

ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

W.P. No.1370/2020
Javed Masih
versus
Capital Development Authority, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	11.08.2020	

Vide my detailed judgment of even date passed in W.P.
No.1324/2020 (Yasir Latif Gill & another vs. Capital Development
Authority, etc.) the instant writ petition is hereby DISPOSED OF.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 25.09.2020.

JUDGE

Khalid Z.

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.1324/2020

Yasir Latif Gill & another v. Capital Development Authority, etc.

W.P. No.1340/2020

Shahzad Malik v. Capital Development Authority, etc.

W.P. No.1341/2020

Zulfiqar Ali v. Capital Development Authority, etc.

W.P. No.1343/2020

Mohsin Zaheer Qureshi v. Capital Development Authority, etc.

W.P. No.1344/2020

Sumaira Butt v. Capital Development Authority, etc.

W.P. No.1345/2020

Ghulam Rasool, etc. v. Capital Development Authority, etc.

W.P. No.1346/2020

Atta Bari Arshad v. Capital Development Authority, etc.

W.P. No.1369/2020

Syed Hamid Ali Shah v. Capital Development Authority, etc.

W.P. No.1370/2020

Javed Masih v. Capital Development Authority, etc.

W.P. No.1371/2020

Ithbar Hussain v. Capital Development Authority, etc.

W.P. No.1372/2020

Ch. Zafar Mehmood v. Capital Development Authority, etc.

W.P. No.1373/2020

Muhammad Ramzan v. Capital Development Authority, etc.

W.P. No.1374/2020

Taj Muhammad Khan Niazi v. Capital Development Authority, etc.

W.P. No.1375/2020

Muhammad Razzaq v. Capital Development Authority, etc.

W.P. No.1414/2020

Ch. Muneer Ahmed v. Capital Development Authority, etc.

W.P. No.1415/2020

Ahmad ud Din Muhammad v. Capital Development Authority, etc.

W.P. No.1416/2020

Muhammad Shahzad Yasin v. Capital Development Authority, etc.

W.P. No.1515/2020

Muhammad Saleem Akhtar v. Capital Development Authority, etc.

Petitioners by: Mr. Taimoor Aslam Khan, Mr. Mudassar Abbas, Mr. Kashif Ali Malik, Syed Naeem Bukhari, Mr. Muhammad Imad Khan, Advocates in respective petitions.

Respondents By: Hafiz Arfat Ahmad Ch. and Ms. Kashifa Niaz Awan, Advocates for CDA.

Mr. Adil Aziz Qazi, Mr. Haseeb Hassan, Abdul Rehman Malik, Kalsoom Rafique, Advocates for MCI in respective petitions.

Date of Hearing: 11.08.2020.

JUDGMENT

MOHSIN AKHTAR KAYANI, J:- Through this common judgment, I intend to decide the captioned writ petitions as common questions of law and facts are involved in the same.

2. For the sake of brevity, the brief and consolidated facts of the captioned writ petitions are that petitioners while serving in the Capital Development Authority (CDA) on different scales have been promoted/upgraded to higher posts/scales, even in gazetted posts, after due approval of the Chairman, CDA being the competent authority. However, the apex Court had taken notice of a report of GEO News, dated 31.10.2014, aired regarding alleged illegal promotions, personal up-gradation, re-designation of officials/officers of CDA between the years 2007 till 2012, which has been numbered as HRC No.25394/2014, though the same was disposed of with direction to the aggrieved employees to agitate their grievances before the competent court. Later on, a Fact Finding Committee of five officers of the CDA was constituted to probe into the facts of alleged illegal upgradation/re-designation of CDA officers/officials and it was found that Rules and Regulations of the CDA have been violated in

upgrading/re-designating the officials/officers. Subsequently, the Member (Administration) under the instructions of Chairman, CDA constituted another Committee to scrutinize the replies against the explanations served upon the officers/officials in the light of Fact Finding Inquiry Report of 02.08.2017, whereby the said Committee observed that considerable employees were upgraded in violation of Rules and Regulations of the CDA. Consequently, the Chairman, CDA constituted yet another Inquiry Committee to review the cases examined by the previous two committees, whereby cases of 85 out of 1068 employees have been taken up by the said Committee for the purpose of carrying out scrutiny and it had been recommended by the said Committee to de-notify the illegally upgraded/ re-designated employees. The raising of objections/issues of petitioners on the recommendations of latter Committee has borne no fruit, which led to filing of different applications at different intervals by the affected employees, on the basis of which a detailed report was prepared by Director HRD, CDA highlighting the irregularities in the report of the Inquiry Committees and proposing the Chairman, CDA for constitution of a Regular Inquiry Committee, however the Chairman, CDA while ignoring said recommended/proposal of Director HRD, CDA together with the applications/representations of the petitioners/employees and without issuance of show cause notice to the petitioners has issued a de-notification/withdrawal order, dated 05.05.2020, and directed to revert back the petitioners to the post which they held prior to their upgradation and redesignation. Hence, the captioned writ petitions.

