

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE GULZAR AHMED
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE SAJJAD ALI SHAH

CIVIL PETITION NO. 2812 OF 2017

*(Against the judgment dated 17.07.2017 of the
Balochistan Service Tribunal, Quetta passed in
S.A.No.238/2017)*

Khan Muhammad.

... Petitioner

Versus

*The Chief Secretary, Government of
Balochistan, Quetta and others.*

... Respondents

For the Petitioner:

Mr. M. Shoaib Shaheen, ASC
Mr. Ahmed Nawaz Ch., AOR (absent)

For Respondents No. 1 & 2:

Mr. Ayaz Khan Swati, Additional
Advocate General, Balochistan
Noor-ul-Haq Baloch, Secretary,
Secondary Education Department

For Respondent No. 3:

Mr. Kamran Murtaza, ASC

Date of Hearing:

May 3, 2018

JUDGMENT

Qazi Faez Isa, J. The petitioner had filed a service appeal before the Balochistan Service Tribunal, Quetta ("**the Tribunal**") under section 4 of the Balochistan Service Tribunal Act, 1974 wherein he challenged the notification dated April 25, 2017 ("**the Balochistan Service Tribunal Act**" and "**the impugned notification**" respectively). The impugned notification was in respect of the posting and transfer order of the petitioner and the respondent No. 3 whereby the petitioner, who was serving as the Acting Divisional Director of Education (Schools), Makran Division (hereinafter the

"**Acting Divisional Director**") was posted / transferred as District Education Officer, Panjgoor and the respondent No. 3, who was serving as the District Education Officer, Turbat, was posted / transferred as Acting Divisional Director, in the place of the petitioner.

2. The petitioner objected to the impugned notification on the following grounds:

- (i) the petitioner was respondent No. 3's senior by ten years, having been promoted to B-19 grade in the year 2007 whereas the respondent No. 3 was promoted to B-19 grade on February 15, 2017, but was made to serve as respondent No.3's subordinate; and
- (ii) The petitioner had only recently been posted to work as the Acting Divisional Director pursuant to notification dated March 10, 2017 and for no reason, much less cogent reason, the notification of March 10, 2017 was supplanted by the impugned notification.

3. The Tribunal dismissed the petitioner's appeal by referring to section 10 of the Balochistan Civil Servants Act, 1974 ("**the Act**"), which provides that a civil servant is liable to serve anywhere within or outside the province unless he is recruited specifically to serve in a particular area or region, and the posting/transfer of civil servants is within the exclusive administrative domain of the Government of Balochistan ("**the Government**"). The Tribunal therefore held that the petitioner had no "*vested right for his posting to a particular post or a station*" and the petitioner's

grievance, "*amounts to the interference in the smooth working of the Government*".

4. This petition was filed on August 2, 2017 and notices were ordered to be issued to the respondents on March 30, 2018, however, before the issuance of such notices the Secretary, Education Department (respondent No. 2) transferred the petitioner back to his position as Acting Divisional Director vide notification dated March 8, 2018 and respondent No. 3 was directed to report to the respondent No. 2. But, the notification of March 8, 2018 was "held in abeyance" by the notification which was issued the very next day on March 9, 2018 pursuant to the orders of the Minister for Education. The Government (respondent Nos. 1 and 2) filed concise statement (CMA. No. 3743/2018), however, to understand the unconventional working of the Government the respondent No.2 was directed to attend Court.

5. We inquired from Mr. Mohammad Ayaz Khan Swati, the learned Additional Advocate General ("**AAG**"), and the Secretary, Education Department of the Government as to the manner in which the notifications of March 8 and 9, 2018 were issued and particularly the authority exercised by the Minister and the reason for his intervention. We are informed that in respect of posting and transfer of officers above B-20 grade the Minister was accorded such powers vide notification dated February 3, 2014, relevant portion whereof is reproduced hereunder:

"NO.SO (Admn) 15-63/2014/2036-2218. With the prior approval of the competent authority, the following powers are hereby delegated in Secondary

Education Department with immediate effect and until further orders:-

S.No.	Description of powers	Presently exercised by	Proposed authority
12	Posting Transfers against clear vacancies of the eligible officials BPS-20 and above other than Secretary Secondary Education who have completed their tenure.		Minister Secondary Education

(The aforesaid notification is hereinafter referred to as **"the notification of February 3, 2014"**).

