

Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: F.A.O. No.73 of 2015

Masud Humayun

Vs.

Federal Public Service Commission etc.

**Appellant by: Mr. Muhammad Shoaib Shaheen,
Advocate.**

**Respondents by: Syed Hasnain Ibrahim Kazmi,
Deputy Attorney-General.
Ramiz Ahmed Director FPSC.**

Date of Hearing: 27.01.2016

AAMER FAROOQ, J.- This appeal is directed against orders dated 20.08.2015 and 25.06.2015 passed by respondent No.1.

2. The appellant appeared in the Competitive Examination 2013 and stood 4th on Sindh Urban merit list. His first choice was Police Service of Pakistan (PSP), however, according to the distribution of seats by respondent No.1 two seats from Sindh Urban were allocated for PSP and two from Pakistan Administration Service, therefore, the appellant since was 4th on the merit list was not awarded his first choice but was nominated for Inland Revenue Service. The appellant preferred a representation before respondent No.1 against allocation of PSP seats to minority quota which was turned down against which a review was filed which also was dismissed and the matter, now is pending in appeal before this Court (FAO No.69/2014). One Mr. Hamza Ali Abbasi who was allocated PSP from Sindh Urban and was to join 42nd Common Training Programme (CTP) corresponding to the Competitive Examination 2013 declined to accept the offer,

therefore, the Establishment Division sent a Reference to respondent No.1 for reallocation of the seat before start of 42nd CTP. Respondent No.1 did not make allocation vis-à-vis the seat vacated by Mr. Hamza Ali Abbasi. Since the seat vacated by Mr. Hamza Ali Abbasi belonged to Sindh Urban, therefore, the appellant made a representation for allocation of the seat to him. Respondent No.1 declined the representation of the appellant against which review was filed by the appellant which also was dismissed by the referred respondent vide the impugned order.

3. Learned counsel for the appellant *inter alia* submitted that on 30.10.2014 after vacation of the seat by Mr. Hamza Ali Abbasi the Establishment Division intimated the matter to respondent No.1 and asked for reallocation of the seat vacated by the referred person but the Commission declined to do the same without any justification or basis. It was further contended that according to Rules i.e. Rule 91 if valid offer of CTP is declined before the start of the same it shall go to the next position holder and in the present case since the appellant is the rightful candidate, he should have been allocated the Senate (Election) Act, 1975; that in a similar case of one Bilal Qayoom, respondent No.1 had made allocation which the appellant has been denied, therefore, he is being discriminated in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. The learned counsel also pointed out that relevant Rule/Law in this regard is Office Memorandum No.1/29/87/-T.V. dated 19.03.1991 in which any vacancy occurring before the start of the Programme shall be reported to Federal Public Service Commission for completing/ reallocation before commencement of the CTP at Civil Services Academy.

4. Learned Deputy Attorney-General *inter alia* submitted that after the announcement of the result of CSS Examination

2013 on 21.05.2014 the appellant was allocated Inland Revenue Service and as a result of allocation the matter vis-à-vis the appellant's posting has become past and closed transaction; that allocation against the unadvertised vacancies is not permissible under the relevant Rules inasmuch as the claim of the appellant for reallocation against an unadvertised/unfilled vacancy of PSP of CE 2009 conveyed by the Establishment Division to the Federal Public Service Commission on 30.10.2014 is unlawful as it is not a consequential vacancy i.e. from within the advertised vacancies for Competitive Examination 2013. It was also submitted that Mr. Hamza Ali Abbasi who qualified Competitive Examination 2009 was allocated PSP on Sindh Urban merit quota and was required to join 38th CTP but took deferment for four years and was supposed to join 42nd CTP but withdrew his letter of acceptance whereby the vacancy was created which was almost five and a half months after the advertisement of the vacancies for Competitive Examination 2013 and completion of entire process of allocation of groups and services vis-à-vis 2013 candidates. The learned Deputy Attorney-General emphasized that since the vacancy created by non-acceptance of PSP by Mr. Hamza Ali Abbasi was not a consequential vacancy i.e. from within the advertised vacancies but rather was an additional vacancy, therefore, the same shall be carried forward to the share of the same Province for the post to be advertised for Competitive Examination 2015 under Rule 17 of Competitive Examination Rules, 2013.

5. Admittedly, the appellant did not qualify for allocation of PSP according to merit and allocation made for Competitive Examination 2013 and therefore, was allocated Inland Revenue Service. One Mr. Hamza Ali Abbasi who had been a successful candidate and allocated PSP with respect to

