

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

W.P.No...3032-P of 2014

JUDGMENT

Date of hearing _____ **03.06.2015** _____

Petitioner _____

Respondent _____

NISAR HUSSAIN KHAN, J.- *Through this single judgment, we intend to dispose of two writ petitions, bearing No.3032-P/2014 titled "Abdul Haseeb Vs Principal Karnal Sher Khan Cadet College, Swabi and others" and W.P. No.494-P/2015 titled "Jehanzeb Vs Principal, Karnal Sher Khan Cadet College, Ismaila, Swabi and others", as common questions of facts and the law are involved therein.*

2. *Petitioner of W.P.No.3032-P/2014 has averred in his petition that he was appointed as Lecturer (Math) in BPS-17 after going through due process of recruitment on regular*

basis in the Karnal Sher Khan Cadet College, Swabi on 25.7.2012. He maintained that after his appointment, he performed his duty to the entire satisfaction of the college administration. However, with the change of administration, he was in hot waters and ultimately he was terminated by the Acting Principal on 25.4.2014 . It is contended on behalf of the petitioner that Acting Principal is not competent authority to pass his termination order which is sheer violation of rules; that the impugned order has been passed without issuance of any show cause notice or providing any opportunity of hearing in defence which is against the principle of law and natural justice.

3. *In W.P.No.494-P/2015, Jehanzeb Khan petitioner has averred in his petition that he was appointed as Computer Lecturer (BPS-17) In the Cadet College Palandri, on the recommendation of the Selection Board on 22.9.2003 on regular basis after due process of recruitment. He maintained that after rendering 8 years service in the said College, he in response to an advertisement floated by the administration of Karnal Sher Khan Cadet College, Swabi, applied for the post of Assistant Professor for which he was selected in BPS-18 by*

the Selection Board with three advance increments on 4.9.2011. He maintained that on 13.1.2015, principal of the College, out of the blue, communicated retrenchment letter without assigning any reason. It is contended on his behalf that the principal was not the competent authority to pass retrenchment order nor such order could have been passed without assigning any reason and issuance of show cause notice.

4. *Respondents in their comments filed in W.P.No. 3032/2014 have pointed out the continuous absence and persistent neglect of duties on the part of petitioner. According to them, despite issuance of several notices, he did not respond which ultimately culminated into passing of termination order.*

5. *While in their comments, in response to W.P.No.494-P/2015, it is maintained by the respondents that Karnal Sher Khan Cadet College, Swabi, primarily runs on the tuition fee of the Cadets having no independent source of income nor government provides any funds, so cannot retain surplus or inefficient staff. It is further averred that though*

initially Karnal Sher Khan Cadet College, Swabi, offered three categories of choices of studies to the aspirant students comprising pre-engineering, pre-medical and computer sciences but with the passage of time, students did not show interest in the Computer science. Since 2011, only one student opted for ICS, hence services of the petitioners were dispensed with.

6. *Learned counsel for respondents at the very outset raised a preliminary objection on the maintainability of instant petitions. He contended that Regulations relied upon by both the petitioners are not gazetted, hence in terms of Section 2(41) of the West Pakistan General Clauses Act 1956, it cannot be termed as a legal Notification hence the regulations are not statutory, so this court cannot interfere with action of the respondents, taken on the basis of non-statutory rules. In support of his arguments, he placed reliance on case titled The Principal, Cadet College, Kohat and another Vs Muhammad Shoaib Qureshi (PLD 1984 – Supreme Court – 170).*

7. *Learned counsel for petitioners in response to preliminary objection, contended that the Regulations have*

been framed in compliance with Section 20 of KPK Government Educational and Training Institutions Ordinance, 1971 which does not contain any condition of the publication in the official gazette. He maintained that Regulations applicable to the petitioners are in accordance with Section 20(2)(e) of ibid Ordinance, so are the statutory one, hence writ petition against any adverse action taken in violation thereof is maintainable. To augment his argument, he placed reliance on the judgment of the august Supreme Court in Civil Appeal No.495 of 2010 titled The Rector National University of Sciences and Technology (NUST), Islamabad and others Vs. Driver Muhammad Akhtar decided on 28.4.2011 and Civil Petition No.1563 of 2012 titled Muhammad Zubair and others Vs Federation of Pakistan through Secretary, Ministry of Defence and others decided on 26.2.2013 and cases of Pakistan Defence Officers' Housing Authority and others Vs Lt.Col. Syed Jawaid Ahmad (2013 SCMR 1707).

