

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4334 of 2019

Naeem Anwar

Versus

Federation of Pakistan through its Secretary, Ministry of Commerce
and Textile and others

Dates of Hearing: 19.03.2021 & 09.06.2021

Petitioner by: Mr. Ali Murad Baloch, Advocate

Respondents by: Mr. Arshid Mehmood Kiani, learned Deputy
Attorney-General

Mr. Aasim Shafi, Advocate for respondent
No.3

Mr. Mehmood Khan Lahko, Section Officer,
Establishment Division

Mr. Amjad Raja, Section Officer, Ministry of
Communications

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner (Naeem Anwar) impugns the appointment of respondent No.3 (Muhammad Saleem) as Member, National Tariff Commission (“N.T.C.”) through notification dated 06.12.2019 issued by the Ministry of Commerce and Textile in exercise of the powers under Sections 4 and 7 of the National Tariff Commission Act, 2015 (“the N.T.C. Act”). In essence, the petitioner’s grievance is that since his name was higher up than that of respondent No.3 in the merit list prepared by the Selection Committee and forwarded to the Federal Government for appointment as Member, N.T.C., the appointment of respondent No.3 was made by undermining merit and violating the principles of fairness and transparency.

2. Section 4 of the N.T.C. Act provides *inter alia* that the N.T.C. shall comprise of five members appointed by the Federal Government “*in the prescribed manner.*” The term “*prescribed*” has been defined in Section 2(d) of the N.T.C. Act to mean prescribed by rules made under the N.T.C. Act. Section 26(1) of the N.T.C. Act empowers the N.T.C. to make rules, with the prior approval of the Federal Government, for carrying out the purposes of the N.T.C. Act. In exercise of the powers conferred by Section 26 of the N.T.C. Act, the N.T.C., with the prior approval of the Federal Government, made

the National Tariff Commission (Terms and Conditions of Service of Members) Rules, 2018 (“the 2018 Rules”). The procedure for the appointment of Members of the N.T.C. is prescribed in the said Rules.

3. Rule 6 of the 2018 Rules provides for the composition of a Selection Committee for recommending appointment of Members of the N.T.C. to the Federal Government. Rule 7(3) of the said Rules requires vacant posts of the Members of the N.T.C. to be advertised in at least two newspapers. Rule 7(8) of the said Rules provides for the following process to be followed by the Selection Committee after the receipt of the applications pursuant to the advertisement:-

- “(a) the Selection Committee shall short-list the applicants on the basis of eligibility and qualification and disqualification criteria as provided in sections 5 and 6 of the Act while recording reasons for short-listing or rejecting an application;*
- (b) only short-listed candidates shall be called for interview by the Selection Committee;*
- (c) the credentials of the short-listed candidates shall be verified as reasonably as possible before calling them for interview;*
- (d) after the interviews, the Selection Committee shall recommend a panel of candidates in order of merit for appointment as Members;*
- (e) the competent authority shall ensure that the panel preferably contains candidates that are thrice the number of vacant posts of Members that are being proposed to be filled;*
- (f) the Ministry shall forward the recommendations of the Selection Committee for appointment of Members in the shape of a summary to the Federal Government under the Rules of Business 1973.”*

4. The facts leading to the filing of the instant petition are that on 30.12.2017, an advertisement was published by the Ministry of Commerce and Textile (Commerce Division) inviting applications for appointment of Members of the N.T.C. The last date for the submission of the applications was 14.01.2018. In response to the said advertisement, 104 applications were received by the closing date. The petitioner and respondent No.3 were among the applicants. The Selection Committee constituted by the Ministry of Commerce and Textile evaluated the applications and shortlisted 21 candidates. Thereafter, 17 candidates, including the petitioner and respondent No.3, appeared for the interview. A Special Selection Committee, in its meeting dated 16.05.2018, unanimously recommended the following candidates in order of merit for

appointment as Members of the N.T.C. for a term of five years or on attaining the age of sixty-five years, whichever is earlier:-