Competitive Examination 2009 declined the acceptance of offer to join the 42nd CTP. In this behalf the referred candidate was originally to join 38th CTP, however, obtained repeated deferments in this behalf. Learned Deputy Attorney-General during the course of arguments pointed out that under Rule 3 of Occupational Groups and Services (Probation, Training and Seniority) Rules, 1990 every probationer has to undergo training in such Institutions and places which the Government may specify and in case the probationer fails to undergo such training and qualify the prescribed examination, shall render his qualification liable to be terminated without notice, however, the deferment vis-à-vis the training and examination may be obtained for one year only on the recommendation of the training Institution. The referred candidate i.e. Mr. Hamza Ali Abbasi obtained the deferment in violation of the referred Rules. Learned Deputy Attorney-General also pointed out that vide S.R.O. No.557(1)/2015 dated 19th March 2015 the said Rule has been amended since 19.05.2015 and now the deferment is not allowed at all, however, the said aspect is not relevant for the purposes of present controversy. In presence of Rule 23 of Competitive Examination 2013 Federal Public Service Commission announced the vacancies including the carried over vacancies to be filled on the basis of final result of the said examination. The same was done under Rule 14 of Federal Public Service Commission Conduct of Business Rules, 1963. After the examination under Rule 14 (v) of the referred Rules the Commission arranges the successful candidates in order of merit on the results of the examination and in conformity with the relevant Rules and the allocation is made on the basis of number of vacancies announced.

6. As mentioned above the appellant did not qualify on the merit for allocation of PSP from Sindh Urban, however, it is

only when Hamza Ali Abbasi declined that a representation was made by him for allocation of the seat. Both the sides have relied upon Office Memorandum No.1/29/87/-T.V. dated 19.03.1991, in furtherance of their stance. The relevant Office Memorandum is reproduced below for the sake of brevity and is as follows:

Government of Pakistan Establishment Division (Training Wing)	
No.1/29/87/-T.V.	Islamabad the 19 th March, 1991
<u>Office Memorandum</u>	
Subject: <u>RE-ALLOCATION AGAINST THE VACANCIES CAUSED BY REPEATERS/NON-JOINDERS.</u>	
<p>In supersession of the Establishment Division O.M. of even number dated 10th June, 1990 on the above subject, the undersigned is directed to say that it has been decided with the approval of the competent authority that w.e.f. Competitive Examination, 1990 following system/procedure with regard to re-allocation against the vacancies caused by the repeaters/non-joiners will be adopted:-</p> <p>“a. In the first phase, Establishment Division will issue telegrams to all the candidates allocated to various occupational Groups/Services with the advice to each candidate that he/she should convey his/her acceptance of the offer within 15 days from the date of issue of telegram failing which allocation will be treated as cancelled and the vacancy will be offered to the next eligible candidate. Simultaneously, the allocation made by the FPSC will also be announced in all the leading newspapers with similar advice to the candidates.</p> <p>b. In the second phase the vacancies occurring due to non-acceptance of offer within 15 days of the announcement will be reported to the FPSC for completing re-allocation before the commencement of the common training programme at the Civil Service Academy, Lahore. <i>Any vacancy occurring after the start of the common training will be carried over to the next competitive examination.</i></p> <p>c. The announcement of initial allocation shall be made 45 days before the commencement of CTP at CSA to ensure timely completion of both the phases indicated above”</p>	
(Shahid Humayun) Deputy Secretary (Tr) Ph 826712	
All Ministries/Division/Departments concerned, Islamabad/Rawalpindi, Lahore.	
Copy forwarded for information to:- <ol style="list-style-type: none"> 1. The Director General, Civil Services Academy, Lahore. 2. The Secretary, FPSC, Islamabad with the advice that the above instructions may be intimated to the candidates of competitive examination, 1990 at the time of issuing call letters for viva voce. 	
(Shahid Humayun) Deputy Secretary (Tr)	

7. The bare reading of the Office Memorandum shows that

vacancies occurring due to non-acceptance of offer within 15 days of the announcement shall be reported to Federal Public Service Commission for completing reallocation before commencement of the CTP at Civil Services Academy. Reference was also made to Office Memorandum at Sl. No. 36 of ESTA Code, 2007 bearing No.8/9/72-TRV, dated 31.08.1973 under which it is provided that vacancies which cannot be filled by candidates belonging to the Province or Region to which the vacancy is allocated should be carried over and re-advertised at later stage.

8. Admittedly, vacancy which has been created in the instant case is not with respect to the original advertised vacancies vis-à-vis Competitive Examination 2013 rather was a carried over vacancy due to repeated deferments obtained by Hamza Ali Abbasi. The stance of the learned Deputy Attorney-General is that since it is not the originally advertised seat vis-à-vis 2013 Competitive Examination, therefore, it cannot be reallocated in terms of the O.M. dated 19.03.1991 which now stands incorporated as Rule 17 of Competitive Examination Rules, 2014. The examination/reading of the referred Office Memorandum does not show that any distinction is made regarding the original vacancy or carried over vacancy rather, it provides the process for reallocation in cases of repeaters or non-joiners. Advertisement for Competitive Examination 2013 was made on 19.05.2014 whereas the vacancy was created on 30.10.2014 and was admittedly before the start of 42nd CTP. The vacancy so created was not in the category of advertised vacancy, neither original nor carried over. The vacancies are to be filled in line with the O.M. dated 19.03.1991. The stance of the appellant that he is entitled to the allocation of seat left by Hamza Ali Abbasi as being the next person on merit has substance inasmuch as OM dated 19.03.1991 makes no

categorization regarding the nature of vacancy created and also whether the same is with respect to advertised seats or otherwise. The learned counsel for the appellant pointed out that in past reallocations were made in similar circumstances which fact has not been rebutted by the respondents. In case titled *Province of Sindh and others v. Ghulam Hassan Bughio* (2014 SCMR 643) the Hon'ble Supreme Court of Pakistan distinguished its earlier decision reported as (1993 SCMR 1124) and observed as follows:

"In Musa Wazir case (quoted supra) the question was whether after merit list of competitive examination has been prepared and selection of successful candidates has been made, a waiting list can be prepared for further requisition of vacancies occurring. In this case this Court has observed as under:--

"... Combined competitive examination--- Posts vacated by non-joinder of selected candidates or subsequent requisitions for additional posts---Remedy---Where posts were vacated by non-joinder of selected candidates or subsequent requisitions were received, the ordinary course for the Public Service Commission and the Government should be to re-advertise those posts---Advisable practice in exceptional situation.

In the case of posts vacated by non-joinder of selected candidate's or subsequent requisitions received the ordinary course for the Commission and the Government should be to re-advertise it.

In an exceptional situation such additional vacancies subsequently reported to the Commission would get assimilated to the vacancies already advertised and the selection would take place from the result of the combined competitive examination as a single selection."

This Court has also referred to letter dated 8-1-1989 issued by the Commission in which it was specifically pointed out as under:--

"The Federal Public Service Commission

makes re-allocation only in the cases where the original nominees, fail to join the post. Therefore, this readjustment is only in limited cases and the new requisitions which are received thereafter are carried over to the next year examination which is their yearly feature."

It is, therefore, clear that the commission has already made clear that in case of non-joining of original nominee, re-allocation can be made for the post and this Court has not deprecated such practice.

9. In the case of Dr. Faizur Rehman (quoted supra) again the question before this Court was whether waiting list can be maintained or not and therefore, it has no nexus with this case.

10. In the presont case, the facts are very clear that admittedly the respondent had been placed at S.No.44 of the merit list and was allocated Section Officer group, however, due to non-joining of one of the original nominee Abdul Qudoos Sheikh son of Muhammad Siddique a vacancy had occurred and since apparently the respondent had the rural domicile like that of the Abdul Qudoos Sheikh and was on the top of the list, therefore, there was no bar in re-allocating him to the DDO group, as he has already qualified competitive examination. The learned High Court had allowed the petition in the following terms:--

"However, the case of the petitioner is different. In the present case the post did not fall vacant but was not occupied at all. Then such post had to be filled and should have been given to the candidate who was next on the merit list. The petitioner being the next in the line of the merit list should have been given the post of Deputy District Officer which was never occupied."

11. The learned AAG has failed to convince us that the above observations of the learned High Court are un-reasonable or against the regulations of the Sindh Public Service Commission. On the other hand, we are of the considered opinion that the judgment of the

learned High Court is unexceptionable and no interference is called from this Court. This petition being meritless is therefore dismissed and leave to appeal refused."

In case titled *Shamsuddin Qazi v. Federation of Pakistan through Secretary Establishment Division, Islamabad and 2 others* (2006 PLC (C.S.)170) The Hon'ble Division Bench of Sindh High Court observed as follows:

"In view of the fact that the respondents have not been able to controvert the factual position that there was a consistent practice of re-allocation of groups to the different candidates after the vacancies were caused, we are persuaded to hold that the petitioner was not treated at par with other incumbents and was discriminated upon on account of bureaucratic wrangling.

We may observed that during the arguments issued with regard to the jurisdiction of this Court was not raised on behalf of the respondents. Even otherwise we are of the firm view that / the matter which is subjudice before us does not fall within the ambit of Service Tribunal as re-allocation to a specific service group is not covered by the terms and conditions of service. Consequently, the bar of jurisdiction contained in Article 212 of the Constitution of Islamic Republic of Pakistan is not attracted in the instant case.

Upon the above discussion we have reached the conclusion that the petition merits to be allowed. The same is accordingly allowed as prayed with no order as to costs.

Similarly, Respondent No.1 has failed to point out any Rule or Regulation by virtue of which allocation on the vacancy created cannot be made. It is an established principle that whatever is not specifically prohibited is permissible. Reliance is placed on the case titled *Mohammad Ijaz Ahmed Chaudhry v. Mumtaz Ahmed Tarar and others* (2016 SCMR

1), *Haji Fazal Elahi and Sons through Muhammad Tariq v. Bank of Punjab and another (2004 CLD 162 Lahore) and Messrs Chawla International v. Habib Bank Limited and others (2003 CLD 956).*

9. In view of above, the instant appeal is allowed and impugned orders dated 20.08.2015 and 25.06.2015 are set aside; consequently the representation filed by the appellant is accepted.


(AAMER FAROOQ)
JUDGE

Announced in open Court on the 21st day of April 2016.


JUDGE

M.Naveed

Approved For Reporting