

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
**[Judicial Department].**

**Writ Petition No.3695-P/2019**

Muhammad Nasir,  
 Deputy Director (Technical) Roads BPS.18,  
 Peshawar Development Authority, and others; and  
 PDA/LAA Officers Welfare Association  
 Through its President Engr. Abdul Ghafoor.

Petitioner (s)

**VERSUS**

Government of Khyber Pakhtunkhwa,  
 Through Chief Secretary and others.

Respondent (s)

For Petitioner (s) :-

Mr. Aamir Javed, Advocate.

For Respondents :-

Mr. Arshad Ahmad, AAG, Barrister Waqar Ali  
 Khan and M/S Muhammad Ijaz Sabi and  
 Muhammad Esa Khan Khalil, Advocates.

Date of hearing:

**21.09.2021**

Date of announcement:

**29.09.2021**

**JUDGMENT**

**ROOH-UL-AMIN KHAN, J:-**By invoking the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners, seek issuance of the following writ:-

“It is, therefore, prayed that on acceptance of the instant writ petition, this Hon’ble Court may be pleased to:-

- (i) Declare the filling-in of promotion posts of petitioners through deputationists-respondents No.6 to 17, against the PDA Act of 2017, PUDB Service Rules 1978 and the Khyber Pakhtunkhwa Deputation Policy, hence, illegal, without lawful authority, mala fide, arbitrary and against the norms of justice and principles of legitimate expectation,

therefore, the impugned deputation notification(s) of respondents No.6 to 17, may be struck down.

(ii) To set-aside the illegal transfer/posting of respondents No.6 to 17, against the promotion's posts of petitioners.

(iii) To restrain respondents No.1 to 5 from transfer of deputationists against the promotion posts of PDA/LAAs as ordained by law and any/all notifications/Office orders to the contrary be set-aside/quashed.

(iv) Any other relief appropriate in law but not specifically asked for, may also be granted.”

2. As per averments made in the writ petition, the petitioners were appointed against various regular posts of Provincial Urban Development Board (**PUDB**) Local Area Authorities (**LAAs**) including Peshawar Development Authority (**PDA**). The PUDB, was constituted and established under the NWFP Urban Planning Ordinance, 1978, falling under the administrative control of the Physical Planning and Housing Department of the Government of Khyber Pakhtunkhwa and till date a joint seniority list of all the employees of PUDB including PDA/LAAs is maintained. In pursuance of promulgation of the Khyber Pakhtunkhwa Urban Planning Ordinance, 1978, under section 71 thereof, the Khyber Pakhtunkhwa PUDB employees Service Rules, 1978 and NWFP PUDB Rules of Business, 1978, were framed, approved and notified by the Government. The Rules of Business, 1978 provides service structure for the posts of PBS.1 to 20, according to which the posts in BPS.17 to PBS.20 are to be filled through promotion from amongst the eligible Officers in the same department on the basis of seniority-

cum-fitness except the post of Director Finance, which was to be filled through transfer, however, vide notification dated 03.06.2008, criteria for appointment of Director Finance, PDA was also changed and the said post was also declared as a promotion post. Petitioners alleged that the Rules of 1978 were amended from time to time by inserting various other posts of PBS.4 to PBS.20, and were declared to be filled either through initial recruitment or through promotion. In the wake of the Local Government System in 2001, the Ordinance of 1978 was repealed and the PUDB was dissolved through PUDB Dissolution Ordinance, 2002, however, the terms and conditions of service of the petitioners and other employees of the Board were protected under section 6 of the Ordinance 2002. Finally, the Khyber Pakhtunkhwa PDA Act, 2017 was promulgated, which on one hand, saved the Ordinance of 2002 and on the other hand, did not repeal much less disturb the mode and method of appointment from BPS.1 to PBS.19.

**3.** Grievance of the petitioners is that despite availability of competent and eligible Officers in the department, the respondents No.1 to 5 instead of filling the posts through promotion illegally transferred respondents No.6 to 17 on deputation, depriving the petitioners from their lawful right of promotion and the respondents are still hell bent to continue the said illegal exercise. The acts of the respondents No.1 to 5 are squarely against the law and the norms of justice, hence, this writ petition.

