

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P No.5938-P/2019

**Tahsin Ullah V/s The Chairman Khyber
Pakhtunkhwa, Public Service Commission &
others.**

Date of hearing 16.12.2020

**Mr. Akhunzada Ahmad Saeed, Advocate, for the petitioner.
Syed Sikandar Hayat Shah, AAG, alongwith S.O (Lit)
E&SE Deptt and Mehtab Gul Law Officer KPPSC.**

JUDGMENT

SYED ARSHAD ALI, J. Through the instant constitutional petition, the petitioner has challenged the impugned refusal/order of the Khyber Pakhtunkhwa, Public Service Commission (respondent No.1 to 3) by not recommending his name for appointment against the post of Subject Specialist (Statistic) despite being top on the waiting list on the eve of non-joining of the one post by one of the recommended candidate namely Wazibullah.

2. The learned counsel appearing on behalf of the petitioner has argued that the petitioner had applied against the post of Subject Specialist Statistic, pursuant to the advertisement issued by the respondent/Public Service Commission. His name appears at serial No.79 of the merit list. He being the domicile of Bajour, falls in Zone-I.

Wazebullah who also belong to Zone-I, was one of the candidate from Zone-I, who was recommended for the post, however, despite the fact that he did not join the service as he was already appointed against the same post in earlier process of appointment under the auspices of the Khyber Pakhtunkhwa, Public Service Commission (*“Commission”*). Similarly, the other two candidates namely Muhammad Arif & Atta-Ur-Rehman, who were higher on merit from the petitioner, have also refused to join the service/post in question for the same reason, therefore, the present petitioner being next on merit was eligible for appointment against the post, in view of the waiting list policy of the Commission. The learned counsel has placed reliance on “*Saiful Haq V/s Government of Khyber Pakhtunkhwa through Secretary and 4 others* [2020 PLC (C.S.) 276], *Musa Wazir & 2 others V/s N.W.F.P Public Service Commission through its Chairman and others* [1993 SCMR 1124], *Shahid Habib V/s Government of Khyber Pakhtunkhwa through Secretary Elementary and Secondary Education Department Peshawar & 3 others* [2019 PLC (C.S) 1426], *Government of N.W.F.P through Secretary Education Department, Peshawar & others V/s Qasim Shah* [2009 SCMR 382], *Dr. Sumera Tabassum V/s F.P.S.C & others* [2016 SCMR 196], *Muhammad Saeed Zafar V/s District Co-Ordination Officer, Mianwali & 2 others* [2017 PLC (C.S) Note 5], *Shabana Akhtar V/s District Co-Ordination Officer, Bhakkar & 2 others* [2012 PLC (C.S)

366], *Rafaqat Ali V/s Executive District Officer (Health) and others [2011 PLC (C.S) 1615], Tayyaba Komal V/s District Co-Ordination Officer, Sialkot & 4 others [2014 PLC (C.S) 378], Mst. Fouzia Bano V/s Secretary, Population Welfare Department, Lahore & 2 others [2011 PLC (C.S) 226], Muhammad Ayaz Sohail V/s Director, Anti-Corruption, PUNJAB, Lahore & others [2000 PLC (C.S) 453]*”.

3. On the other hand, the learned AAG while controverting the arguments of the learned counsel for the petitioner has argued that the appointment from waiting list is valid only when a candidate, although recommended, but does not join the service, however, in the case in hand Wazebullah had joined the service as evident from his arrival report, therefore, the recommendation of the present petitioner for the said post was rightly declined by the Commission.

4. Through an advertisement No.02/2017 the Commission had invited applications for appointment against various posts including 38 numbers of posts of Male Subject Specialist Statistic (BPS-17) in Elementary and Secondary Education Department. The present petitioner has participated in the process of appointment and according to the tentative merit list the name of the petitioner appears at serial No.79. Out of 38 posts, 10 posts were to be filled on merit, whereas, 06 posts were to be filled from Zone-I and Zone-II each, 07 posts from Zone-III, 05 posts from Zone-IV, and 04 posts from Zone-V. The name of Wazebullah S/O Muhammad Azeem appears at

serial No.05 of the merit list, and his Zone is mentioned in the said list as Zone-I. Muhammad Arif and Atta-Ur-Rehman, whose names appears at serial No.74 & 76, belong to the same Zone and, thus, they are higher on merit from the present petitioner.

5. Through notification No.FS/E/100-96(Vol-16)/5642-52, Dated 23.07.2018, the Appointing Authority/the FATA Secretariat, had issued the appointment order of 05 Subject Specialist Statistic. Similarly, another notification dated 23.10.2018, shows the date of arrival of Wazebullah as a Subject Specialist in the Appointing Department as 01.08.2018. However, through letter dated 30.10.2018, the Appointing Department i.e. Elementary and Education Department of Khyber Pakhtunkhwa has requested the Commission to furnish recommendation of the candidate next in merit in the Subject of Statistic owing to refusal of Wazebullah for joining the said post because he was recommended against the said post by the Commission against the earlier process of appointment. Through letter dated 24.02.2018, the Commission had solicited further information from the Appointing Department regarding the non-joining of one of the candidate namely Wazebullah. In reply to the said letter, the appointing department through letter dated 14.02.2019, has categorically mentioned that Wazebullah had submitted his refusal for appointment against the post before starting of the process of appointment and, thus, he was not

referred to Standing Medical Board for medical examination and to Special Branch for verification of his character and antecedents. Finally, the Commission has regretted the sending of recommendation through letter dated 12.01.2019, for the reason that since Wazebullah, the duly appointed selectee had submitted his arrival report before the Competent Authority on 01.08.2018, therefore, in view of the non-joining policy of the Commission further recommendation could not be sent for appointment against the said post.