Neither the learned AAG nor the learned counsel for the private respondent No. 3 could justify the transfer of the petitioner after a month and for placing him under a person who was ten years his junior, but state that the matter was within the discretionary realm of the Government. They further state that the petitioner had no right to demand a particular posting and was obliged to serve at the discretion of the Government anywhere within the province under section 10 of the Act, and that the impugned judgment of the Tribunal gave sound reasons for the dismissal of the petitioner's appeal. They conclude by stating that the present case does not involve a substantial question of law of public importance, in terms of Article 212(3) of the Constitution of Islamic Republic of Pakistan (**"the Constitution"**), therefore, this Court should not intervene with the impugned judgment.

6. Mr. Muhammad Shoaib Shaheen, learned counsel for the petitioner, reiterated what was urged by the petitioner in his appeal before the Tribunal and added that the Government realizing the illegality which was committed by it issued

notification dated March 8, 2018, which could not be acted upon because the Minister intervened and issued orders that it be “held in abeyance”. He also refers to the Balochistan Government Rules of Business, 2012 (“**the Rules**”) to contend that the Minister has no power to post and/or transfer any officer and that the notification of February 3, 2014 was not issued under any law. He next contends that the Minister could not be given the power to post/transfer officers as the Rules did not permit this. He concludes by stating that the Government disregarded the principle enunciated by this Court in the case of Mahmood Akhtar Naqvi v Federation of Pakistan, which is also known as the *Anita Turab case*, (PLD 2013 Supreme Court 195), wherein the practice of frequent transfers was deprecated and a minimum period of posting/transfer was prescribed and that a civil servant should not be disturbed before expiry of such period. Reference was also made to the case of Province of Sindh v Ghulam Fareed (2014 SCMR 1189) to contend that the ‘own pay and scale basis’, which had also been mentioned in the impugned notification, has no legal sanction.

7. The learned AAG and Mr. Kamran Murtaza, the learned counsel representing respondent No.3, support the impugned judgment which they state gave valid reasons for dismissing the petitioner’s appeal. They also support the notification of February 3, 2014, and state that pursuant to it the Minister had exercised his powers to hold in abeyance the notification of March 8, 2018 and that the petitioner has not been able to show that such powers were exercised for any ulterior purposes or that their exercise was in any manner *mala fide*.

8. We have heard the learned counsel, examined the documents on record, read the impugned judgment, the notification dated February 3, 2014, the Rules and perused the judgments referred to by the learned counsel. Before attending to the impugned notification, the notifications of March 8 and 9, 2018 and the notification of February 3, 2014, it would be appropriate to refer to the Constitution, consider the role and powers of provincial ministers, the manner in which the business of the provincial government is to be conducted, the scope of the Rules; and, in their light determine whether a minister can be granted the power to post/transfer civil servants. We shall then proceed to determine the effect of notifications dated March 8 and 9, 2018 and that of the impugned notification.

9. The manner in which the business of the provincial government is to be conducted is attended to in Article 139 reproduced hereunder:

“(1) All executive actions of the Provincial Government shall be expressed to be taken in the name of the Governor.

(2) The Provincial Government shall by rules specify the manner in which orders and other instruments made and executed in the name of Governor shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the Governor.

(3) The Provincial Government shall also make rules for the allocation and transaction of its business.”

10. Article 139(3) of the Constitution enables the provincial government to make rules for the allocation and transaction of its

business and in exercise of such powers the Rules have been made. The Rules, amongst other things, set out the organization of a department, the functions of ministers and the duties and functions of the secretaries of the departments. Rule 4, which is titled 'Organization of the Department', reads as under:

"(1) Each Department shall consist of a Minister, a Secretary to the Government and of such other officials subordinate to him as the Government may determine:

Provided that the same person may be Secretary of more than one Department;

(2) The Secretary shall, by means of standing orders, distribute the work of the department among the officers, branches and/or sections. Such orders may specify the cases or class of cases which may be disposed of by an officer subordinate to the Secretary."

The 'Functions of the Minister' are provided in rule 6(1) of the Rules, reproduced hereunder:

"Minister

A Minister shall:-

- (a) be responsible of policy matters and for the conduct of business of his Department;
Provided that in important political, economic or administrative matters, the Minister shall consult the Chief Minister;
- (b) submit cases to the Chief Minister through Chief Secretary as required by the provisions of these rules;
- (c) keep the Chief Minister informed of any important case disposed of by him without reference to the Chief Minister; and
- (d) conduct the Business relating to his Department in Assembly."