8. *Learned counsel for petitioner in W.P. No.3032/2014 while arguing the case on merits, contended that the impugned termination order has been passed by the Acting Principal who is non-entity in the regulations*

governing the services of the employees. He maintained that Chairman of the Board is the competent authority, to pass such order. He maintained that the termination order contains an element of misconduct which is a stigma on the petitioner for all times to come and no such order can be passed without affording opportunity of hearing to the affected party for which show cause notice and enquiry are sine qua non. He referred to the result of the College with reference to the petitioner and maintained that his performance was outstanding.

9. *Learned counsel for petitioner in W.P.No.494/2015 contended that Jehanzaib Khan petitioner was previously performing his duty in Cadet College Palandri, wherefrom he opted for the instant institution where he was appointed on 4.9.2011 in BPS-18; that the impugned retrenchment order is illegal and violative of law and natural justice. He maintained that the petitioner though filed appeal but it was not forwarded to the competent authority, so it has not been decided as yet.*

10. *Learned counsel for respondents in response to arguments of petitioner in W.P.No.3032/2014 contended that an FIR was registered against petitioner for a brawl occurred*

in the College premises; that he filed mercy petition to the Board of Governors which was regretted; that result of his F.Sc class was very poor, that the result pointed out by the learned counsel for petitioner is aggregate result of the College including two others sections, whose performance and result was outstanding while result of the petitioner's class was pathetic. He maintained that neither petitioner has been condemned unheard nor any violation of rules has been committed by the respondents. He maintained that the Rules empower the respondents to pass impugned termination orders.

11. *In response to the contentions of petitioner in W.P.No.495/2015, the learned counsel for respondents maintained that the government does not provide any grant to the college and it runs on its own resources, generated from the fees of the students, so the staff and especially the teaching faculty is required to be efficient and responsible.*

12. *Primary question to be resolved in the case is the objection of the respondents as to whether the instant petitions are maintainable? The answer of the question, in turn*

is based on the resolution of the question that; whether the service regulations, pressed into service by the petitioners, are statutory? To resolve the controversy, we will have to revert to the parent Statute under which the service Regulations have been framed. The parties are unanimous on the point that Karnal Sher Khan Cadet College, Swabi, was established in pursuance of Section 3 of KPK Government Educational and Training Institutions Ordinance, 1971 (KPK Ordinance No. III of 1971). Thus, undeniably the College is a statutory body, as such is amenable to the writ jurisdiction of the High Court. The question as to whether any action taken by the management of the College against employees is susceptible to the writ jurisdiction, may be resolved while reverting to Section 20(2)(e) of the ibid Ordinance which for proper appreciation of law is reproduced in extenso, as below:-

“20.Regulations.-

(1).The Board may, subject to the approval of Government, frame regulations not inconsistent with the provisions of this Ordinance and the rules made thereunder, to carry out the purposes of this Ordinance.

(2). In particular and without prejudice to the generality of the foregoing power, such regulations may provide for—

(a). xxxxxxxxxxx

(b).xxxxxxxxxxx

(c).xxxxxxxxxxx

(d).xxxxxxxxxxx

(e).the recruitment, tenure of office, terms and conditions of service of the officers and servants appointed by the Board.