4. Initially, comments of the respondents were called, which were filed accordingly, wherein they have refuted the stance of the petitioners on various legal and factual grounds. It is alleged by the respondents that under section 18 of the Act of 2017, the Authority is vested with the power to engage employees for carrying out its function. The petitioners are principally the employees of PUDB and not that of the PDA, Peshawar, which is no more a Local Area Authority just like MDA, SDA, KDA, etc. The Peshawar Development Authority is a separate and unique entity with its own identity and the petitioners do not belong to the said Authority in the first place. The BUDB Employees Service Rules emphatically mention that it shall be applicable to the deputationists working under the PUDB thereby emphasizing the fact that the employees can be appointed in the service of PUDB through deputation. Similarly, section 4 (j) of the Rules of 1978, says about appointment of employees from another Organization and autonomous Body under the Provincial Government, which also impliedly speaks about the deputationists.

5. We have heard the exhaustive arguments of learned counsel for the parties advanced at the bar and perused the record as well as the law on the subject.

6. It appears from the record that initially the petitioners were appointed on different dates against various positions in the defunct Provincial Urban Development Board (*PUDB*) established under the Khyber Pakhtunkhwa Urban Planning

Ordinance, 1978 (**Ordinance 1978**). Section 69 of the Ordinance 1978, provides that the Chairman, members, Officers, advisers, consultants, or other employees of the Board shall while acting or purporting to act, in pursuance of the provisions of the Ordinance or the rules or regulation made thereunder, be deemed to be public servants within the meaning of section 21 of the Pakistan Penal Code 1860. Section 71 of the Ordinance 1978, empowers the government to make Rules for carrying into effect the provision of the Ordinance, consequent whereupon, the Government of Khyber Pakhtunkhwa framed, approved and notified PUDB employees Service Rules 1978 (**Rules of 1978**) rule 3 whereof provides that:-

“These rules shall apply to all persons employed or previously absorbed by the PUDB or a local Area Authority (created by the PUDB) and **shall also apply to contractees as well as to deputationists** except in so far as they may be inconsistent with any provision of their contract or terms of deputation but shall not apply to work charged employees.”

Under rule 6 of the Rules 1978, appointments to the posts in the PUDB/LAA, may be made by any of the following methods:-

- (i) By Initial recruitment
- (ii) By promotion of the existing employees on the basis of seniority cum fitness;
- (iii) By Lateral Entry;
- (iv) By contract.

Word “**Employee**” and words “**By Lateral Entry**” have been defined under rule 4 (f) and (J) of the Rules 1978 as under:-

“(f) **“Employee”** means a person employed or previously absorbed whether at the Head Office or at project or in a sub-Office of the PUDB/LAA and such a persona shall be deemed to be in service of the Board.

**“Lateral Entry”** means entry into service of the Board from another Organization, Autonomous Body under the Provincial Government of North West Frontier Province a parallel post or from one cadre of the Board service to another cadre or post in grade.”

Rule 11 of the Rules 1978 provides that appointments by *“lateral entry”* will be made only from amongst such persons who have held at least for one year an appointment on regular basis in the same grade in which the post is to be filled.

7. The PUDB Rules of Business, 1978, provides service structure of PUDB/LAA. The said rules were amended vide notification dated 31.03.1988, whereby all the posts from Housing Officer BPS.17, Assistant Director BPS.17, Deputy Director BPS.18, Directors BPS.19 and Director General BPS.20, shall be filled through promotions only among the eligible Officers in the same department on the basis of seniority-cum-fitness except the posts of Director Finance, which was to be filled by transfer in consultation with the Finance Department. In view of the aforesaid Rules, except the post of Director Finance, no other post is to be filled by way of transfer on deputation to PDA or other local Area Authorities, however, subsequently, vide notification dated 03.06.2008, the Government amend the

criteria for appointment of Director Finance PDA and the same post was also designated as promotion post instead of transfer. The Rules of 1978 were further amended by the Government vide notification dated 12.05.2009, whereby the posts of Director Planning, Building Control Agency and Estate Management Department BPS.19 were held to be filled by promotion from the Deputy Director BPS.18. Vide notification dated 07.03.2011, the Rules of 1978 were further amended by inserting the posts of Deputy Director Vigilance PBS.18, Assistant Director (Electrical) BPS.17, Audit Officer/Accountants Officer BPS.17, Office Superintendent BPS.16 and Sub-Engineer BPS.11, to be duly filled by promotion from one step down officer to the said post and not on transfer/deputation. Similarly, vide notification dated 16.01.2017, the Rules of 1978 were further amended by inserting the post of Secretary PDA BPS.18, Deputy Director (EM) BPS.18, Deputy Director (Vigilance) BPS.18 and Deputy Director (Legal) BPS.18 and all these posts have been declared to be filled in by way of promotion only. Through Notification dated 16.01.2017, the Rules of 1978 were further amended by inserting the posts of Deputy Director Horticulture BPS.18, Assistant Director Horticulture BPS.17, Senior Garden Superintendent BPS.11, Garden Superintendent BPS.8, Senior Forester BPS.7, Forester BPS.5, Head Mali BPS.4 and all these posts were held to be filled through initial recruitment or through promotion. Though, rule 3 of the Rules of 1978, reproduced above, mention words “**deputationists**” and “**contractrees**” and

