

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No. 4167 of 2016

Dr Yawar Sherwani
Vs
Federation of Pakistan, etc.

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
06)	<u>26-01-2021.</u>	Sardar Nasir Ahmed Sagir Advocate, for the petitioner in W.P. No. 860/2020. Syed Muhammad Tayyab, DAG. Mr Majid Khan, A.D. M/O National Health Services Regulation and Coordination.

ATHAR MINALLAH, C.J.- Through this order I shall decide the instant petition as well as W.P. No. 860/2020, titled "Ehsan-ul-Haq and others v. Secretary, Finance Division and others".

2. The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "**Constitution**"]. They are aggrieved because the respondents have stopped the payment of 'health allowance' and are now taking action to recover the already paid allowance. They have challenged letters, dated 27.10.2016, 03.01.2020, 10.01.2020, 11.02.2020.

3. The facts in brief are that the *Career Structure for Health Personnel Scheme Ordinance, 2011* [hereinafter referred to as the "**Ordinance of 2011**"] was promulgated

and notified in the official gazette on 27.08.2011. The expression 'health personnel' was defined in section 2(b) of the Ordinance of 2011. After lapse of the Ordinance, the Federal Government through office memorandum, dated 04.02.2012, took a policy decision regarding grant of adhoc allowance to the 'health personnel' in the employment of Federal Government, in BPS scheme, w.e.f. 01.01.2012. The said office memorandum was followed by issuance of office memorandum, dated 06.02.2012, whereby it was informed that the Federal Government had decided to grant benefit of one basic pay of running salary as health allowance to the health personnel in the employment of Federal Government in BPS scheme w.e.f. 01.01.2012. The Finance Division vide letter, dated 27.03.2012, clarified that health allowance will also be admissible to the non-clinical staff serving in Federal hospitals/clinics as per list attached with the said letter. The Capital Administration and Development Division vide letter, dated 19.03.2012, informed the Accountant General as follows:

"While extending the above benefit to all health personnel, the beneficiaries comprised all doctors/dentists/nurses (belonging to Administrative and General cadre, Clinical cadre and teaching cadre), allied professionals (pharmacists, Health Education experts, Special Education experts (holding at least M Phil special education degree), physiotherapists, paramedics, health secretariat/support staff serving in the Federal Government."

4. The learned Division Bench of this Court had allowed Intra Court Appeal no. 588/2013, titled "*Dr. Ayesha Shafique Raja v. District Health Officer, ICT, Islamabad and another.*" Perusal of the judgment, dated 08.12.2016, shows that the learned Division Bench had held that in the facts and circumstances of that particular case, the appellant was entitled to the health allowance. It was further held that excluding some health workers/practitioners from the scheme was discriminatory. The Federal Government challenged the judgment of the learned Division Bench and the august Supreme Court dismissed the appeal i.e. Civil Petition no. 2487/2017 vide order, dated 09.05.2018, on the ground of being barred by time. The petitioners were paid the 'health allowance' till issuance of the impugned notifications.

5. It was pointed out that the same grievances were earlier raised and a Single Bench of this Court had referred the matter to the Federal Government. The representation of health workers was dismissed by the competent authority. The aggrieved civil servants thereafter filed respective appeals before the learned Federal Service Tribunal. The learned Federal Service Tribunal allowed the appeals and the judgment had attained finality because according to the learned counsel for the petitioners, the august Supreme Court had dismissed the appeals preferred by the Federation. It is, therefore, obvious that
✓ the grievances of civil servants in relation to refusal on

part of the Federation to grant or discontinue payment of 'health allowance' are amenable to the jurisdiction of the learned Federal Service Tribunal.

6. The learned counsel for the petitioners has been heard at length. The learned counsel has primarily argued that a right had accrued in favour of the petitioners and, therefore, payment of health allowance could not have been stopped by the respondents. The learned counsel has placed reliance on the judgment of the august Supreme Court, dated 17.01.2018, passed in Civil Appeal nos. 1631 to 2112 of 2017, Civil Appeal nos. 216 of 2016 and Civil Appeal nos. 806 to 811 of 2016, titled "*Federation of Pakistan, through Secretary, Capital Administration and Development Division, Islamabad etc. v. Nusrat Tahir, etc.*" in support of his contention that the apex Court has held that employees posted against ministerial posts were also entitled to payment of 'health allowance'.