- i. *Ms. Anjum Assad Amin*
- ii. *Mr. Naeem Anwar (petitioner)*
- iii. *Mr. Muhammad Saleem (respondent No.3)*
- iv. *Syed Kausar Ali Zaidi*
- v. *Mr. Khizar Hayat*
- vi. *Mr. Hamood-ur-Rauf*

5. On 18.05.2018, a summary was moved for the Prime Minister by the Ministry of Commerce and Textile proposing the appointment of Members of the N.T.C. In the said summary, it was explicitly mentioned that the name of the five candidates had been given “*in order of merit.*” By the time the said summary was submitted to the Prime Minister’s Secretariat, after being routed through the Establishment Division, a caretaker regime was in place. The caretaker Prime Minister, on 09.07.2018, directed that the matter be placed before the next elected government for a decision in the matter.

6. On 28.11.2018, the new Prime Minister directed that the names of the three candidates for appointment as Members, N.T.C., to be placed before the Cabinet for consideration. On a summary submitted by the Ministry of Commerce and Textile, the Cabinet, in its meeting held on 10.01.2019, approved the appointment of Ms. Anjum Assad Amin as Member, N.T.C. It ought to be borne in mind that Ms. Anjum Assad Amin’s name appeared at the top of the merit list prepared by the Special Selection Committee.

7. After the Ministry of Law and Justice had opined that there was no prohibition on filling the second vacancy of the Member, N.T.C., the Prime Minister, in his capacity as Minister-in-Charge of Commerce and Textile, approved the proposal of the Ministry of Commerce and Textile for placing a summary to the Cabinet for the appointment of the fifth Member of the N.T.C. from among the following candidates:-

- i. *Mr. Naeem Anwar (petitioner)*
- ii. *Mr. Muhammad Saleem (respondent No.3)*
- iii. *Syed Kausar Ali Zaidi*

8. The Cabinet, in its meeting held on 26.11.2019, approved the appointment of respondent No.3 as a Member, N.T.C. The

documents brought on record by the learned Deputy Attorney-General show that the Advisor to the Prime Minister on Commerce, Textile, Industry, Production, and Investment had interviewed the above named three candidates and recommended to the Cabinet that respondent No.3 was the most suitable among them for appointment as the fifth Member, N.T.C. The decision of the Cabinet whereby respondent No.3's appointment as Member, N.T.C. was approved is reproduced herein below:-

"The Cabinet considered the summary titled 'Selection of Member of National Tariff Commission' dated 25th November, 2019, submitted by Commerce Division, and approved the appointment of Mr. Muhammad Saleem, as Member, National Tariff Commission, as recommended by the Advisor to the Prime Minister on Commerce, Textile Industry & Production and Investment."

9. Vide the impugned notification dated 06.12.2019, respondent No. 3 was appointed as Member, N.T.C. for a term of five years or until attaining the age of 65, whichever is earlier. The said notification has been assailed by the petitioner in the instant writ petition.

10. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the petitioner and respondent No.3 had participated in the competitive process for appointment against the two vacant posts of Member, N.T.C; that the Special Selection Committee had prepared a merit list of the candidates after evaluating their credentials and conducting interviews; that the petitioner's name on the merit list was at serial No.2 whereas respondent No.3's name was at serial No.3; that Ms. Anjum Assad Amin whose name was at the top of the merit list was appointed as Member, N.T.C. against one of the vacant posts; that since in the merit list the petitioner's name was higher up *viz-a-viz* respondent No.3, the petitioner had a legitimate expectation to be appointed against the second vacant post of Member, N.T.C.; that the 2018 Rules do not envisage any role for an Advisor to the Prime Minister in the selection/appointment process of Member, N.T.C.; that it was due to the intervention of the Advisor to the Prime Minister that respondent No.3 was appointed as a Member, N.T.C.; that the respondents have not brought any

document on record to show that any reasons were assigned for giving preference to respondent No.3 over the petitioner; and that the appointment of respondent No.3 ought to be set-aside and directions be issued for the petitioner's appointment as Member, N.T.C. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