similarly, as per definition “ **Lateral Entry**” means entry into service of the Board from another Organization, Autonomous Body under the Provincial Government of Khyber Pakhtunkhwa a parallel post or from one cadre of the Board service to another cadre or post in grade, however, nothing with regard to appointment by way of transfer of deputationists, contractee or lateral entry is mentioned in the Service Structure.

**8.** No doubt, in wake of the Local Government System in 2001, the Ordinance of 1978 has been repealed and the PUDB has been dissolved through PUDB Dissolution Ordinance, 2002, and under section 3 thereof, the Board has been dissolved however, the terms and conditions and service guarantees of the petitioners and other employees were expressly protected under section 6 of the Ordinance of 2002, which for the sake of convenience and ready reference is reproduced below:-

**“Employees of the Board:-** The employees of the Board shall be dealt with in accordance with the terms and conditions of their appointment under the Board”.

Section 6 of the Ordinance, 2002, has saved the Rules of 1978 and PUDB Rules of Business 1978. This is not disputed that since, 2002 the petitioners and other employees are being governed under the Rules of 1978 because no fresh Rules and Regulations have been framed till the year 2017 when the Government of Khyber Pakhtunkhwa promulgated the PDA Act 2017 (**Act of 2017**). Under Section 48 of the Act of 2017, the

Government was empowered to make Rules for carrying out the purpose of the Act, however, no such Rules have been framed till date. Vide letter dated 07.11.2015 despite dissolution of PUDB and repeal of Urban Planning Ordinance, 1978, the services Rules 1978 of the PUDB/LAA employees have been kept intact. In case titled, **“Dr. Muhammad Amin vs President Zarai Taraqiati Bank Limited” (2010 SCMR 1458)**, it has been held by the Hon’ble Supreme Court that:-

“Till framing of new rules, old rules would be deemed to be operative despite their implied repeal.”

Since no fresh Rules have been framed, approved and notified under the Act of 2017, therefore, in light of the judgment (*supra*) of the august apex court, the old Rules of 1978 would be deemed to be operative. Under the Rules of 1978, the Service Structure of the employees of the Board nowhere provides transfer of deputationists. All the posts from BPS.4 to BPS.20 are either to be filled by way of initial recruitment or through promotion. There is no mention of filling of any post by way of transfer through deputationists. An iota of evidence has not been brought on record by the respondents No.1 to 5 to show the exigency and need of transfer of the private respondents on deputation. Similarly, they have also not brought on record anything to the effect that the petitioners are deficient of qualification, experience or ineligible to be promoted against the posts filled in by way of transfer on deputation through private respondents.

**9.** During the course of arguments learned counsel for the petitioner produced a copy of notification dated 29<sup>th</sup> July, 2021, whereby the services of one Mian Shafiq ur Rehman (LCs-PUGF-BS.19), has been placed at the disposal of the Peshawar Development Authority. The orders speak volumes about the whims and wishes of some unknown competent authorities for placing the service of blue eyed employees in the PDA. We have examined all the orders of private respondents, wherein none was found to have been requisitioned by the Director General PDA or the Authority has felt necessity of filling any post through lateral entry in the PDA from the Provincial Government employees. Neither the learned AAG nor learned counsel representing PDA could convince us about any exigency and need of the Authority which necessitated the filling of regular posts by way of transfer on deputation; depriving the permanent and eligible employees of the department from their due right of promotion. For ready reference, the language of notification mentioned above is reproduced below which read as under:-

“The competent Authority is pleased to place the services of Mian Shafiq ur Rehman (LCs-PUGF-BS-19) awaiting posting in Local Council Board at the disposal of Peshawar Development Authority with immediate effect for further posting in the public interests.”

**10.** We have also gone through the impugned orders whereby the services of private respondents have been placed at the

disposal of the Peshawar Development Authority by the parents departments. The only ground/reason given in the said orders is that such transfers are being made on deputation with immediate effect in the **“public interest”**. Not a single reason, much less plausible, has been given by the respondents indicating towards the exigency, the need and the public interest of such transfers notwithstanding the fact that the service structure formulated under the Rules of 1978 does not provide any room for deputationists.

