regional/provincial quota without observing any inter se quota so the decision taken in the minutes of meeting dated 10th September, 1991 is contrary to SL-244. With regard to this line of argument, we

are of the well-founded view that SL-244 incontrovertibly speaks of regional and provincial quota but concomitantly it does not postulates exact parameters as to how and in what manner the vacancies will be distributed amongst the officers of Army, Navy and Air Force. In order to evolve a proper mechanism and procedure, a meeting was convened between the stakeholders and after premeditation in the meeting attended by six persons including the Chairman, FPSC, they fixed the criteria for fair allocation of vacancies in the year 1991 which was never challenged by any stakeholder. The decision was taken on the proposal of the representative of the Ministry of Defence which was agreed in principle by the other participants subject to the confirmation by the Establishment Secretary in consultation with Ministry of Defence. Much emphasis bring forth by the counsel for the petitioner that the decision taken in the aforesaid meeting was not approved by Establishment Secretary in consultation with the Ministry of Defence.

10. The Establishment Division and Ministry of Defence both are Respondents in the petition. The Establishment Division filed their comments but no comments have been filed by the Ministry of Defence, however, the learned Standing Counsel represented the both. The Establishment Division stridently sustained the induction of Respondent No.4 in PSP. The letter of Deputy Director, FPSC dated 29.2.2016 put on view that vide Establishment Division letter dated 10.02.2016, 09 vacancies were earmarked for induction of armed forces officers i.e. 04 in PAS, 03 in PSP and 02 in FSP. After this allocation, a breakup was made for distribution i.e. 07 vacancies of CSS-2015 for Pakistan Army, 01 for Pakistan Air Force and 01 for Pakistan Navy.

The name of petitioner from Pakistan Navy is at number 26 for Sindh Urban while the name of Respondent No.4 from Pakistan Army for Sindh Urban PSP is at serial number 27. The petitioner claims that since he is at number 26, therefore, he should be given preference for induction in PSP rather than the Respondent No.4 while one vacancy reserved for Pakistan Navy out of nine was already given to Lt. Tariq Masroof for his induction in FSP.

11. If the Ministry of Defence with the consultation of Establishment Division mutually decided to allocate the vacancies in the Armed Forces for fair and equitable distribution, it does not amount in any way violation or contravention of SL-244 Estacode. This modality or the decision for distribution of vacancies in the Armed Forces is in vogue since 1991 and the decision was taken in the minutes unanimously. Neither anything on record nor argued by the learned counsel for the petitioner that this mechanism for distribution was ever challenged by Pakistan Army, Pakistan Air Force and or Pakistan Navy nor Ministry of Defence has taken any exception to it. Nothing has been placed on record to show that the petitioner ever approached to the competent authority in his Force or the Ministry of Defence conveying his objection or dissatisfaction to the decision taken for an equitable distribution. The Respondent No.4 appeared in person who argued that there is a rationale to allocate more seats to Pakistan Army simply for the reason that the strength of officers in Pakistan Army is more than Pakistan Navy and Pakistan Air Force, therefore, the methodology of distribution is quite fair and equitable and this contention was not opposed or objected by the learned counsel for the petitioner. We have also seen the comments

filed by FPSC along with various documents. They have attached the list of officers nominated and recommended for permanent induction in Civil Service of Pakistan by Pakistan Army, Pakistan Air Force and Pakistan Navy separately. The number and names nominated by each Force separately do show that they are fully aware and adhere to the prescribed and decided ratio for induction as laid down in the minutes of meeting held in 1991. For example, Pakistan Air Force nominated only 06 officers on 27th May, 2016. While Pakistan Navy nominated only 08 names including the petitioner on 1st July 2016, whereas, Pakistan Army nominated 21 names on 20th July, 2016. The genre of recommendation/nomination of officers allowed to appear in CSS-2015 for permanent induction through FPSC seems to be rationale and compatible to the vacancy position allocated in terms of policy decision for selection.

12. Under Section 7 (3) (a) of Federal Public Service Commission Ordinance, 1977, it is provided that the candidate aggrieved by any decision of the Federal Public Service Commission may within 30 days make a representation to the Commission and the Commission shall decide the representation within 15 days after giving the candidate a reasonable opportunity of hearing and the decision of the Commission would be subject to the result of review petition. In clause (b) it is further provided that the candidate aggrieved by the decision by the Commission made under paragraph (a) may within 15 days of the decision, submit a review petition to the Commission and Commission shall decide the review petition within 30 days. However, in clause (b) it is further provided that any candidate aggrieved by decision of the Commission under paragraph (b) may within 30 days of the decision prefer an