11. Learned Deputy Attorney-General submitted that there was no embargo on the Cabinet to appoint any one of the three candidates whose names had been placed before it for consideration for appointment as Member, N.T.C.; that the mere fact that the names of the candidates had been submitted to the Cabinet in order of merit did not obligate the Cabinet to appoint the candidate whose name was at the top of the merit list; that the recommendations of the Selection Committee are not binding on the Cabinet/Federal Government; that since respondent No.3's name was present in the list submitted to the Cabinet, his selection as Member, N.T.C., suffered from no legal infirmity; that the Advisor to the Prime Minister had not changed the names which have been recommended by the Selection Committee; that the Advisor committed no illegality by interviewing the three candidates; that the recommendations of the Advisor were also not binding on the Federal Government; that it was the sole discretion of the Federal Government to appoint Member, N.T.C. from among the list placed before it; that there was no oblique intention behind appointing respondent No.3 as Member, N.T.C.; and that the credentials of respondent No.3 are better than those of the petitioner. In making his submissions, learned Deputy Attorney-General placed reliance on the law laid down in the cases of Muhammad Ashraf Sangri Vs. Federation of Pakistan (2014 SCMR 175), Mir Alam Jan Vs. Muhammad Shahzad (2018 SCMR 960) and Munir Khan Khattak Vs. Chancellor, The University of Agriculture Khyber Pakhtunkhwa (2017 PLC (C.S.) Note 10). Learned Deputy Attorney-General prayed for the writ petition to be dismissed.

12. Learned counsel for respondent No.3 adopted the arguments of the learned Deputy Attorney-General.

13. I have heard the contentions of the learned counsel for the petitioner and the learned Deputy Attorney-General and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 4 to 9 above and need not be recapitulated.

14. The Selection Committee had scrutinized the credentials and interviewed the applicants for appointment against the two vacant posts of Member, N.T.C. It is clearly borne out from the documents brought on record by the respondents that the candidates unanimously recommended by the said committee for appointment as Members, N.T.C. were in order of merit. Since Ms. Anjum Assad Amin had been found to be most meritorious among the shortlisted candidates, her name was placed at the top of the merit list prepared by the Selection Committee. This had caused her appointment against one of the two vacant posts of Member, N.T.C.

15. Now, as regards the second vacant post of Member, N.T.C., the names of three candidates, including the petitioner and respondent No.3, were placed before the Cabinet. It is not disputed that the names of the three candidates were submitted to the Cabinet in order of merit. The petitioner's name was at serial No.1 whereas that of respondent No.3 was at serial No.2.

16. It needs to be determined why the Cabinet chose respondent No.3 over the petitioner for the appointment of Member, N.T.C. In the written comments filed on behalf of Establishment Division (respondent No.4), it is pleaded *inter alia* that the "*Federal Cabinet, in its decision dated 26.11.2019 approved the appointment of Mr. Muhammad Saleem as Member, N.T.C. as recommended by the Advisor to the Prime Minister on Commerce, Textile, Industry, Production and Investment.*" In the written comments submitted on behalf of the Ministry of Commerce and Textile, it is pleaded that the Advisor had interviewed the three candidates before a summary was submitted to the Cabinet. The minutes of the Cabinet meeting dated 26.11.2019 clearly show that the Advisor had interviewed the three candidates "*and recommended to the Cabinet that Mr. Muhammad Saleem was the most suitable amongst them for appointment as the*

5th Member of N.T.C.” The decision of the Cabinet, reproduced in paragraph 8 above, also makes explicit reference to the recommendations of the Advisor.

