

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

C.P. No.D-1573 of 2012.

Before:

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-ul-Karim Memon

Ghulam Sarwar Unar ----- Petitioner

VERSUS

HESCO & others ----- Respondents

Date of hearing & decision: 16.09.2020

Mr. Tariq Majeed advocate for petitioner.
Mr. Muhammad Arshad S. Pathan advocate for respondents.
Mr. Muhammad Humayoon Khan Deputy Attorney General.

ORDER

ADNAN-UL-KARIM MEMON, J. The petitioner has impugned the office order dated 28.6.2012 issued by Hyderabad Electric Supply Company (HESCO) whereby they have withdrawn the office order dated 21.6.2012, regarding exoneration of Petitioner from certain charges due to misconduct.

2. Basically petitioner claims through instant petition "Time Scale Up-gradation" from BPS-17 to 18, allowed to the colleagues of petitioner vide office order dated 21.1.2010 and followed by another office Memorandum (OM) dated 27.5.2011 revised by another OM dated 29.9.2011, prescribing the following criteria:-

- a) A total service of 10 years in BPS-17 for up-gradation from BPS-17 to 18.
- b) Either 10 years service in BPS-18 or an aggregate of 20 years service in BPS-17 and BPS-18, whichever is applicable for up-gradation from BPS-18 to BPS-19.
- c) Either 5 years service in BPS-10 or aggregate of 25 years service in BPS-17, BPS-18 and BPS-19, whichever is applicable, for up-gradation from BPS-10 to BPS-20.

3. 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 Junior Engineer on 24.9.2001 on contract basis and thereafter he was confirmed. The petitioner has averred that respondents HESCO vide order dated 24.4.2012 issued him explanation under Rule 5(IV) of WAPD Employees (E&D) Rule-1978 with certain allegations of misconduct; however, the same charges were withdrawn vide office order dated 21.6.2012. Petitioner has averred that after exoneration from the charges he was entitled for Time Scale Up-gradation from 17 to 18. Petitioner has submitted that all of sudden respondent HESCO vide impugned order dated 28.6.2012 had withdrawn the letter dated 21.6.2012 and was not allowed the benefits of up-gradation due to pending explanation against him. The petitioner has submitted that his colleagues have been promoted, though against them explanations were also available but their up-gradation had not been withdrawn, as this is sheer discrimination which has been meted out to him, which is not sustainable under the law. Petitioner being aggrieved by and dissatisfied with the impugned office order has filed the instant petition on 25.8.2012.

4. Petitioner claims that he was fulfilling all the requirements for upgradation to BPS-18 and having legitimate expectancy of his upgradation but his candidature was not considered without lawful justification and in the meanwhile he was issued explanation vide letter dated 24.4.2012 under Pakistan WAPDA E&D Rules 1978 for allegedly causing losses in private units assessments by – 10.4% and -20.31% respectively to the tune of Rs.10.11 million to the respondent-company. Petitioner replied the charges, denied the allegation and subsequently he was exonerated from the charges vide office order dated 21.6.2012. However, after seven days the said order dated 21.6.2012 was withdrawn without assigning any reason, thereafter personnel hearing was given to him but no decision was taken. Subsequently vide office order dated 18.7.2012 most of his batch-mates were upgraded to BPS 18 but he was not considered.

5. Upon notice, the Respondent-company filed objections in which they have controverted the stance taken by the Petitioner.

6. Mr. Tariq Majeed learned counsel for the petitioner has argued that the impugned order is a result of personal grudge and departmental intrigues. Even otherwise there is no reason to withdraw the office order as discussed supra, which is lawful and has been issued after completing all the formalities; that prior to issuance of impugned office order, no opportunity of hearing was given to the petitioner, as such, impugned order is not lawful, non-speaking thus not sustainable under the law; that discrimination has been meted out with the petitioner; that no enquiry of any agency, NAB

