

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Writ Petition No.3198/2013

Muhammad Zubair, etc.	Versus	N.C.A. etc.
Petitioners by:		Mr. Abdur Rehman Siddiqui, Advocate.
Respondent No.1 by:		Barrister Waqas Aziz Qureshi, Advocate.
Respondent No.2 by:		Mustafa Shakir Hussain Manager (Legal) NESCOM.
Date of hearing:		28-10-2016.

JUDGMENT

MOHSIN AKHTAR KAYANI, J. Through the instant writ petition, the petitioners have prayed for following relief:

“Under the circumstances it is, therefore, respectfully prayed that this Honourable Court may very graciously be pleased to set aside the impugned order dated 23.07.2013 and direct respondents to grant promotion to the petitioners to SPS 11 and SPS 12 respectively w.e.f. the dates, their juniors were promoted as such with all consequential benefits.

Any other relief which this Honourable Court may deem just and proper may also be awarded.”

2. Brief facts of the instant writ petition are that the petitioners are serving as General Manager at National Development Complex (NDC) which is an integral part and a subsidiary body of the National Engineering & Scientific Commission (NESCOM) duly controlled by the National Command Authority (NCA)/respondent No.1 headed by the Prime Minister of Pakistan. The NCA was established under NCA Ordinance 2007 which was later on enacted as NCA Act, 2010 having control and supervision over almost all the strategic organizations of the country. As per petition, the petitioners claimed that after their initial appointments they are performing their duties diligently, to the best of their abilities and to the entire satisfaction of their Competent Authority and no adverse entry or remarks have ever been recorded against them.

3. The instant petition was initially dismissed by this Court on the ground that the rules of the Organization are non statutory however, the latest judgment of the Supreme Court of Pakistan has declared the rules having a statutory force. In view of the said judgment of the Apex Court the matter has been remanded to this Court again for re-hearing.

4. The petitioners are presently serving in SPS-10 under NCA Employees Service Regulations, 2011. All the petitioners have qualified for their educational academic factors and also completed their minimum threshold of service required under the said scale and they are entitled to be promoted in SPS-11 however, under the promotion policy introduced by the NCA, the present petitioners have been deferred and at present superseded for the reasons not extended to them although, the respondent authority admits that they qualify the minimum threshold but they have not been promoted on the ground of fitness-cum-seniority principle. The petitioners claim that they are entitled to be considered and granted promotion in SPS-11 w.e.f. 01.12.2006, 01.12.2007, & 01.12.2009 and thereafter in SPS-12 after exhausting a period of 04 years service respectively, as they have become eligible for promotion in accordance with the promotion policy but their cases have neither been deferred nor they have been superseded but they have simply been ignored without assigning any reason. The petitioners further claim that number of their juniors colleagues have been promoted in SPS-11 and then to SPS-12 but the petitioners have been ignored without any lawful excuse. In order to prove their contentions the petitioners have placed on record the seniority list of G.M (technical) whereby petitioners are mentioned at serial No.1 to 3 and 6 of the seniority list of the G.M. (technical) and are still waiting for promotion but the persons who have already promoted are at serial No.4, 5, 7, 11, 15, 18, 21, 22, 23, 31, 34, 36, 41 to 44, 47 and 48 of the seniority list. Similarly who are shown at serial No.18 to 118 of the seniority list of the officers of SPS-11 were junior to the petitioners have been promoted and likewise officers shown at serial No.24 and 29 of the seniority list of the officers of SPS-12 were also juniors to the petitioners but they have not only been promoted to SPS-11 but presently they are enjoying SPS-12 without any justification. In last the petitioners have referred a letter dated 23.07.2013

whereby one of the petitioner has been transferred to another organization of NCA and he has also assailed the said order.

5. Learned counsel for petitioners contends that the petitioners have not been considered for the promotion without assigning any reason and their junior officers have already been promoted in SPS-11 and SPS-12 and they have been deferred without any reason although they met the criteria. Even there is no adverse entry against them.

