

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

W.P No. 6843-P/2019

Shaheryar Gul

Vs

**The Government of Khyber Pakhtunkhwa through
Principal Secretary to Governor Khyber Pakhtunkhwa
Peshawar and others**

Date of hearing 27.10.2021

Petitioner (by) Noor Muhammad Bledak Adoo case

Respondent (by) Muhammad Sohail Adoo: AG

JUDGMENT

MUSARRAT HILALI, J. Through the instant petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, petitioner (Shaheryar Gul) has prayed for setting aside of the impugned order dated 20.11.2019, whereby he was terminated from service and also prayed for his reinstatement in service with all back benefits.

2. In essence, it is the petitioner's case that he was initially appointed as Computer Operator (BPS-12) in Law, Parliamentary Affairs and Human Rights

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Department, Khyber Pakhtunkhwa, Peshawar vide order dated 21.11.2007. On 31.01.2011, his services were placed at the disposal of Provincial Ombudsman on deputation basis where he was absorbed vide order dated 06.08.2011. The respondents-department through Notification dated 31.12.2014 amended the service rules of the cadre according to which, the post of Assistant Programmer (BPS-16) was to be filled up by promotion from amongst Data Supervisors (BPS-14). Subsequently, the posts of Computer Operator and Data Processing Supervisor have been upgraded from (BPS-12) & (BPS-14) respectively to (BPS-16) vide Notification dated 29.07.2016. It is averred in the petition that the petitioner alongwith his other colleagues moved applications for issuance of joint seniority list of Computer Operator and Assistant Programmer. In the meanwhile, a new post of Assistant Director (IT) (BPS-17) was created by the respondents-department and only the cadre of Assistant Programmer was allowed for promotion to the said post.

The petitioner filed Appeal followed by writ petition No.3550-P/2019 and during pendency of the writ petition, the respondents-department issued a show cause notice to the petitioner vide dated 23.10.2019 which was replied by the petitioner, however, surprisingly, he was removed from service vide order dated 20.11.2019, hence, the instant petition.

3. Comments were sought from respondents, which were accordingly submitted, wherein issuance of the desired writ has been opposed.

Arguments heard and appended record gone through.

4. It appears that when petitioner alongwith three others filed an application for issuance of joint seniority list of Computer Operator (BPS-16) and Assistant Programmer (BPS-16), the service rules of the respondents were amended vide which a new post of Assistant Director (I.T) (BPS-17) was created. According

to which, only the cadre of Assistant Programmer (IT) (BPS-16) were allowed promotion access to the post of Assistant Director (OT) (BPS-17). The petitioner filed a departmental appeal followed by W.P No.3550-P/2019 and during the pendency of the said writ petition, a Show Cause Notice was issued to the petitioner by respondent No.3 which is reproduced as follows:-

SHOW CAUSE NOTICE

WHEREAS, you have submitted an application to the Section Officer (Cabinet) without bringing into knowledge of the functionaries of Provincial Ombudsman Secretariat alleging that Mr. Aqal Badshah (By Name) Provincial Ombudsman desires to appoint his favourable/ choice Assistant Programmer to the post of Assistant Director (IT), thus tempted to scandalize, reticulate him before the functionaries of Cabinet and Administration Department;

2. AND WHEREAS, you have alleged against Provincial Ombudsman that despite of filing Writ Petition by you, a case has been initiated for promotion of Assistant Programmer by submitting it to the Provincial Government by concealing the facts that you are the senior most amongst the Computer Programmers which is not correct;

3. AND WHEREAS, attempt has been made by you to humiliate and suppress the Institution of Ombudsman despite of the fact, a Writ Petition filed by you, was pending before the Hon'ble Peshawar High Court, with no Status Quo order passed and indulged in critical remarks against the Provincial Ombudsman, which are against discipline and good conduct;

4. AND WHEREAS, your service record is very bleak i.e. several explanations and Notices were served upon you and disciplinary proceedings were initiated in past wherein you were charged sheeted twice culminated on giving two advisory notices

and imposing upon you a minor penalty of "Censure". But, you did not improve your attitude towards service discipline and conduct;

AND WHEREAS, above act of Omissions and commissions on your part constitute "Misconduct" in terms of Section 2(1) of the Khyber Pakhtunkhwa Government Servants (E & D) Rules, 2011 and call for major penalty i.e. removal from service or dismissal from service as specified in the said rules;

5. NOW, THEREFORE in exercise of the powers under rule 5 of the said rules, I, Provincial Ombudsman, Khyber Pakhtunkhwa being the Competent Authority, is of the view that on the basis of my knowledge and information placed before me, that there are sufficient grounds for initiating proceeding against you, for the reasons recorded by me in writing dispense with inquiry process, in view of your past and present conduct during service, call upon you to show cause as to why any or all penalties specified in the said rule should not be imposed upon you.