Reference is pending against him; that under the WAPDA (E&D) Rules the competent authority shall not be inferior to the appointing authority as such no penalty can be imposed nor any action can be initiated by the General Manager / Chief Engineer against officer of BPS-17 and above; that withdrawal of the EXONERATION order was illegal and void abinitio; that the up-gradation policy prescribe 10 years service for up-gradation which was completed in the year 2010 as such after waiting for a year in the said scale, the petitioner should have been allowed up-gradation in September 2011; that since the up-gradation to BPS-18 was due in September 2011, which Board was conducted in July 2012, (without prejudice) due to some administrative delay, as such by no stretch of imagination the show cause notice issued in June 2012 for allegation of March and April 2012 which was decided in favour of petitioner too but later on recalled cannot be considered adverse to his interest while considering his case for up-gradation to BPS-18 as the up-gradation was due in September 2011 and all allegations and proceeding came into existence much after that particularly in June 2012; that it is well settled law that mere pendency of an enquiry or proceedings cannot be termed as hurdle for denying promotion; that malafide of respondents can be measured from the factual position; that up-gradation to BPS-18 does not fall within the ambit of terms and condition of service; that up-gradation is merely a financial advancement for the Officers who are having legitimate expectancy of their promotion; that the contractual period of employment of petitioner was actually a probationary period as such all the employees / batch-mates of the petitioner have been considered on regular cadre right from their initial appointment for a practical purpose, including up-gradation etc. He lastly prayed for allowing the instant petition.

7. Mr. Arshad S. Pathan learned counsel for Respondents has raised the preliminary objection with respect to maintainability of the instant Petition and argued that Respondent-Company is incorporated under the Companies Ordinance 1984 and relationship between the Petitioner and the Company is that of "master and servant" as such the instant petition is not maintainable; 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 no statutory rules of service and therefore, the instant petition under Article 199 is not maintainable; that up-gradation order was withheld on reasonable and relevant ground of pending inquiry against the petitioner, 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 against the officer; that the

competent authority decided his case on merits without any discrimination purely in accordance with rules/ policy; that the petitioner's record is not clear therefore cannot be placed at par with those who have unblemished service record; that no any discriminatory treatment has been meted out with the Petitioner; that the case of petitioner for up-gradation was considered and not finalized due to pendency of disciplinary proceedings against him that his services has been regularized; therefore, the question of up-gradation does not arise. He prayed for dismissal of the instant petition.

8. Mr. Muhammad Humayoon Khan learned Deputy Attorney General for Pakistan has adopted the arguments of learned counsel for Respondent-company.

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

10. We have noticed that up-gradation policy was conditional subject to the fact that if any inquiry / penalty or deviation appears at the latest stage the Board of Director HESCO will review the case and deal as per rules. Since up-gradation of the post is not the matter of right therefore it cannot be claimed as a vested right.

11. 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 serious charges of misconduct is 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 departmental authorities. An excerpt of the letter dated 24.4.2012 is as under:-

No.CEO/HESCO/1559-63

24.04.2012

Mr. Ghulam Sarwar Unner
SDO (Opr.) S/Div: HESCO
ODEROLAL

SUBJECT: LETTER OF EXPLANATION UNDER RULE 5(IV) OF PAKISTAN WAPDA EMPLOYEES (E&D) RULE-1978.

You Mr. Ghulam Sarwar Unner, SDO (Opr.) Sub-Div:HESCO ODERO LAL, are alleged to have committed the following acts of omission and commission which tantamount to 'Misconduct'.

A. That Comparative Private Units and Assessment (without FPA) showing that the units billed has been decreased by -10.04% whereas Assessment is decreased by -20.31% which is less than the %age increase of units billed. The average units rate have been decreased by Rs.0.99 with corresponding period of last year, with the result Company has sustained loss of Rs.10.21 x 0.99 = Rs.10.11 Million.

B. The average GOP notified sale rate if Rs 9.80/Kwh (including Taxes). In comparison of actual sale rate with average GOP notified consumer end tariff HESCO sustained loss of (Rs.9.80 – 7.69)= 2.11 x 10.21 = Rs.21.54 Million during the quarter.