**11.** Perusal of different orders whereby the private respondents No.6 to 17 and some others have been transferred to PDA either on deputation or in the garb of “Lateral entry” would reveal that on the face of it, the same are the result of some extraneous consideration and not on the principles of merit, transparency and credible process. Neither any proposal or request has been made by the borrowing department for need of services of the deputationists nor any permission in shape of “No objection” is granted by the lending department. We have noted and the petitioners have established that the eligible employees waiting for promotion in their respective cadres have been denied the right of promotion to the higher posts without any valid reason and inexperienced person without any skill and specialization were brought and posted on deputation against the technical posts. The practice of appointment in autonomous bodies through deputation from government department, establishments, organizations and corporation is not only

deprecated by the Hon'ble Supreme Court of Pakistan but has also held the same against the good governance because such appointment being made on political affiliation, extraneous consideration always pollute the process of transfer in the government department. In **Human Rights cases No.8340, 9604-G, 1396-G, 13635-P and 14306-G to 143309-G of 2009**, decided on 28<sup>th</sup> April 2010 reported as (2010 SCMR 1301), while dilating upon the object of the good governance has observed that:-

“It is a settled principle of law that object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness and openness in consonance with the command of the Constitution enshrined in different articles including Articles 4 and 25. Once it is accepted that the Constitution is the supreme law of the country, no room is left to allow any authority to make department from any of its provision or the law and the Rules made thereunder. By virtue of Articles 4 and 5(2) of the Constitution, even the Chief Executive of the country is bound to obey the command of the Constitution and to act in accordance with law and decide the issues after application of mind without reason as per law laid down by this court in various pronouncements.”

**12.** No doubt, the PUDB employees Service Rules 1978, provides and empowers the Authority for appointment to a post

on by “Lateral entry” which means inviting employees from anywhere into the service of the Board (now PDA), but such power and discretion may be exercised in case of dire need of the borrowing department coupled with the consent of the lending department, that too, in a situation when no fit and suitable employee commensurate to such post is available in the borrowing department. In case in hand, no such exercise is undertaken; rather the Provincial Government or the Establishment department has imposed a good number of blue eyed officer upon the borrowing department (PDA) to indispensably accept their services on deputationists basis. One can see that Mr. Uzair Afridi, Archaeological Engineer BPS.17 Directorate of Archaeology & Museum Khyber Pakhtunkhwa Peshawar, has been transferred on deputation to PDA without assigning any demand and exigency, while the borrowing department without any hesitation has adjusted him as a Deputy Director (Machinery) in his own pay and scale in the PDA. Likewise, Pir Saif ur Rehman, Senior Auditor BPS.16 Office of the Military Accountant General Rawalpindi has been transferred on deputation to PDA, despite the fact that qualified Officers in row were waiting for promotion against the said post. Engr. Salman Ahmad, Principal BPS.17 Mono-Tech Institute, Mardan, was brought to PDA on deputation and posted as an Electrical Engineer. Mr. Faheem Ullah Electrical Supervisor BPS.16 Tehsil Municipal Administration Town-III, Peshawar, has been transferred to PDA against the post of Electrical Engineer

BPS.17. Mr. Faheem Ullah Shah Assistant Professor/Head Department of Architecture Hazara University Mansehra was obliged by selecting for posting as a Director Planning and Monitoring of Beautification of Peshawar. Mr. Muhammad Shahid Ali Karim OMG BS.18 has been adjusted in PDA as a Director Finance BPS.19. Mr. Naveed Iqbal succeeded to get place in PDA on his transfer on deputation from Worker Welfare Board.

All the above named deputationists have been transferred to the PDA without assigning reason of requirement of their service or their requisition by the authority in PDA. Over and above, it is shocking that the Director General PDA without any resistance and hesitation has adjusted all of them against the posts neither commensurate with their skills, experience or qualification nor has agitated before the lending authority that according to the Rules these posts shall be filled from the eligible employees through promotion. The deafening silence and conspicuous attitude of an Officer setting on helm of affair of an Authority like PDA, was surely great concerned of this court. Much was expected from the Director General PDA when the valuable rights of its employees were being taken by the executive authority.