17. The minutes of the Cabinet meeting dated 26.11.2019 do not show any comparative analysis that had been carried out between the qualifications and abilities of the petitioner and respondent No.3 causing the Cabinet to come to an independent and informed decision to appoint respondent No.3 instead of the petitioner, who had been found more meritorious than respondent No.3 by the Selection Committee. Paragraph 6 of the said minutes show that the decision to appoint respondent No.3 was taken solely on the recommendations of the Advisor to the Prime Minister. The minutes of the Cabinet meeting and its decision do not show any other reason for preferring respondent No.3 over the petitioner.

18. The decision of the appointing authority to appoint respondent No.3 clearly appears to have been based on the recommendations of the Advisor to the Prime Minister who had formed his opinion on the basis of interviewing the three candidates. In the case of Syed Muhammad Raza Vs. General Manager, WAPDA (1994 MLD 1647), the Hon'ble Lahore High Court expressed reservations on the process of selection on the basis of interviews. It was held that *“in view of the dictates of justice and equality clause in the Constitution, the reservation of marks for interview should not be of such a high percentage which could lead to arbitrariness and unfairness which must be avoided.”* One of the reasons why the Hon'ble Lahore High Court struck down the interview-based selection process was that no record of reasons for awarding marks in the interview was maintained and it was based purely on the subjective assessment by the Selection Committee during the course of which the misuse of power could not be ruled out.

19. It is well settled that appointments against posts created by statute have to be made strictly in accordance with the procedure prescribed in the statute or rules made thereunder. As mentioned above, the procedure for the selection and appointment of Member, N.T.C. is prescribed in the 2018 Rules. These Rules do not envisage

for an Advisor to the Prime Minister to conduct interviews of the candidates recommended by the Selection Committee for appointment against vacant posts of Members, N.T.C. Rule 7(8)(b) of the 2018 Rules provides that only the shortlisted candidates shall be called for an interview by the Selection Committee whereas Rule 7(8)(d) provides that after the interviews the Selection Committee shall recommend a panel of candidates *“in order of merit”* for appointment as Members, N.T.C. Neither does the N.T.C. Act nor the 2018 Rules give any role to the Advisor to the Prime Minister in the selection/appointment of a Member, N.T.C. The Advisor is a rank outsider to the selection/appointment process of a Member, N.T.C.

20. Recently, this Court in the case of Syed Pervaiz Zahoor Vs. The Prime Minister of Pakistan (PLD 2020 Islamabad 449) held *inter alia* that the role of an Advisor to the Prime Minister is not contemplated by the Rules of Business, 1973 (*“the 1973 Rules”*) in the conduct of the business of executive authority, and that an Advisor cannot interfere or in any manner influence the executive authority, working or functioning of a Division or Ministry or its policy matters. Furthermore, it was held that an Advisor can neither be given nor can he exercise powers or perform functions in derogation of the mandatory scheme of the 1973 Rules read with the provisions of the Constitution, and that an act of an Advisor in breach of the Constitution and the 1973 Rules would be void, without lawful authority and jurisdiction.

21. Additionally, this Court, in its judgment dated 07.12.2020, passed in Writ Petition No.01/2020, titled “Farrukh Nawaz Bhatti Vs. Prime Minister of Pakistan”, after making reference to different provisions of the 1973 Rules and the Constitution, unequivocally held that an Advisor to the Prime Minister is not a member of the Cabinet and cannot take part in its proceedings. Furthermore it was held that an Advisor can also not be a Chairman or Member of the Committee of the Cabinet but can, on special request, be called in by the Committee. This Court had struck down a notification appointing an Advisor to the Prime Minister as a Chairman and Member of the Committee of the Cabinet.

22. True, in the case at hand, the role played by the Advisor was only of a recommendatory nature but the same was based on him having conducted interviews for which there was no legal sanction under the provisions of the N.T.C. Act as well as the 2018 Rules. The Advisor could give recommendations to the Prime Minister but the Constitution and the 1973 Rules do not provide for an Advisor to give the recommendations to the Cabinet in the process of making appointments against statutory posts. But for the unauthorized intervention of the Advisor to the Prime Minister in the appointment process for the second vacant post of Member, N.T.C., the Cabinet would have had the opportunity to independently consider the three applicants recommended by the Selection Committee in order of merit. Such intervention of the Advisor in the appointment process cannot be considered as a valid ground for overturning merit. Therefore, the interviews of the three candidates conducted by the Advisor and the recommendations made by the Advisor on the basis of these interviews were without lawful authority and of no legal effect and are hereby declared as such.