OCT-DEC 2011					OCT-DEC 2010				
Units Billed	Assessment	FPA	Net Assessment	Unit Rate	Units Billed	Assessment	FPA	Net Assessment	Unit Rate
10.21	90.11	11.61	78.50	7.69	11.35	95.87	-2.65	98.52	8.68

INC / DEC			% AGE INC / DEC		
Units Billed	Net Assessment	Unit Rate	Units Billed	Net Assessment	Unit Rate
-1.14	-20.01	-0.99	-10.04%	-20.31%	-11.42%

C. The comparative Government Units and Assessment (without FPA).

OCT-DEC 2011					OCT-DEC 2010					
Units Billed	Assessment	Unit Rate	Assessment	Unit Rate	Units Billed	Assessment	Unit Rate	Units Billed	Assessment	Unit Rate
32.09	11.18	2.03	24.09	11.87	0.84	8.00	-0.69	41.38%	33.19%	-5.79%

The units charged against the Government connections have been increased by 0.84 MKWH from 2.03 MKWH to 2.87 MKWH.

The above factors caused revenue loss to the company.

If the above allegations are proved you will be guilty of 'Misconduct' as defined in Rule-2(5) of the Pakistan WAPDA employees E&D Rules 1978 and render yourself liable for one or more of the major or minor / Dismissal from Service, penalties as described in Rule-4 of the aforesaid rules.

I, being the competent authority under Rule 2- of Pakistan WAPDA employees E&D Rules 1978, after considering the facts of this case have decided to proceed against you under Rule-5 (iv) of E&D Rules 1978, feel that regular enquiry is not needed, which is hereby dispensed, as the sufficient documentary evidence is available against you, as detailed above, to proceed for disciplinary action.

You are therefore required to submit you defence reply in writing within 14 days of the receipt of this letter as to why action proposed above should not be taken against you.

Your reply should reach to the undersigned within the above mentioned time period. In case of failure, it shall be assumed that you have no defence to offer and hence ex-parte action will be taken against you.

Also state whether you want to be heard in person

CHIEF COMMERCIAL OFFICER
HESCO HYDERABAD

12. 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 is entitled for upgradation.

13. 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 the light of clause "C" an officer of the department can be deferred for 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 subjudice. (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.”

14. In the light of forgoing rule position which clearly demonstrate that in case where an officer against whom an inquiry is pending is proposed to be promoted the details of para invariably be put up before 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 the present case, the petitioner was exonerated from the charges but later on the said charges were recalled which is also a negligence on the part of respondent-company.

15. We have noticed that the Petitioner vide office order dated 21.6.2012 was exonerated from the charges discussed supra; however, through another office order dated 28.9.2012 the letter dated 21.6.2012 was withdrawn without assigning any reason. An excerpt of the office order dated 21.6.2012 and 28.6.2012 are reproduced as under:-

No.CEO/HESCO/M(ADMN)/A2/C-2638-42

21 June 2012

OFFICE ORDER

After due consideration above mentioned documents, I, Laiq Ahmed Khan, General Manager (Technical), HESCO Hyderabad, being competent authority under Pakistan WAPDA E&D Rules-1978 have decided to “**Exonerate**” Mr. Ghulam Sarwar Unar, SDO Opr: Sub-Division HESCO Oderolal from the charges leveled against him.

However, the officer is hereby warned, to be careful in future.

(LAIQ AHMED KHAN)
GENERAL MANAGER (TECHNICAL)
HESCO HYDERABAD

No.CEO/HESCO/M(ADMN)/A2/C-2728-31

28 June 2012

OFFICE ORDER

Disciplinary actions in respect of the following officers finalized vide office orders mentioned against each are hereby withdrawn abinitio, on technical grounds:-

Sr. #	Name & Designation	Final order No. & date
1.	Mr. Ghulam Sarwar Unnar, SDO	C-2638-42 dt: 21.6.2012

This issues with the above of CEO, HESCO Hyderabad.

(LAIQ AHMED KHAN)
GENERAL MANAGER (TECHNICAL)
HESCO HYDERABAD

16. We are clear in mind that due to pendency of disciplinary proceedings a final decision has not yet been taken against the petitioner, therefore, respondents have to decide the fate of petitioner on the aforesaid charges and thereafter may take decision on the issue of up-gradation of petitioner in accordance with law within reasonable time.

17. 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 along with listed application(s).

JUDGE

JUDGE

Karar-hussain/PS*