6. Your reply should reach the undersigned within 07 days of the receipt of this notice, failing which, it should be presumed that you have nothing to say in your defense and an ex-parte decision shall be taken as per rules which may lead to your removal/dismissal from service. You may also state whether you may like to be heard in person.

Sd/-

**Provincial Ombudsman
Khyber Pakhtunkhwa**

*Mr. Shaheryar Gul,
Computer Operator,
Provincial Ombudsman Secretariat,
Khyber Pakhtunkhwa.*

The petitioner on 30.10.2019 vide his reply denied all the allegations which found no favour with respondent No.3 and on 20.11.2019 major penalty of removal from service was imposed upon the petitioner without holding

regular inquiry while reason for not holding inquiry has been given by respondent No.3 which is not only against the intent of law but also against the principles of natural justice and has been finally laid to rest by the august Supreme Court in case titled "*Naseeb Khan .Vs. Divisional Superintendent, Pakistan Railways, Lahore and another*" reported in 2008 SCMR 1369. The relevant extract from the judgment of august Supreme Court is reproduced as follows:-

"Non-holding of departmental Enquiry—Violation of principles of natural justice—Effect—Held, in case of imposing a major penalty, the principles of natural justice required that a regular enquiry was to be conducted in the matter and opportunity of defence and personal hearing was to be provided to the civil servant proceeded against, otherwise civil servant would be condemned unheard and major penalty of dismissal from service would be imposed upon him without adopting the required mandatory procedure, resulting in manifest injustice".

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Reference can also be made to case reported in ***2004 SCMR 316, 2005 SCMR 605 and 2006 SCMR 104***. In view of the judgment referred to hereinabove, we are of the view that before imposing major penalty

holding of an inquiry is mandatory. In absence thereof the order of major penalty cannot sustain.

5. Another illegality resulting into gross miscarriage of justice noted in the instant case is that respondent No.3 issued Show Cause Notice to the petitioner requiring him to show as to why any or all of the penalties specified in rule 5 (i) be imposed upon him and on receipt of reply, respondent No.3 acting as Competent Authority removed the petitioner from service. The order of removal is not only biased but also predetermined and is contrary to the basic principles of service jurisprudence. A similar matter was examined also by the august Supreme Court in case titled *“Government of NWFP through Chief Secretary and another .Vs. Dr. Hussain Ahmad Haroon and others”* reported in 2003 SCMR 104, wherein it was held that:-

“It is an age-old fundamental principle of law that justice should not only be done, but manifestly and undoubtedly should be seen to have been done. To achieve this objective/goal, it is of prime importance that a Judge/person equipped with the authority of decision should

not be having any sort of personal interest in the outcome of the matter under issue before him. The conduct of proceedings should not generate any reasonable apprehension in the mind of a person that the Deciding Officer was by any manner prejudiced against him".

6. It is the basic principle that 'nobody could be the Judge of his own cause'. In this case, respondent No.3 issued show cause notice to the petitioner alleging therein that the petitioner maligned the office of Ombudsman particularly respondent No.3. On reply filed by the petitioner, respondent No.3 without holding inquiry imposed upon him major penalty of removal from service. The maxim "*Nemo debet esse judex in propria sua causa*" is squarely applicable to the present case. Reference can be made to *PLD 2012 SC 553*, wherein the Apex Court held as under:-

"Right to a 'fair trial' means right to a proper hearing by an unbiased competent forum, with the latter component being based on the maxim: "Nemo debet esse judex in propria causa" that "no man can be a judge in his own cause"---Said principle has been expounded to mean that a Judge must not hear a case in which he has personal interest, whether or not his decision is influenced by his interest, for "justice should not only be done but be seen to have been done"--- Right to a fair trial has been associated with the fundamental right of access to justice, which

should be read in every statute even if not expressly provided for unless specifically excluded—While incorporating Article 10A in the Constitution and making the right, to a 'fair trial' a fundamental right, the legislature did not define or describe the requisites of a 'fair trial', which showed that perhaps the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan”.

7. In view of the above discussion on facts and law, the impugned order dated 20.11.2019 is set aside being illegal, arbitrary, malafide, without jurisdiction and untenable in law. Consequently, this writ petition is allowed and the petitioner is reinstated into service with all back-benefits.

Announced
27.10.2021



CHIEF JUSTICE



JUDGE

(D.B) Hon'ble Mr. Justice Qaiser Rashid Khan, Chief Justice
Hon'ble Justice Musarrat Hilali
Noor Shah