23. The 2018 Rules explicitly require the Selection Committee to recommend a panel of candidates *"in order of merit"* for appointment of Members, N.T.C. The panel of candidates *"in order of merit"* is prepared by the Selection Committee after evaluating the credentials of the shortlisted candidates and interviewing them. The appointing authority, i.e. the Federal Government, is not bound to select the candidate whose name was at the top of the merit list or for that matter appoint any of the candidates recommended by the Selection Committee. But where a panel of candidates is submitted in order of merit, there must be reasons recorded justifying why the candidate at the top of the merit list is ignored and a candidate lower on the merit list selected. These reasons must be contemporaneously reflected in the decision-making process and cannot be put forth as an afterthought in the form of written comments. When the Selection Committee recommends the names of candidates to the appointing authority in order of merit, the appointing authority is not free to pick and choose any person from

the merit list and appoint him ignoring the claim of persons over and above him in the merit list. The Federal Government / appointing authority does not enjoy arbitrary and unfettered power to put the constitutional and statutory rights of candidates higher up on the merit list at naught by appointing a candidate lower on the merit list without assigning reasons which are sustainable in law and satisfy the test of reasonableness. Appointing a candidate lower on the merit list without such reasons amounts to hostile discrimination and not permissible under any canon of law, justice and equity.

24. It must be appreciated that in the case at hand, the merit list was prepared by a Selection Committee constituted pursuant to Rule 6 of the 2018 Rules. The reasons which ought to have been assigned by the appointing authority for not selecting the petitioner, who ranked higher than respondent No.3 on the merit list, should have demonstrated why respondent No.3 had been found to be more suited and qualified for appointment as Member, N.T.C. over the petitioner. If the contention canvassed by the learned Deputy Attorney-General that the Cabinet was at liberty to choose any candidate from the merit list prepared by the Selection Committee and not assign any reason for not selecting a candidate at the top of the merit list, it would not just render the scrutiny and interview process carried out by the Selection Committee under the 2018 Rules as an exercise in futility but would amount to compromising merit, fairness and transparency which are recognized in a civilized society as the ethos of a competitive process for a public office. In making these observations, I derive guidance from the law laid down by the Superior Courts in the following judgments:-

- (i) In the case of Munir Hussain Bhatti Vs. Federation of Pakistan (PLD 2011 S.C. 407), it was held as follows:-

“32. The recommendations of the Judicial Commission are now on greater footing than the recommendations of the Chief Justice alone in the earlier system. These cannot be superseded for any extraneous considerations as already discussed above. Therefore, the Parliamentary Committee cannot simply brush aside the recommendations of the Commission without its own sound reasons.”

- (ii) In the case of High Court Bar Association, Bahawalpur Vs. Federation of Pakistan (PLD 2015 Lahore 317), the Hon'ble Lahore High Court held as follows:-

“17. Another aspect is that once the candidate receives a nod of approval by the Judicial Commission and his candidature is placed before the Parliamentary Committee, denial of approval of the Committee requires compelling reasons based on irrefutable evidence against the nominated person, which should irresistibly justify that the nominated person is not fit to be appointed as an Additional Judge.”