6. Conversely, learned counsel for respondent No.1/NCA states that NCA has been established under NCA Act, 2010 where the powers and functions of the authority contained in section 7 of the Act and Strategic Planning Division (SPD) serves as Secretariat to the Authority. Learned counsel further contends that National Development Complex (NDC) by virtue of section 2-D read with section 8 of the Act is for all intent and purposes is strategic organization working under complete control of NCA and the employees thereof are without exception. Employees in service of the authority and the respondents organization is bound by the provisions of NCA Act which shall take precedence over any other law in force by virtue of section 21 of NCA Act therefore, the instant writ petition is not competent. He further contends that after the judgment of the Apex Court whereby the Hon'ble Supreme Court has declared the rules of the instant organization as statutory have been further amended through NCA amendment ordinance, 2016 formulated on 30 March 2016 whereby the rules of the Authority have been declared to be non statutory hence, the instant relationship between the petitioners and the respondents is that of the master and the servant and the writ petition is not competent. Learned counsel further contends that the ordinance has further been extended by the parliament for the next tenure therefore the instant writ petition is devoid of merits and is not competent. Lastly, he argued that the principle of fitness cum seniority is applicable in the instant matter and the NCA categorically admits that the seniority/eligibility in the case of the petitioners meets out but their fitness has not been confirmed only on the touchstone of security clearance as the accumulating effect of non clearance of security has been taken into consideration and due to said factor the promotion has been denied to the present petitioners. He further contends that in order to discuss the issues of fitness on the touchstone of security clearance the proceedings require an in camera session as all those

factors could not been shared at this level before the Court except in camera proceedings, therefore, in order to understand the entire situation the question of fitness specially in terms of security clearance can be argued in camera before the Court whereby the respondents authority has placed the details of certain documents before the Court.

7. Arguments heard, record perused.

8. From the perusal of record it has been observed that the petitioners who are working as General Managers at the NDC and duly qualify to be promoted but their cases have not been taken into consideration since 2006 and from the perusal of record it has been observed that the petitioners are entitled to be considered and granted promotion in SPS-11 w.e.f. 01.12.2006, 01.12.2007 & 01.12.2009 and thereafter in SPS-12 but after exhausting a period of 04 years service they have become eligible for promotion as such they securely fall within the promotion criteria but their cases have not been considered and their junior officers have been given promotion in SPS-11 and subsequently in SPS-12. From the perusal of the seniority list available on record which has been admitted by the other side it has been observed that the junior colleagues of the petitioners have been promoted in SPS-11 and then SPS-12 without lawful excuse the petitioners' names are mentioned at serial No.1 to 3 and 6 of the seniority list of the G.M. (Technical) and they are still waiting for promotion but the officers whom names have been placed at serial No.4, 5, 6, 11, 15, 18, 21, 22, 23, 31, 34, 36, 41 to 44, 47 & 48 in the seniority list have been promoted. Similarly, those officers who have been shown at serial No.18 to 118 of the seniority list of the officers of SPS-11 (Annex-G) are junior to the petitioners and they have been promoted likewise the other officers shown at serial No.24 to 29 in the list of the officers of SPS-12 (Annex-H) were also junior to the petitioners but they were not only promoted to SPS-11 prior to the petitioners but they are presently enjoying the status of SPS-12. In view of the above referred factors this Court has also considered other in camera proceedings whereby the respondent authority claims that the question of fitness is taken up on the ground of the security clearance and it has been conceded before this Court that there is no doctrine of security available on record nor even there is any rule through which the respondents can demonstrate/challenge the parameters of security clearance, considered or observed with certain criteria hence, there is no hard & fast principle for

clearance of security however, it has been discussed by the respondents that the reports from internal security agencies and different strategic organizations are obtained by the departmental promotion authority before considering the cases of promotion. The respondent authority has also conceded that all the petitioners are qualified and fulfill the criteria of promotion on the touchstone of their qualification, experience and working performance duration the service and they have been recommended by their relevant senior authorities as fit for promotion but even then their cases could not be considered due to certain factors of security clearance. The respondents in order to answer the question of security clearance, have placed reliance upon section 7 (d, e, f & g) of National Command Authority Act, 2010 whereby the powers and functions of authority have been defined in which clause d, e, f & g are reproduced as under:

“(d) to prescribe specific terms and conditions of the employees including but not limited to, appointments, removals, promotions, transfers, integrity and reliability assessment and other relates matters;

(e) to create classification amongst employees based on the sensitivity of the functions, nature of assignment, security considerations and in the interest of security of Pakistan;

(f) to take measures regarding employees in respect of their movement, communication, privacy, assembly or association, in the public interest or in the interest of integrity, security or defence of Pakistan or friendly relations with foreign states and public order;

(g) to place such restriction and limitation on the employees that are necessary in the interest of the confidentiality of the functions, assignments, jobs etc., being performed by the said employees or the class of employees.”

From the perusal of National Command Authority Act it has been observed that under section 9 the status of employees of the Authority has been defined which is reproduced as under:

“9. Employees of Authority.- (2) *The Authority shall regulate all the matters relating to terms and conditions of the service of the employees in the service of the Authority, including their appointment and removal, promotion, transfer, integrity assessment, reliability, security clearance, and other related matter:*

Provided that the employees working in the service of the Authority who are subject to the Pakistan Army Act, 1952 (XXXIX of 1952), Pakistan Air Force Act, 1953 (VI of 1953) and Pakistan Navy Ordinance 1963 (XXXV of 1963), shall also be governed by this Act and rules made thereunder:

Provided that the Pakistan Army Act, 1952 (XXXIX of 1952) shall be made applicable in respect of employees in the service of the Authority to who section 2 of the said Act applies or employees in the service of the Authority for who a notification under section 8 of the aforesaid Act is issued.”

In view of above provision of section 9 (2) the Authority can regulate the matters relating to the terms & conditions of services of employees wherein a specific reference has been given with regard to “security clearance” and the learned counsel for the respondents time and again put his emphasis upon the term “security clearance” but the respondents could not demonstrate from record that what are the reasons which prevail upon the Authority while denying the right of promotion to the petitioners even there is no documentary evidence on record placed by the respondents due to their concept of security clearance and due to strategic organization behavior nor even they can demonstrate as to what are the factors which give rise to their non clearance of security even through the petitioners are qualified and their security has been cleared for the purpose of SPS-10 but their security has not been cleared for the promotion of SPS-11 & 12, respectively. I am of the view that if a person is not qualified in terms of fitness which includes the security clearance for the SPS-11 then he is also not qualified to hold the position of SPS-10 or lower ranks, therefore, the reasons put forward by the respondents authority under the garb of term “security clearance” is not sustainable in the eyes of law nor even there is any legal justification available on record to deny the rights of the petitioners for promotion.

9. The respondents have also placed the promotion rules/documents on record whereby any employee possessing such minimum qualification, experience and other conditions as may be specified in the rules shall be eligible for promotion to post reserved for Departmental Promotion in the higher grade although respondents are not contesting the case of the petitioners on the touch stone of other grounds of eligibility rather they are only putting their emphasis on the term “security clearance”. It is apparent from record that junior officers of respondent organization have been promoted to SPS-11 and SPS-12 respectively without considering the factors of promotion of present petitioners therefore, I am of the view that petitioners are entitled for the relief of promotion since their junior colleagues have been promoted under the law however, the relief claimed by the petitioners whereby the letter dated 23rd July 2013 has been impugned has no legal force in it, therefore, the relief claimed to that extent has denied and all the petitioners are declared to be entitled for promotion in their appropriate grades w.e.f. the date their juniors have

been promoted with all consequential benefits. Reliance is placed upon **2016 SCMR 1784**.

The instant writ petition is allowed to that extent only.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE

Irfan Ali

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