(f).xxxxxxxxxxx

(g).xxxxxxxxxxx

(h).xxxxxxxxxxx”

13. Simple recital of the regulations manifests that to carry out the object of the Ordinance, with reference to recruitment, tenure of office, terms and conditions of service of the officers and servants, appointed by the Board, Regulations may be framed with prior approval of the Government by the Board. There is no stipulation of notifying the said Regulations. The only condition imposed is that the regulations must be framed with the prior approval of the Government. The regulations so framed and appended with the petitions as Annexure-A, clearly denotes that the same were made in compliance with Section 20(2)(e) of KPK Government Educational and Training Institutions Ordinance,

1971 (KPK Ordinance No.III of 1971) with prior approval of the Provincial Government of KPK. There is no pre-condition imposed by the parent statutory clause for the regulations to be gazetted through the Notification. The requirement of the *ibid* section has squarely been complied with by soliciting the prior approval of the Provincial Government of KPK for making the regulations, hence it can safely be concluded that the service regulations of Karnal Sher Khan Cadet College Swabi are statutory being in accordance with legal requirement of the parent statute.

14. Precedent case of The Principal, Cadet College, Kohat and another Vs Muhammad Shoaib Qureshi (PLD 1984 – Supreme Court – 170) relied upon by the respondents for non-maintainability of the petition is distinguishable on its peculiar facts. Careful perusal of the judgment clearly suggests that Cadet College, Kohat, was established under the West Pakistan Government Educational and Training Institutions Ordinance, 1960 (Ordinance No.XI of 1960). Section 18(2)(e) of the said Ordinance, contemplates that the Board for carrying out the purposes of the Ordinance, may frame regulations for the matters of recruitment,

tenure of office, terms and conditions of the officers/servants appointed by the Board with prior approval of the Government.

It appears that Section 20(2)(e) KPK Government Educational and Training Institutions Ordinance, 1971 (KPK Ordinance No.III of 1971) is replica of Section 18(2)(e) of Ordinance-XI of 1960 of West Pakistan Government Educational and Training Institution Ordinance, 1960. It was re-enacted after the dissolution of Province of West Pakistan by repealing the earlier Ordinance, of 1960. In the precedent case, though Board of Governors did frame rules for appointment, promotion, retirement, termination and dismissal of staff employed by the Board of Governors but those were not approved by the Government, hence were not treated as regulations framed in contemplation of Section 18 of Ordinance No.XI of 1960. In that eventuality, august Supreme Court was pleased to hold those regulations as mere instructions issued for the guidance of the Board of Governors and nothing more than that. Thus it was concluded that since regulations pertaining to the Services of the employees of Cadet College Kohat were not framed with the prior approval of the Government, so those were declared to be as non-

statutory, being in derogation of Section 18(2)(e) of the Ordinance NO.XI of 1960. While it is not the case herein. The Regulations of Karnal Sher Khan Cadet College, Swabi, have been framed with prior approval of the Government of KPK, hence the principle laid down in case of the Principal ,Cadet College Kohat (supra) is inapplicable to the instant petitions.

15. *In the case of Masood Ahmad Bhatti and others Vs Federation of Pakistan through Secretary, M/O Information Technology and Telecommunication and others (2012 S C M R - 152), the august Supreme Court observed, while deciding appeal against judgment of High Court of Sindh, Karachi, that the judgment in the case of PIAC & others Vs Tanvir ur Rehman and others (PLD 2010 Supreme Court – 676), was distinguishable on its own merits. In Tanvir ur Rehman’s case , it was held that though the regulations have been framed by the Board of Directors of the PIAC in contemplation of the Section 30 of the PIAC Act but were not framed with the sanction of the Central Government nor were gazetted or laid before the National Assembly in compliance with Section 31 of the PIAC Act so it was concluded that the regulations of PIAC were non-statutory having not been framed in compliance with*

Sections 30 & 31 of the PIAC Act. Cases of appellants in Masood Ahmad Bhatti & others' case, were distinguished by holding that Section 9 of the PTC Act gave protection to the services of the employees who were earlier remained employees of T & T Department prior to 1996 who in turn were governed by statutory rules of civil servants i.e., Civil Servants (Efficiency and Disciplinary) Rules, 1973, and Civil Servants (Appointment, Promotion & Transfer) Rules, 1973. Similarly, in case of Rector National University of Sciences and Technology (NUST), Islamabad and others Vs Driver Muhammad Akhtar, it was argued on behalf the appellant that their rules are non-statutory in nature as the same have neither been approved by the government nor notified in the official gazette. The august Supreme Court repelled this stance of the appellant and it was held that section 21 of the Act stipulates for making of Statute to regulate the services, pension and fringe benefits and other terms and conditions of the employees of the University which may be enforced after its approval by the Board/Chancellor. It was clearly observed that Section 21 does not require approval of the government of the proposed statute nor its notification. Rather it prescribes

its own procedure. It was concluded that since requirement of Section 21 of the Act was fulfilled, so regulations of the NUST were statutory, having been framed in accordance with the procedure prescribed in the Statute.