3. Learned counsel for petitioners contended that the impugned order dated 05.05.2020 has been issued in utter breach of Chapter 8 of the CDA Employees (Service) Regulations, 1992 as well as of Articles 4, 10-A, 14 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 as neither any notice nor any opportunity of hearing was afforded to the petitioners; that as many as three

(03) Inquiry Committees were constituted since 2017 and that too in violation of the procedure prescribed under Chapter 8 of the Regulations, 1992, therefore, rendering the entire exercise carried out by each Committee as a nullity in the eyes of law; that the judgment of the apex Court reported as 2015 SCMR 456 (Ali Azhar Khan Baloch v. Province of Sindh) has been applied with a misconceived notion as the same was rendered in the cases of civil servants, and as such, same is not applicable to the CDA employees; that petitioners have been meted out with discrimination as only 85 out of 1068 cases have been picked and chosen for carrying out the process of scrutiny, on the basis of which impugned order has been passed to the extent of those 85 employees, therefore, the same may kindly be set-aside and the CDA may be directed to consider the cases of petitioner on the recommendations made by the Inquiry Committee by holding a fresh DPC/DRC.

4. Conversely, learned counsel for respondents (CDA and MCI) opposed the filing of captioned writ petitions on the grounds that the same are not maintainable as petitioners have raised disputed questions of facts, which cannot be adjudicated upon by this Court in writ jurisdiction, even otherwise, the Service Regulations, 1992 of the CDA are non-statutory in nature and on this score also the writ petitions are not maintainable; that it is settled principle of law that in presence of a regular channel of promotion, upgradation cannot be granted, whereas the petitioners were illegally upgraded/re-designated in violation of Service Regulations; that the petitioners have been awarded opportunity of hearing and they had explained their positions before the relevant authorities, even otherwise, if an employee is succeeded in getting a benefit for which he is not legally entitled to, there is no need to conduct formal disciplinary proceedings; that it is settled principle of law that passing of an illegal order by the Executive Authority does not create any right in favour of any individual, therefore, the upgradation orders passed in favour of the petitioners were

patently illegal and same have been recalled by the respondent Authority vide the impugned order in the interest of justice, which is liable to be maintained.

5. Arguments heard, record perused.

6. Perusal of record reveals that the petitioners are mainly aggrieved by the order dated 05.05.2020, passed by the CDA, whereby petitioners' promotion / upgradation have been withdrawn and they were reverted to posts which they were holding immediately before re-designation/upgradation. The impugned order has been issued with common draft, therefore, it is necessary to reproduce the same for understanding of the proposition:

2. *Whereas, the Honorable Supreme Court of Pakistan in their Review Jurisdiction in CRP No.193/2013 in C.P. No.71/2011 (Crl. O.P. No.89/2011) ordered that all those employees who have been promoted to higher posts under the garb of up gradation having not been promoted in accordance with law need to be reverted to their substantive ranks/posts which they were holding immediately before their up-gradation and their seniority shall be determined along with their batch mates.*

3. *Further more, the Honorable Supreme Court of Pakistan in 2014 through a Suo-moto in Human Rights Case No.25394/2014 and Crl. O.P. No.18 of 2015 etc. regarding illegal promotions, personal up-gradation, re-designation of official/officer of CDA passed judgment dated 13.02.2019 stating that "wherein the cases which are germane before us in the present proceedings, we are of the view that same should be the result in the present cases also".*

4. *Moreover, Departmental Fact Finding Inquiry Committee constituted vide HRD letter No.CDA-5(355)-HRD-I/2017/611, dated 03.03.2017 on the matter opined that the cases of up-gradation / re-designation / change of cadre have been made without observing the laid down procedure and that too much pick and choose method and in certain cases without having the upgraded post may be de-notified.*

5. *Whereas another committee was constituted for giving personal hearing to upgraded/re-designated officers/officials vide letter No.CDA-5(355)HRD-1/2017/1969, dated 02.08.2017. The said committee after giving opportunity of personal hearing observed that, up-gradation / re-designation was made in violation to rules/policy and recommended for de-notification of their up-gradation orders.*

6. *Whereas, a third committee vide HRD letter No.CDA-5(355)HRD-I/2017/110, dated 28.01.2018 was constituted to review cases of up-gradation / re-designations in light of previous inquiry reports. The committee observed that their up-gradation / re-designation*

was made in violation to rule/policy and therefore, recommended de-notifying of both illegally upgraded and re-designated officers in light of the Supreme Court of Pakistan in Crl. O.P. No.18 of 2015 etc. decision dated 13.02.2019 read with CRP No.193/2013 etc. and CMA No.8540 of 2015 which has attained finality.