**13.** Without dilating upon the conduct of such a person only it may be realized that wanting to please others, avoid failure and evade hard decision are perceptible indications showing weakness and cowardness of an officer. Lazy and coward Officer

may be useful and beneficial for promoting or enhancing his well being but must be injurious for good governance, which is largely dependent upon the honest, upright and honest Officers. Appointment of the deputationists in another department is always discouraged by the Hon'ble superior Judiciary of the country, as it has been time and again held that by inducting outsiders in other department, the employees of that department who are already serving after qualifying the departmental examinations and going through the selection process, have been adversely affected and their reasonable expectation viz a viz their promotion, seniority etc, is snatched away while importing the outsiders. By posting outsiders on the basis of deputation has also created an unrest and sense of deprivation having been created amongst the employees already working there and practice of such appointments on deputation basis has been declared against justice, equity and good governance. In this respect discretionary powers are not unbridled or unfettered but said discretion is required by law to be exercised in judicial manner which means that same must be exercised on sound judicial principles. In case titled, **“Walayat Ali Mir vs Pakistan International Airlines Corporation” (1995 SCMR 650)**, the Hon'ble Supreme Court has observed as under:-

“The discretion is not to be exercised on whims, caprices and moods of the authorities. It is now well-settled that exercise of discretion is circumscribed by principles of justice and fairness.

The authority exercising discretion should take into consideration and advance the aim and object of the enactment, rule or regulation under which it is authorized to act. It should not act in complete negation of the object of such law, rule, regulation or established policy otherwise it will not be fair, reasonable and just exercise of power. The precondition imposed for exercise of discretion should be honoured and respected unless from valid reasons they have to be discarded.”

So far as the contention of learned counsel for the respondents that appointment through “*Lateral entry*” is provided by the Rules of 1978, therefore, appointment and transfer of private respondents through deputation is not amenable to writ jurisdiction of this court is concerned, we may refer to the judgment of the Hon’ble Supreme Court in case titled, **Brig. Muhammad Bashir Vs Abdul Karim and others (PLD 2004 Supreme Court 271)**, wherein while dilating upon the principles, object and scope of Article 199 of the Constitution, the august apex court has ruled that:-

“It is well settled by now that Article 199 casts an obligation on the High court to act in aid of law, protect the rights of the citizens within the framework of the Constitution against the infringement of law and constitution by the executive authorities, strike a rational compromise and a fair balance between the rights of the citizens and the actions of the State functionaries, claimed to be in the larger interest of society. This power

is conferred on the High court under the Constitution and is to be exercised subject to constitutional limitations. The Article is intended to enable the High court to control executive action so as to bring it in conformity with the law. Whenever executive acts in violation of the law, an appropriate order can be granted which will relieve the citizen of the effects of illegal action. It is an omnibus Article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution, illegally or not in accordance with law, then Article 199 can always be involved for redress". It is to be noted that "paramount consideration in exercise of constitutional jurisdiction is to foster justice and right a wrong". (Rehmatullah vs Hameeda Begum 1986 SCMR 1561, Raunaq Ali vs Chief Settlement Commission PLD 1973 SC 236.)"

Supreme Court in Contempt Proceedings against Chief Secretary Sindh and others reported as **(2013 SCMR 1752)**, held that:-

"The concept of power under the Constitution of Pakistan is distinct from other Constitutions of Common Law Countries. Under the Constitution of Pakistan, the sovereignty vests in Allah and it is to be exercised by "the people within the limits prescribed by Him", as a sacred trust. The authorities in Pakistan while exercising powers must keep in mind

that it is not their prerogative, but a trust reposed in them by the Allah and the Constitution.”

**14.** For what has been discussed above and deriving wisdom from the judgments (supra) of the august apex Court, we did not find any reason, much less, plausible to justify the transfer of respondents No.6 to 17 including those posted during pendency of the instant writ petition on deputation in the borrowing department. Neither in the comments nor in the transfer orders of respondents No.6 to 17, the exigency which warranted transfer of the deputationists, has been given by the respondents No.1 to 5 so much so the consent of the Director General PDA is not obtained by the Provincial Government or Establishment Department Khyber Pakhtunkhwa for throwing the employees of the department into the basket of PDA. Similarly, it is not the case of respondents No.1 to 5 that no suitable, eligible or competent and fit employee was available with the borrowing department for the questioned posts.

**15.** Accordingly, this writ petition is allowed. The orders of respondents No.6 to 17 and other issued during pendency of the writ petition whereby they have been transferred to PDA, Peshawar on deputation or on pretext of “Later Entry” are declared, illegal, issued without lawful authority, therefore, are set-aside. The official respondents, most particularly, the Director General PDA is directed to immediately initiate the process of promotion to all the posts filled and occupied by the private respondents and subsequent deputationists and consider the

eligible employees of the department for promotion strictly in accordance with the Rules i.e. seniority cum fitness as provided in their service structure.

**Announced:**

**29.09.2021**

*M.Siraj Afridi PS*

*Senior Puisne Judge*

**JUDGE**

**DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge;  
And Hon'ble Mr. Justice SM Attique Shah**