The 'Duties and Functions of the Secretary' are set out in rule 8 of the Rules, reproduced hereunder:

"1. A Secretary shall:-

- (a) assist the Minister in formulation of policy and bring to the notice of the Minister cases which are required to be submitted to the Chief Minister under the rules;
- (b) duly execute the sanctioned policy;
- (c) be the official head of the Department and be responsible for its efficient administration and discipline, and for the proper conduct of business assigned to the Department under rule 3;
- (d) submit all proposals for legislation to the Cabinet with the approval of the Minister;
- (e) be responsible to the Minister for the proper conduct of the business of the Department and keep him informed about the working of the Department and of any important cases disposed of without reference to the Minister;
- (f) keep the Chief Secretary informed of important cases disposed of in the Department;
- (g) where the Minister's orders appear to involve a departure from rules, regulations or Government policy, resubmit case to the Minister inviting his attention to the relevant rules, regulations or Government policy and if the Minister still disagrees with the Secretary, the Minister shall refer the case to the Chief Minister through Chief Secretary for orders;
- (h) subject to any general or special orders of Government, issue orders specifying the cases or class of cases which may be disposed of by an officer subordinate to the Secretary; and
- (i) be responsible for the careful observance of these rules in his Department;

2. While submitting a case for the orders of the Minister, it shall be duty of the Secretary to suggest a definite line of action."

11. An examination of the referred to Articles of the Constitution and those of the Rules reveal that the functions of the Government

are bifurcated between the minister and the secretary of department. The minister attends to policy matters and conducts the business relating to his department in the Provincial Assembly, whereas the secretary is the official head of the department and is responsible to, amongst other things, execute the sanctioned policy, ensure efficient administration and discipline of his department, is responsible to the minister for the proper conduct of the business of the department and to keep the minister informed about the working of the department. The secretary is required to ensure the careful observance of the Rules and is also required to advise the Minister on the relevant rules, regulations and Government policy and to state if any order of the minister is contrary thereto.

12. The notification of February 3, 2014 does not mention any law, rule or regulation pursuant to which it was issued. This notification could have been construed as instructions for the better working of the department, provided it did not contravene or negate any provision of the Rules or the scheme of governance as set out in the Constitution. In this case we are only concerned with, whether the Minister could have been given the power to post/transfer a civil servant? Rule 6(1) of the Rules does not grant to a minister the power to post or transfer a civil servant. And if such a power is given to a minister it will negate Rule 8(1)(c) of the Rules, which stipulates that the secretary is "the official head of the Department". Such a power vesting in the minister would also undermine the secretary's power to enforce "discipline" and dilute his power to ensure the "efficient administration" of the Department. We were also provided a copy of the 'Summary' titled

'Rationalization in Delegation of Powers' which was moved by the department and submitted to the Chief Minister prior to the issuance of the notification, but it does not mention any reason why it was proposed that the Minister for Education be given the power to post/transfer civil servants; nor do the respective notes of the Secretary, the Chief Secretary, the Minister for Education and the Chief Minister inscribe anything with regard to affording the Minister the power to post/transfer a civil servant.

13. A civil servant must not pursue a minister to get a posting/transfer of his/her choice, but this, more likely than not will happen, if a minister is given the power to post/transfer a civil servant. Civil servants are not permitted to approach politicians. The Balochistan Government Servants (Conduct) Rules, 1979 stipulates that, *"No Government servant shall, directly or indirectly, approach any Member of the National Assembly or Provincial Assembly or any other non-official person to intervene on his behalf in any manner."* If a civil servant approaches a minister to obtain a posting or transfer of his choice it also constitutes misconduct, and disciplinary action can be initiated against such civil servant. In this regard reference may be made to the Balochistan Civil Servants (Efficiency and Discipline) Rules, 1992 which defines 'misconduct' and includes when, a civil servant *"bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or the Minister or any Government officer in respect of any matter relating to the appointment, promotion, transfer, punishment, retirement or other conditions of service of a civil servant"*.