7. *Now therefore, the Competent Authority i.e. Chairman CDA after considering the facts of the case, the judgments of the Honorable Courts and recommendations of the committee, as elaborated at Para 06 has given approval to de-notify / withdraw the order(s)/Notification(s) of the individuals at Para 01. The offices are hereby reverted to the post which they were holding immediately before their re-designation/upgradation and their seniority shall be determined along with their batch mates in respective cadre in light of mechanism framed by the Honorable Supreme Court of Pakistan in review jurisdiction vides CRP No.193/2013 in Crl. O.P. No.71/2011 (CRP No.989/2011) read with Human Rights case No.25394/2014 in Crl. O.P. No.18 of 2015 etc.*

7. Abovementioned impugned order clearly spells out that same was initiated on the basis of direction of the apex Court, resultantly a Fact Finding Committee was constituted on 03.03.2017 to review the cases of upgradation/re-designation / change of cadre, whereby employees of CDA have been promoted to different positions without observing the procedure laid down in the CDA Employees (Service) Regulations, 1992 (*hereinafter referred to as "Regulations, 1992"*) by adopting pick and choose policy. As per impugned order, another committee was also constituted to afford personal hearing to the individuals who have been upgraded/ re-designated vide order dated 02.08.2017, even a Review Committee was also constituted on 28.01.2018 to review all the cases in the light of previous inquiry reports. Resultantly, petitioners have been de-notified and reverted to original positions they were holding immediately before their re-designation / upgradation, as such, out of 1068 employees only 85 have been dealt with in this manner.

8. All the petitioners have advanced their common arguments in their respective writ petitions that all three inquiries, if considered to be justified, then procedure provided in the Regulations, 1992 has to be followed as petitioners were enjoying their upgraded/promoted positions since long. During the course

of arguments, the CDA raised certain legal objections qua maintainability of instant writ petitions mainly on the ground that the Regulations of 1992 are non-statutory in nature and writ petitions are not competent. It has also been highlighted that as per delegation of Revised Schedule of Financial & Administrative Powers, 2007, it is mandatory/required in all matters relating to creation of post/ upgradation, the concurrence of Financial Advisor of CDA is *sine qua non* as per Regulation 3.02 of the Regulations, 1992, however said concurrence had never been obtained, which renders the creation of posts / upgradation / re-designation of posts in violation of the Regulations, 1992. It is pertinent to refer that Upgradation Policy of Establishment Division (2001) also makes mandatory in all matters of upgradation of post to get concurrence of the Finance Division at the first stage. There is no denial to proposition that upgradation is always for post and not for incumbent thereon, as such, for justifying the creation of post it is required to establish that the department needed reconstructing, reform or to meet the exigency of service in public interest. In absence of precondition, upgradation was not permissible. The said concept has been highlighted by the apex Court in case reported as 2015 SCMR 456 (Ali Azhar Khan Baloch v. Province of Sindh).

9. Even it has been settled that upgradation of post could not be done to benefit a particular individual by promoting him to a higher post and further providing him with the avenues of lateral appointment. Reliance is placed upon 2016 SCMR 859 (Regional Commissioner Income Tax, Northern Region, Islamabad v. Syed Munawar Ali). It has also been settled that upgradation was resorted to only for incumbents of isolated posts having no avenue or channel or promotion at all, as such, this concept is to address their stagnation and frustration on a particular post for sufficient length of service without any progression or avenue for promotion. Upgradation by no standard could be treated and/or considered as promotion to a higher grade. Reliance is placed

upon 2017 SCMR 890 (FPSC vs. Anwar ul Haq). There is no cavil to proposition that upgradation of post was distinct from promotion as held in 2017 PLC (CS) 1030 (Regional Commissioner Income Tax, Northern Region, Islamabad vs. Syed Munawar Ali, etc.). The Islamabad High Court in its reported judgment 2017 PLC (CS) Note 58 (Chairman FBR vs. Ata Muhammad Mehsood, etc.) held that the upgradation can only be proposed on the basis of circumstances mentioned in Clauses (a) to (d) of Para-2 of the policy issued by the Establishment Division, as such, without satisfying said pre-conditions no one is allowed to claim upgradation as a right. At the same time, it has also been held that discrimination in terms of violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 cannot be pleaded as a ground for upgradation of a post.