- (iii) In the case of Ghazala Yasmeen Vs. Chancellor, Shaheed Benazir Bhutto Women University (2016 PLC (C.S.) 686), a panel of three candidates had been recommended by the Search Committee for appointment as Vice Chancellor in order of merit. The Special Assistant to the Chief Minister, Khyber Pakhtunkhwa recommended the name of a candidate lower in the merit list for the appointment. This recommendation was approved by the Governor of Khyber Pakhtunkhwa resulting in the appointment of a Special Assistant's recommendee as the Vice Chancellor. The Division Bench of the Hon'ble Peshawar High Court declared the appointment as without lawful authority. Paragraph 6 of the said report is reproduced herein below:-

“6. A look of the referred provision of law provides the constitution of Search Committee consist upon eminent educationalist and members of the society apart from Government senior officers, which recommend a panel of 3 candidates and out of it on the advice of Govt. (Chief Minister) Vice Chancellor shall be appointed by the Chancellor. Though Government has the discretion to appoint one candidate out of the panel recommended by Search Committee however, it has to exercise the discretion with conscious and independent application of mind. The Government has only recommended respondent No.5 without assigning any reasons, which amounts to disposal of the matter in hasty and summary manner without taking into consideration the eligibility, merit and recommendation of high profile Search Committee constituted under the statute for the assessment of eligibility and merit of the candidates. The Government failed to realize its parental status vis-a-vis the subject and it never behaved it to deny to the subject what is determined by competent Committee constituted for search purpose, to be their right. The Government should not take shelter under technicalities of law. The order passed by Govt. comprising of single word "recommended" is not in line with law nor can be termed as a reasoned order. It is by now established principle of law that apart from court of law, authority entrusted with

quasi judicial powers must dispose the matter pending before it with a reasoned judgment. It must appear not merely that the authority has reached a conclusion rather appear to have reached the conclusion which is just and is result of fair play and good conscious.”

(iv) In the case of Secretary, Establishment Division, Government of Pakistan Vs. Dr. Muhammad Arif (2017 PLC (C.S.) 907), I had the occasion to hold as follows:-

“90. If a junior officer is to be promoted and the senior deferred, a comparative analysis must be carried out between the two or with each of the officers over which a junior is being promoted, and reasons should be given which would satisfy and convince any reasonable mind as to the causes and factors due which the seniors are ignored. Such reasons must contain the attributes which are possessed by a junior promoted officer and which the senior deferred or superseded officers are bereft of. Where the senior officers are so ignored, it is their right to know about their deficiencies, which prevailed over the minds of the members of the CSB in arriving at a conclusion not to recommend him for promotion.”

The principle enunciated in the aforementioned judgment in cases where preference is given to a junior officer over senior officers while making promotions will apply with equal force when preference is given to a candidate who is lower on the merit list over those higher on the merit list. It may also be mentioned that the said judgment passed by this Court was upheld by the Hon'ble Supreme Court in the case of Federation of Pakistan Vs. Dr. Muhammad Arif (2017 SCMR 969).

25. This Court has no intention to embark on a subjective assessment of the petitioner and respondent No.3's credentials or assume the role of the selection or the appointing authority. The subjective assessment of the applicants' credentials had already been carried out by the Selection Committee before submitting the names of the candidates in order of merit to the appointing authority. It is for the Federal Government (i.e., the Prime Minister and Cabinet collectively) to consider the names of candidates recommended by the Selection Committee for appointment against the second vacant post of Member, N.T.C.

26. Since the appointment of respondent No.3 as Member, NTC is found to be the product of injudicious selection, the instant petition

is allowed; the process adopted for the appointment of respondent No.3 as Member, N.T.C. is declared to be in violation of the procedure provided in Rule 7(8) of the 2018 Rules, and therefore declared as unlawful; the appointment of respondent No.3 as Member, N.T.C. is set-aside. The Ministry of Commerce and Textile shall submit a summary (which shall not include the recommendations of the Advisor to the Prime Minister on Commerce and Textile or any reference to interviews conducted by him) regarding the selection of one Member, N.T.C. on the basis of the unanimous recommendation of the Selection Committee to the Cabinet for a decision in the matter in accordance with the law. This judgment shall remain in abeyance for a period of one month from today and during this period the Cabinet/Federal Government is expected to take a decision in the matter on a summary to be submitted by the Ministry of Commerce and Textile. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 24/06//2021

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**