14. We therefore have no hesitation to hold that the notification of February 3, 2014 to the extent of item 12 (reproduced in paragraph 5 above) which grants the Minister the power to post/transfer a civil servant is *ultra vires* the Rules and the scheme of governance envisaged in the Constitution and therefore is of no legal effect. Needless to state that if there are similar notifications or powers granted to ministers with regard to the posting/transfer of civil servants in any other department which negate the Rules and the scheme of governance envisaged in the Constitution those would also be of no legal effect.

15. The Secretary had issued a notification on March 8, 2018 with regard to the posting of the petitioner and respondent No. 3 but this was undone the very next day by the Minister exercising powers under serial No. 12 of the notification of February 3, 2014, which provision of the notification we have declared to be of no legal effect, therefore, the notification of March 9, 2018 issued on the direction of the Minister would also be of no legal effect. The issuance of the notification of March 9, 2018 on the Minister's directive was a clear example of undermining the authority of the Secretary to run his department efficiently and to maintain discipline, encouraging as it did those subordinate to the Secretary to bypass him and approach the Minister.

16. Since the impugned notification was challenged by the petitioner in the appeal filed by him, therefore, we now turn to consider the legality thereof. A junior officer was elevated and placed above his seniors through the impugned notification; the impugned notification gave no reason why this was done. The

petitioner had been posted as the Acting Divisional Director for a little over a month when he was posted/transferred again. The impugned notification does not state why it was considered necessary to post/transfer the petitioner again after such a short period. The Tribunal however dismissed the petitioner's appeal stating that the law empowers the Government to post the petitioner anywhere in the province, by relying on section 10 of the Act, reproduced hereunder:

"10. Posting and transfer. Every civil servant shall be liable to serve anywhere within or outside the Province of Balochistan, in any post under the Federal Government, or any Provincial Government or local authority, or a corporation or body set up or established by any such Government:

Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:

Provided further, that where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favourable than those to which he would have been entitled if he had not been so required to serve."

The aforesaid section does not state that a civil servant can be posted or transferred by disregarding his seniority, nor does it empower the Government to cut short the normal tenure of a posted/transferred civil servant, and particularly without assigning any reason. In the case of Mahmood Akhtar Naqvi (*Anita Turab case*) (above) this Court held:

"16. In the Hajj Corruption Case, the court reiterated its earlier ruling in Zahid Akhtar v. Government of Punjab (PLD 1995 SC 530), where it had been held that *"the normal period of posting of a Government servant at a station, according to Rule 21 of the Rules of Business is three years, which has to be followed in the*

ordinary circumstances, unless for reasons or exigencies of service a transfer before expiry of the said period becomes necessary in the opinion of the competent authority." Furthermore, with regard to transfers of civil servants, this Court has stated that transfers by political figures which are not legally sustainable. Farrukh gulzar v. Secretary Local Government and Rural Development Department, Lahore and 2 others (1998 SCMR 2222). These are principles of law enunciated by this court and are to be followed in terms of Article 189 of the Constitution. We, however, repeatedly come across violations of such principles. This unnecessarily leads to litigation which, in turn, clogs Courts and Service Tribunals."

The principles enunciated in the judgment were summarized in paragraph 22 (at page 210) and are reproduced hereunder:

"(i) Appointments, Removals and Promotions: Appointments, removals and promotions must be made in accordance with the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent and reasonable manner and in the public interest.

(ii) Tenure, posting and transfer: When the ordinary tenure for a posting has been specified in the law or rules made thereunder such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable.

(iii) Illegal orders: Civil servants owe their first and foremost allegiance to the law and the Constitution. They are not bound to obey orders from superiors which are illegal or are not in accordance with accepted practices and rule based norms; instead, in such situations, they must record their opinion and, if necessary, dissent.

(iv) OSD: Officers should not be posted as OSD except for compelling reasons, which must be recorded in writing and are judicially reviewable. If at all an officer is to be posted as OSD such posting should be for the minimum period possible and if there is a disciplinary inquiry going on against him, such inquiry must be completed at the earliest."

The impugned notification stipulates that the petitioner and the respondent No.3 were posted/transferred in their "own pay & scale". In the case of Province of Sindh v Ghulan Fareed (above) it was held, that posting/transferring a civil servant on his own pay and scale (OPS) is not legally permissible:

"11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop gap arrangement. We have examined the provisions of Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appointment [of] any officer on higher grade on "Own Pay And Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has also always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides blocks promotions of the deserving officers."