7. The learned Deputy Attorney General, on the other hand, has stated that though the payment of 'health allowance' to eligible civil servants has not been stopped but it has been clarified that employees working against ministerial posts were not included in the definition of the expression 'health personnel'.

8. The learned counsel for the petitioners and the learned Deputy Attorney General have been heard and the record perused with their able assistance.

9. The status of the petitioners is admittedly that of civil servants. Earlier similarly placed civil servants, claiming that they were entitled to receive 'health allowance' had invoked the jurisdiction of this Court under Article 199 of the Constitution and the matter was referred to the Secretary, Capital Administration and Development Division. The latter dismissed their representations and thereafter the aggrieved civil servants had approached the learned Federal Service Tribunal. Their appeals were competent and, therefore, subsequently allowed. According to the learned counsel for the petitioners, the august Supreme Court had dismissed the appeals filed by the Federal Government challenging the judgment of the learned Federal Service Tribunal. It is, therefore, established that the petitioners who are civil servants are amenable to the exclusive jurisdiction of the learned Federal Service Tribunal relating to their grievances raised through the instant petition.

10. It is settled law that the bar under Article 212 is of constitutional nature and, therefore, curtails the jurisdiction of this Court in respect of matters committed to the learned Federal Service Tribunal. Reliance is placed on the case of '*Khalid Mehmood Wattoo v. Government of Punjab and others*' [1998 SCMR 2280].

11. It is also settled law that the jurisdiction of a High Court is barred under Article 212 of the Constitution even

if an order assailed before the High Court or the proceedings are *malafide*, *coram-non-judice*, without jurisdiction or on the ground of violation of fundamental rights. Reliance is placed on the cases of '*Peer Muhammad v. Government of Balochistan through Chief Secretary and others*' [2007 SCMR 54], '*Syed Arshad Ali and others v. Pakistan Telecommunication Company Ltd and others*' [2008 SCMR 314], '*Khalid Mehmood Wattoo v. Government of Punjab and others*' [1998 SCMR 2280] and '*Noor Badshah Khattak v. Government of N.W.F.-P and others*' [2004 PLC (CS) 1084].

12. The grievances of the petitioners are twofold. Firstly, they are aggrieved on account of the clarification issued by the Federal Government through the impugned notifications and secondly, because the Accountant General Pakistan Revenues [hereinafter referred to as the "**Respondent no. 2**"] has initiated proceedings for recovery of the allowance already paid to the petitioners. The grievance of the petitioners i.e. whether they are entitled to claim payment of 'health allowance' in terms of section 2(b) of the Ordinance of 2011 read with the policy decisions taken by the Federal Government, is amenable to the jurisdiction of the Federal Service Tribunal and, therefore, it cannot be adjudicated while exercising jurisdiction under Article 199 of the Constitution. However, it is not disputed that the payment of 'health allowance' already received was pursuant to authorization

given by various competent authorities prior to clarification issued by the Finance Division. It is not the case of the Federation that the petitioners had obtained the benefit through concealment of facts. There is nothing on record to indicate that the payment was received by the petitioners through fraud. The Federal Government has failed to satisfy this Court that in the facts and circumstances of the matter in hand, recovery proceedings are warranted at this stage. Nonetheless, recovery if any would be subject to the final outcome of appeals which the petitioners may prefer before the learned Federal Service Tribunal. The learned Deputy Attorney General was not able to show any law authorizing recovery of already paid 'health allowance', particularly when it is not alleged that the petitioners are at fault. The petitions are, therefore, **allowed** to the extent of recovery proceedings initiated by the Accountant General of Pakistan. The petitioners would be at liberty to avail their right of appeal before the learned Federal Service Tribunal provided under the Service Tribunals Act, 1973.

13. The petitions are, therefore, **disposed of** in the above terms.

(CHIEF JUSTICE)