appeal to the High Court. The learned Standing Counsel further argued that before filing this petition, the petitioner filed the representation and before deciding the representation he approached to this court, therefore, the petition is not maintainable as the proper remedy was to wait for the decision of the representation thereafter a review could be filed and if the petitioner would be found aggrieved by the decision of review than he could have filed appeal in this court instead of this constitution petition. In this regard, we are convinced with the arguments of learned counsel for the petitioner that in fact the petitioner is not aggrieved by any act or omission of Federal Public Service Commission but the disagreement in hand is the proprietary of the minutes of meeting convened in the year 1991 for the distribution of vacancies amongst the officers of armed forces so in the present situation, we do not want to take any rigid view as in our mind there is no doubt that the FPSC could not take any independent view overriding the decision of the minutes as this is not in their realm or purview to change the criteria of allocated vacancies decided between all the stakeholders. In the case of **Ameer-ur-Rehman Khan Vs. FPSC**, reported in **2002 CLC 1642**, the appellant assailed rules framed by Federal Public Service Commission in terms of Section 7-A and 10 of Federal Public Service Commission Ordinance, 1977 but his writ petition was dismissed by the learned Single Judge hence he filed the Intra Court Appeal. The learned Division Bench of Lahore High Court held that such rules could not be deemed to be a decision within the purview of provision of Federal Public Service Commission Ordinance, 1977 conferring upon an aggrieved person a right of representation or review hence the Intra Court Appeal was found maintainable in circumstances.

13. What's more, the learned counsel for the petitioner referred to the case of **Fazil-I-Qadir Vs. Secretary, Establishment Division**, reported in **PLD 1988 S.C. 131**. Indeed in this judgment the hon'ble Supreme Court focused on Section 8 and 25 of the Civil Servant Act and held that instructions appearing in Estacode governed the terms and conditions and the discipline in service. Merely because said office memorandum did not bear the appellation of rules is not sufficient to reduce their legal status. Such instructions should be treated as rules and fully capable of setting aside or modifying the rules, therefore, is not ultra vires of Section 8 and not in conflict with the Act and the rules framed there under. He further referred to the case of **Province of West Pakistan Vs. Ch. Deen Muhammad**, reported in **PLD 1964 SC 21** in which the apex Court while reaffirming the view in Civil Appeal No.35 of 1961, Federation of Pakistan Vs. Maqbool Elahi, held that even departmental instructions were capable of creating legal rights and of possessing binding effect if they had been expressed in precise terms and were capable of being applied with exactness in all relevant cases relating to a particular service in general. The learned counsel also alluded to the case of **Messrs Polyron Ltd. Vs. Government of Pakistan**, reported in **PLD 1999 Karachi 238** in which the learned division bench of this court held that where a notification is inconsistent with the declaration of policy contained in a circular, in such event the court could only give effect to the notification having force of law as compared to a mere declaration of policy. In our considerate view, the case law cited by the learned counsel for the petitioner are distinguishable in the facts and circumstances of the present case as the plain reading of the impugned policy decision taken in the meeting for

setting criteria for allocation of seats amongst the officers of the Armed Forces copiously demonstrates that it is neither in violation of SL-244 Estacode nor any such restriction is imposed under SL-244 Estacode not to devise or contrive a methodology by dint of a nondiscriminatory policy decision for fair-minded and equitable distribution. The respondent No.1 in the comments has also confirmed unequivocally that this decision was approved by the Competent Authority. We have also no doubts in our mind that the policy is evenhanded and not person specific moreover it is in vogue since 1991 which otherwise does not infringe or intrude on any fundamental right of the petitioner for induction in PSP beyond the benchmarks. It is well recognized principle that courts do not sit in judgment over a policy of Government nor interferes or strike down it unless it is proved mala fide or made in a colorful exercise of authority or power.

14. In the **Human Rights Case No.14392/2013 and others**, reported in **2014 SCMR 220**, the hon'ble Supreme Court held that the court exercises judicial restraint in matters of Government policy except where fundamental rights are violated. In the case of **Doctor Alyas Qadeer Tahir vs. Secretary M/O CADD Education Islamabad**, reported in **2014 SCMR 997**, the apex court held that for enactment of rules or amendment therein is the prerogative of the Government. It can enact and amend the rules according to the needs and exigencies of service. It is not individual but institutional interest or uplift which shapes its service structure. Alright, at the time of appointment of the respondents, no such rules were enacted or enforced but it does not mean that the institution or the department having thus started would remain in wilderness. It may change with a change in attending circumstances and future

prospects. It was further held that the vires or validity of Rules or amendments therein attending to such aspects, cannot, therefore be looked askance at. The more so when there is absolutely nothing in the Rules to show that they are either person specific or an off shoot of mala fides.

15. As a result of above discussion we do not find any substance in the petition. Consequently, this petition is dismissed along with injunction application.

Karachi:-
Dated.13.01.2017.

Judge

Judge