10. The petitioners have taken particular stance that they have been stigmatized, rather blamed for obtaining the upgradation/promotions by misrepresentation/fraud through an illegal manner, which ultimately led to passing of the impugned order, dated 05.05.2020 pursuant to two inquiry reports and one review. Later on, a show cause notice, dated 09.06.2020, has also been issued with common draft highlighting that in terms of Regulation 8.03(a) & (b) of Regulations, 1992 the cases of upgradation / re-designation and change of cadre of CDA officials were processed in sheer violation of the regulation, and without observing the policy/rules. It was further highlighted in the said show cause notices that the incumbent has achieved upgradation / change of cadre on the basis of pick and choose method, especially when they are not entitled to such position. As such the matter has been considered in terms of misconduct and inefficiency on the part of official concerned, who were instrumental in those up-gradation whereas the petitioners have been declared beneficiaries. This background discloses the application of major penalties referred in Chapter 8 (Discipline) of the Regulations, 1992, which deals with concept of misconduct, hence there is no cavil to proposition that procedure for disciplinary action in

Clause 8.06 has to be applied in strict sense followed by an inquiry procedure in terms of Clause 8.08 known as a regular inquiry, which provides (a) framing of charge, (b) reasonable time to the accused person to submit reply to the charge, (c) inquiry by the inquiry officer into the charge and examine the oral and documentary evidence in support of charge or defence of accused person, and (d) hearing of the case by inquiry officer and report the matter to authorized officer, whereafter the Authority in terms of Clause 8.09 may call for a record of any pending proceedings before the authorized officer and pass any order which it deems fit. The said concept of inquiry has to be considered at the touchstone of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 and a fair chance has to be given to the concerned employee to rebut the allegations.

11. In order to deal with the proposition as to whether the impugned orders of reduction in rank from the existing posts could have been passed by respondent authority without adopting the procedure provided for regular inquiry is legally justiciable or otherwise, such aspect has been considered in the light of judgment reported as 2009 SCMR 339 (Muhammad Haleem and another Vs. GM (Operations) Pakistan Railways and others), wherein it has been held that where the allegations/ charges/misconduct is of the nature requiring production of evidence to prove the same, then holding of a departmental inquiry is a necessary condition and dispensation therewith cannot be made as in the first place, there would be no evidence or material in possession of the department to establish and prove the charges/allegations of fact and secondly, that the civil servant proceeded against would be deprived of his right to defend himself properly as it would be possible for him to cross-examine the witnesses, who would depose against him and from their cross-examination, he could not elicit favourable and beneficial statements.

12. Similar view has also been rendered by the Apex Court in 2007 SCMR 639 (Salman Faruqi Vs. Javed Burki, Authorized Officer, Secretary, M/o Water &

Power, Government of Pakistan, Islamabad) where charge sheet against civil servant pertained to serious intricate, disputed and denied questions of fact where no prudent man, in such circumstances, could reach to conclusion that all such allegations of fact were true, without being proved and if not proved through holding regular inquiry it was violative of interest of justice. It has also been held that where charges were serious pertaining to intricate question of fact and where penalty of dismissal from service is likely to be imposed, a regular inquiry has to be conducted to prove such disputed question of facts. Similar view has also been rendered in 2007 SCMR 1643 (Syed Sajjad Haider Kazmi Vs. Director General (S&GAD) WAPDA) and 2017 SCMR 356 (Muhammad Naeem Akhtar Vs. MD Water and Sanitation Agency LDA, Lahore).

13. Respondent authority has raised question of maintainability of instant writ petitions on the ground that alternate efficacious remedy is available to the petitioners in terms of Regulation 20.03(2)(b) of the CDA Employees (Service) Regulations, 1992 i.e. the Appellate authority against the order of Chairman is the CDA Board, this particular stance has been taken in the additional written statement on behalf of CDA in pursuance of order dated 07.08.2020, which is reproduced as under:-

That the Regulation 20.03 of the CDA Employees Service Regulations, 1992 deals with appeals against an order other than an order imposing penalty and appellate authorities. The de-notification order impugned in the titled petition was issued with the approval of the Chairman CDA and the same is a case which falls within the ambit of the Regulation ibid. As per Regulation 20.03(2)(b) of the CDA Employees Service Regulations, 1992, the appellate authority against an order of the Chairman is the CDA Board.