16. *In case of Muhammad Zubair and others Vs Federation of Pakistan through Secretary Ministry of Defence and others in CP No. 1563 of 2012 decided on 26.2.2013, the august Supreme Court was pleased to reverse the findings of the Islamabad High Court on the point of maintainability by holding that National Command Authority Employees Service Rules, 2011 are statutory because they have been framed by the authority in contemplation of Section 7 read with Section 9(2) and Section 15 of National Command Authority Act 2010. The rule making powers have been exclusively vested in the authority by the Act in which no condition of the prior approval of the Federal Government or any other authority has been imposed.*

17. *Similarly in case titled Pakistan Defence Officers' Housing Authority and others Vs Lt.Col. Syed Jawaid Ahmad (2013 SCMR 1707), after detailed survey and scrutiny*

of the case law since Muhammad Mubeen-us-Salam and others Vs Federation of Pakistan through Secretary, Ministry of Defence and others (PLD 2006 Supreme Court - 602), it was observed by the august Supreme Court that if there is a statutory intervention like Removal from Service (Special Powers) Ordinance, 2000, in matters of service of an employee of a statutory body, he can maintain a writ petition by invoking constitutional jurisdiction of the High Court, though there may not be statutory rules governing the services of such employees.

18. *This brief survey of the case law clearly demonstrates that status and nature of the Rules or Regulations governing the services of the employees is to be determined with reference to the statutory instrument conferring rule making power on the concerned authority. When the statute provides that Rules may be framed by the concerned authority subject to the approval of the government, central or provincial, as the case may be, and shall be published in the official gazette, it must be followed and framed in the same manner. If the condition stipulated in the statute has not been followed and the rules/regulations are*

not framed, as prescribed in the statute, it may conveniently be termed as non-statutory. However, if there is no such condition imposed by the statute for the publication of the Rules/Regulations in the official gazette, it may not be poked into on any hypothesis. The rule making authority, in contemplation of the parent statute, cannot supply, what is not required of it nor can accord approval beyond its mandate. It cannot be demanded of, nor supposed to make any addition, alteration or subtraction in the elementary scope of delegating provision. It follows that the Rules/Regulations framed strictly in accordance with the requirement of statute would be statutory and shall accordingly have inbuilt statutory credence.

19. *In the instant case, the regulations have been framed by the Board of Governors of the Karnal Sher Khan Cadet College, Swabi, with the prior approval of the Government of the KPK in compliance with Section 20(2)(e) of KPK Government Educational and Training Institutions Ordinance, 1971 (KPK Ordinance No.III of 1971), which is in complete accord with the statutory requirements. The ibid section of law does not require publication of the regulations in the official gazette, hence regulations are statutory in nature. The objection on maintainability of writ petition is*

untenable. Since regulations governing the services of the employees of Karnal Sher Khan Cadet College, Swabi, are statutory in nature, hence any adverse action taken in violation of the regulations, is amenable to the writ jurisdiction of the High Court in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

20. *Now we proceed to discuss, merits of the cases. The appointment order of Abdul Haseeb petitioner was issued with effect from 25.8.2012 against the post of Lecturer (Math) in BPS-17 on regular basis and it is stipulated in Clause-4 of his appointment order that he shall be on probation for a period of one year which was to expire on 25.8.2013. However, he has been terminated on 26.8.2014 vide order of Acting Principal with the allegation of persistent poor conduct and discipline, lack of respect for college rules/regulations with continuously leaving the college premises at will, without any information/intimation to the authority concerned and lastly for the poor result shown in Higher Secondary Certificate Examination in the Board of Intermediate and Secondary Education, Mardan. Petitioner has annexed merit list of Board of Intermediate and Secondary Education Mardan, pertaining to annual examination 2014. Since petitioner is Lecturer of*