Unfortunately, the Secretary did not act pursuant to rule 8(1)(g) of the Rules by resisting the Minister's order nor referred the matter to the Chief Minister through the Chief Secretary. Instead he submitted to the Minister's whim and issued another notification on March 9, 2018 which held the notification of March 8, 2018 in abeyance. This was unfortunate.

17. Bureaucrats are there to serve the people and not the whims of ministers. Ministers are politicians who have been elected by the people and as such are entitled to enact policies on the basis of which they were elected, however, the posting or transfer of a civil servant is not a policy matter. Once a policy is sanctioned the department, headed by the secretary, is to implement it. The making of policy and implementing it after it has been made fall in separate domains. Policy matters are within the political domain and a minister or, as may be the case, the cabinet has complete discretion with regard thereto. But, once policy has been made it has to be implemented by the department, headed by the secretary. And, it is the secretary who is responsible for the efficient administration of the department and to maintain discipline in it. If a dispute arises between a minister and a secretary with regard to the respective scope of their domains or the orders of a minister appear to depart from any rule or regulation of established Government policy the secretary has to draw the attention of the minister to it; and, if the minister still disagrees with the secretary then the secretary is required to refer the matter to the Chief Minister through the Chief Secretary.

18. Under section 10 of the Act a civil servant can not insist to be posted or transferred to a particular post but this does not mean that a civil servant can be made to serve under a subordinate. Moreover, while section 10 does not prescribe a minimum period during which a civil servant must serve at his post it does not mean that the Government without assigning any reason can move a civil servant from the place he was posted to after a month or subject the civil servant to repeated postings in a

short period of time because this would amount to punishing him. Such postings also adversely affect the public interest and result in the wastage of scarce resources and constitute bad governance.

19. The Rules designate certain posts as 'tenure posts' (rule 22 read with Schedule IV of the Rules) and prescribe a period of three years for an incumbent to serve on such posts. Such prescribed tenure may therefore be categorized as the ideal duration for which a civil servant should serve at a particular post. The post of Divisional Director however is not a tenure post but the principle of serving for a particular duration at this post should be followed. In the present case the petitioner was posted for a little over a month when he was again posted. Any civil servant posted to a particular post requires some time to familiarize himself with the workings of the office and the requirements of the post whereafter he will be best placed to acquit himself of the responsibilities of the post. However, a one month posting, as in the case of the petitioner, would not serve the interest of the people.

20. The issues raised in this petition are substantial questions of law of public importance in terms of Article 212(3) of the Constitution, which we have dilated upon and which were left unattended by the learned chairman and members of the Tribunal. The Tribunal also did not take into account the referred to judgments of this Court. The Tribunal referred to a judgment of this Court, Zaka Ullah Bajwa v Chief Secretary, Government of the Punjab (2005 SCMR 13), which held that a civil servant, "*is required to serve anywhere against the post to which he is transferred*", however, that does not mean a civil servant can be

made to serve under his subordinate or for a very brief period of time or that the minister can undermine the authority of the secretary of the department.

21. Therefore, for the reasons mentioned above, this petition is converted into an appeal and allowed in the following terms:

- (a) Serial No. 12 of the notification of February 3, 2014 which grants to the Minister the power to post/transfer a civil servant is declared to be contrary to the Rules and the scheme of governance envisaged by the Constitution and is therefore struck down;
- (b) As a consequence of the above, the notification dated March 9, 2018, which was issued pursuant to the Minister exercising his powers under the notification of February 3, 2014 is also struck down;
- (c) Notification dated April 25, 2018 with regard to the posting / transfer of the petitioner and respondent No.3, for the reasons mentioned above, is struck down; and
- (d) If there is any other notification/s, order/s and/or instruction/s empowering a minister to transfer a civil servant those are also declared to be contrary to the Rules and the scheme of governance envisaged by the Constitution and are therefore also struck down; and
- (e) The Chief Secretary and the secretaries of the departments of the Government are directed not to act pursuant to any notification, order and/or instruction whereby a minister orders the posting/transfer of a civil servant.

We had converted this petition into an appeal and allowed it by order dated May 3, 2018 and these are the detailed reasons for doing so.

Judge

Judge

Judge

Bench-IV
Islamabad
May 22, 2018
(*Farrukh*)

Approved for Reporting