14. In view of above contention of the CDA/respondent, it is necessary to go through the relevant provision of Regulations, 1992 referred above, same is reproduced as under:-

20.03. Appeal against an order other than an order imposing a penalty and appellate authorities. – (1).....

(2) *The appellate authority for purposes of sub-regulation (1) of this regulation shall be as follows:-*

a)

b) *Board from an order of the Chairman;*

15. While considering the above provision as well as record, it has not been denied that all the orders impugned before this Court have been passed by the Chairman CDA or on his direction and maintainability of instant writ petitions has to be considered in the light of judgments reported as PLD 2002 SC 526 (Shaukat Khan Vs. Assistant Political Agent, Landi Kotal, Khyber Agency and others), 2019 PLC (CS) 717 (Muhammad Salah ud Din Vs. The Islamia University of Bahawalpur), 2017 PLC (CS) 1222 (Tariq Hussain Vs. Government of Balochistan), 2017 PLC (CS) 304 (Abdul Aziz Vs. Secretary Finance) and 2016 PLC (CS) 424 (Abdul Hameed Vs. Province of K.P.K through Chief Secretary, Peshawar) and as such, it is the mandate of law while challenging the order of the proceedings of authority, remedy should be availed first of all within the hierarchy of the law under which forum proceedings have been objected to, instead of approaching different forums for redressal of the grievance, however, there is another problem highlighted during the course of arguments that as per Section 6 of the CDA Ordinance, 1960, "*the Board shall consist of not less than three (03) members to be appointed by the Federal Government*" and at present, the composition of the CDA Board is as under:-

- i. Mr. Amer Ali Ahmed, Chairman CDA.
- ii. Mr. Rana Shakeel Asghar, holding look after charge of Member (Admin) and Member (Finance).
- iii. Dr. Shahid Mehmood, Member (Planning and Design) with additional look after charge of Member (Engineering).
- iv. Mr. Naveed Elahi, Member Estate.

16. The above referred composition of the Board when confronted to the counsel of the CDA for the departmental proceedings against the petitioners,

following written stance has been taken by the CDA in compliance of order dated 04.08.2020:-

That the requisite quorum for a meeting of the Authority is three Members as per the CDA Ordinance, 1960. In the instant case, two of the Board Members namely, Mr. Amer Ali Ahmed (Chairman CDA) and Dr. Shahid Mehmood Member (P&D) with additional look after charge of Member (Engineering) are unable to participate in Board proceedings (to deal with departmental Representations of the petitioners) for the reasons that the impugned order in the captioned case and connected cases have been issued with the approval of Chairman CDA and thus he cannot sit in appeal on his own order. The other Member namely, Dr. Shahid Mehmood remained part of inquiry proceedings which inter alia became the basis for issuance of the impugned orders and for this very reason, it would not be appropriate for him to join Board proceedings to decide departmental representations of the petitioners.

17. The above referred technical defect faced by the respondent Authority could not be resolved by this Court, therefore, judicial intervention of the Court does not permit to supersede the alternate remedy by deciding the writ petitions in terms of judicial review without final order of the competent authority in terms of CDA Employees (Service) Regulations, 1992 as it amounts to denial of fundamental rights of the petitioners as to whether the up-gradation/promotion of the petitioners in different intervals of time was being made after due process of law by observing minimum requirements or otherwise, has to be checked by the appellate authority i.e. CDA Board in terms of CDA Ordinance, 1960.

18. In view of above position, instant writ petitions are hereby **DISPOSED OF** by converting the same into representations. Office is directed to transmit the petitions to the CDA Board for their adjudication in accordance with law, however, due to non-availability of the CDA Board members, Federal Government is directed to appoint members of the Board on vacant positions within period of six (06) months, in accordance with law, who shall convene their meeting after their appointment for adjudication upon all these representations within next six (06) months, accordingly. However, till then orders dated

05.05.2020 together with show cause notices dated 09.06.2020 (issued on the basis of inquiries), so passed against the petitioners or against any other official of the CDA, whereby they have been reverted to the previous positions, shall not be implemented. This order will cease to exist on the date when CDA Board finally adjudicates upon the representations and appeals of the petitioners or any other official of the CDA.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 25th Sept 2020.

JUDGE

Khalid Z.