Mathematics, so his performance relates to Pre-Engineering group. According to the merit list (Annexure-F), top-1 to 5 and 10th positions in the Board have been taken by the Karnal Sher Khan Cadet College, Swabi. Similarly subject-wise result of 2013-14 (Annexure-G), shows that petitioner's performance is satisfactory as he stands at 3rd position of the merit and first position in his subject of Math as pitched against other subjects. Record annexed with the petition obviously contradicts the stance of the respondents and reasons advanced in the termination order. So bad performance of the petitioner could not be substantiated by the respondents through any substantial record.

21. *Rule 18 of the Captain Karnal Sher Khan Shaheed (NH) Cadet College, Swabi Employees (Terms and Conditions of service) Regulations, 2013 empowers the Chairman of the Board to terminate services of employees of BPS-17 and above. While Principal can pass termination order of employees of BPS-16 and below. Admittedly, petitioner is an employee of BPS-17, so termination order passed by the Acting Principal is in sheer violation of the Regulation No.18, hence is not sustainable.*

22. *Since respondents have levelled allegations of misconduct, insubordination and non-adherence to discipline and rules of the College, they were required to put him on notice and conduct proper enquiry where he could have offered his defence. Though there is no such procedural provision in the regulations regarding the services of the employees that how disciplinary action taken and enquiry proceedings are to be conducted against delinquent employee, the respondents could have taken recourse to the general rules and have afforded proper opportunity to the employee, to offer his defence and explain his position. It is established principle of law, having universal application that nobody should be condemned unheard, particularly when there is a charge of misconduct, stigmatizing his career. In such circumstances, proper course of enquiry was inevitable which has wrongly been bypassed by the respondents. Beside that it is basic concept of the penal laws that the punishment must commensurate to the nature of the guilt. Spirit of penal law is to get the accused realized about his responsibilities to the society as well as to his service.*

23. *Jehanzeb Khan petitioner in W.P.No.494/2015*
was appointed as Assistant Professor (BPS-18) in Computer Sciences with effects form 4th September, 2011. The terms and conditions of his service are also the same, i.e. he was put on probation for a period of one year. He has been terminated, vide impugned order dated 13.1.2015 which was to take effect from 2.12.2014, by intimating, that post of Assistant Professor (BPS-18) Computer Sciences has been retrenched. It is pertinent to mention that his appointment order does not denote that he was a contract employee. There is no allegation of misconduct or indiscipline against him. Though the petitioner has been terminated/retrenched by virtue of Clause-5(b)(1) of his appointment order but it is in violation of regulation No.18 of the Karnal Sher Khan Cadet College, Swabi. By virtue of Regulation No.18 ibid, only Chairman is the competent authority to terminate the employees of the College serving in BPS-17 and above while principal can only pass termination or retrenchment order of employees of BPS-16 and below. Since the impugned order is in violation of Rule 18 ibid, which is statutory one, hence the same is not sustainable. It is well settled principle of law that the act or

things are to be done in the manner as provided by the law and the rules or not at all. Since petitioners have been treated in derogation of the regulations governing their services, hence the impugned orders are declared as illegal, unlawful, without jurisdiction, having been passed without lawful authority and of no legal effect and are consequently struck down.

24. Respondents in case of Abdul Haseeb may proceed in accordance with general rules of issuance of show cause notice and enquiry and pass an appropriate order through competent authority but proportionate to his quantum of guilt if proved. Whereas in the case of Jehanzeb Khan petitioner in W.P. No. 494/2015, respondents may make use of his services in any other field, if possible, so that a brilliant brain may not be wasted because he has joined service with the respondents after leaving the service from another cadet college with a legitimate expectation of prosperous and bright future. Thus by passing any order, respondents should strike balance in exercise of discretion which must be exercised justly, fairly and reasonably with judicious application of mind.

25. *Both these petitions are allowed in the above terms.*

JUDGE

*Announced on
3rd June, 2015*

JUDGE