6. The fact that after Muhammad Arif and Atta-Ur-Rehman, the present petitioner is on the top of the waiting list meant for Zone-I, has not been controverted by the respondents. Similarly, the affidavit of Muhammad Arif and Attar-Ur-Rehman, available on the file, shows that they too were appointed against the earlier process of appointment against the post of Subject Specialist in Statistic.

7. Prior to judgment of the Apex Court in *Musa Wazir's case* (1993 SCMR 1124), the Public Service Commission would maintain a waiting list for 06 months, for appointment in case of further availability of the post. This practice more particularly in the competitive examination had resulted in various anomalies in allocation of attractive group to a person who were lower on merit but owing to the subsequent requisition/availability of the post were offered the said post and the candidates who were higher on merit in the first process of appointment were to be allocated lesser attractive

post. In this view of the matter, the Apex Court in (Musa Wazir's Case) supra, while approving the judgment of this Court has issued appropriate directions for abandoning the said process in the competitive examination.

8. Later, the Apex Court in its judgment passed in Civil Petition No.1697/2010, titled Naimatullah and another V/s NWFP, Public Service Commission, Peshawar & Others dated 05.10.2010, has provided an exception to the law laid down in (Musa Wazir's case) supra, in the following words:-

“We are also mindful of the fact that this Court in Musa Wazir's case (ibid) had directed the Public Service Commission not to maintain waiting list for 6 months. Thus, a line is to be drawn beyond which the Public Service Commission shall not fill up vacancies created as a result of non-joinder of a selectee. A balance is to be struck so that a fair chance is provided to a candidate, who has passed a competitive examination but has failed to be selected on merits and at the same prevent the adverse fall out of maintaining a waiting list for long period. It would be, in our view, just and fair to allow filling up of vacancies created on account of non-joinder of selectee up to the commencement of the training of the appointees of the same selection, provided that the process does not in any way affect the rights of any other selectee or appointee. In the present case, the training of the appointees had yet to commence by the time the petitioners filed their constitution petition before the High Court. During the hearing of this petition, we were informed that due to the flood situation in the Province, the training had not yet started by the time the impugned judgment was passed. We had already directed by our short order that the petitioners be immediately allowed to join the training”.

9. Pursuant to the judgment of the Apex Court, the Provincial Government has laid down the following policy

through notification No. SOR VI(E&AD)1-10/2010 dated 19.03.2013.

“Subject:- CHANGE IN THE RECRUITMENT POLICY REGARD IN MAINTENANCE OF WAITING LIST OF THE ELIGIBLE CANDIDATES- JUDGMENT OF THE SUPREME COURT OF PAKISTAN

Dear Sir!

I am directed to refer to this department circular letter No.SOR VI/E&AD/1-10/05/Vol.IV dated 31.12.2008, and to state that the maintenance of the waiting list of eligible candidates for a period of 06 months in initial recruitment were stopped in pursuance of judgment of the Supreme Court of Pakistan in case titled Musa Wazir and others v.s NWFP Public Service Commission and others.

2. However in pursuance of a recent judgment of the Supreme Court of Pakistan in case titled Naimatullah and others v. NWFP Public Service Commission and others dated 05.10.2010, the said policy has been reviewed and it has been decided by the competent authority that from now onwards, the Public Service Commission or Departmental Selection Committee as the case may be, may maintain a waiting list of eligible candidates in the respective zones up to the commencement of the pre-service training of the candidates of the same selection or till expiry of 03 months, where no such pre-service training is prescribed. The Public Service Commission or the Departmental Selection Committee may in case of non-joiners recommend the next eligible candidate on top of the merit list from the respective zones up to the commencement of the training of the appointees of the same selection or for three months where no such training is prescribed provided that the process does not in any way affect the right of any other selectee or appointee.

3. I am, therefore, directed to request that above policy decision may kindly be brought into the notice of all concerned for strict compliance”.

10. Thus, the legal position is now very clear that the Public Service Commission in the case of competitive examination would still maintain a waiting list valid for 03 months for

further recommendation in case any of the selected candidate does not join his service. In the present case, although, there is some confusion which is being created by letter dated 23.10.2018, which shows the date of arrival of Wazebullah to his post, however, the subsequent letter of the appointing department dated 30.10.2018, and the clarification issued by the same Department through letter dated 14.02.2019, clearly shows that the said Wazebullah has not actually joined his service as he was not referred to Medical Board for medical examination.

11. It is further evident from record that prior to the present process of appointment initiated through advertisement No.02/2017, the Commission had earlier initiated another process of appointment against the same post i.e. Subject Specialist Statistic and in the said process of appointment the said Wazebullah was appointed, therefore, there exist no reason that he would also join the present post. Therefore, the assertion of the learned Additional Advocate General has not impressed us that the case of the present petitioner does not fall within the mischief of non-joining policy stated above.

12. In view of the above, we allow this petition and, accordingly, declare that the case of the present petitioner does fall within the mischief of non-joining policy of the Provincial Government circulated letter No. SOR VI(E&AD)1-10/2010 dated 19.03.2013, and thus, accordingly, hold the refusal of the Commission dated 12.01.2019, for further recommendation of

the present petitioner to the appointing department against the post Subject Specialist Statistic as illegal. Consequently the Commission is directed to send recommendation of the present petitioner being top on waiting list to the appointing department for appointment against the post of Subject Specialist Statistic.

Announced

ACTING CHIEF JUSTICE

JUDGE