

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No.1455/2019;

Date of inst. 04.09.2019;

Date of hearing. 08.06.2022;

Date of decision 09.06.2022.

Adnan Shazib S/o Muhammad Zoraz Khan R/o village Kharick Tehsil and Post Office Rawalakot District Poonch, Azad Jammu and Kashmir.

.....Petitioner

VERSUS

1. Azad Jammu and Kashmir Public Service Commission through its Chairman, Muzaffarabad;
2. Secretary Azad Jammu and Kashmir Public Service Commission, Muzaffarabad;
3. Azad Government of the State of Jammu & Kashmir through Secretary Higher Education, Muzaffarabad;
4. Secretary Higher Education Azad Government of the State of Jammu & Kashmir, Muzaffarabad;
5. Education Department Colleges through Secretary Colleges Azad Government of the State of Jammu & Kashmir, Muzaffarabad.

..... Respondents

WRIT PETITION

Before:— Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Chaudhary Amjad Ali, Advocate, for the petitioner.

M/s Syed Atif Mushtaq Gillani, Alia Abdul Rehman Advocates and Sajjad Pirzada AAG for the respondents.

ORDER:

The petitioner through this petition filed under Article 44 of the Azad Jammu and Kashmir Interim

Constitution, 1974, has solicited a direction to the respondents for his appointment as Lecturer Statistics B-17.

Detailed facts giving rise to the instant writ petition are, petitioner is 1st Class State Subject of Azad Jammu and Kashmir, permanently hails from District Poonch having the qualification of M.Sc. Statistics along with B.Ed. It was contended that the Public Service Commission advertised seven posts of Lecturer Statistics Male including one post against the quota of District Poonch vide advertisement dated 04.04.2019. It was further contended that petitioner being eligible applied for his appointment and after appearing in the test and interview, he secured third position. It was submitted that the candidate who attained merit position was appointed and the candidate who was listed at serial No.2 namely Muhammad Awais Tabassum was recommended and appointed against the quota of refugees settled in Pakistan as no one against the said quota could qualify, thus, the petitioner is at serial No.1 of the waiting merit list. The main stance taken by the petitioner is that at the time of requisition of the posts advertised on 04.04.2019, respondents No.4 and 5 withheld two posts which were available at that time with mala fide intention. In this regard, the learned Advocate placed reliance on notification dated 02.03.2018. It was also stated that the petitioner is serving as

Lecturer Statistics on ad-hoc basis since 12.11.2014 which is also a proof of the fact that the respondents withheld the posts at the time of requisition. He averred that had the withheld posts been requisitioned and advertised the petitioner would have been appointed.

The respondents refuted the claim of the petitioner on the ground that at the time of advertisement No.02/2019 dated 04.04.2019, no other post except one requisitioned post, was permanently vacant, against the quota of District Poonch, thus, the allegation of withholding the posts by the respondents is baseless.

The learned counsel for the petitioner reiterated the facts and grounds already taken in the writ petition and submitted that the services of Dr. Tassaddaq Hussain, Lecturer Statistics B-17 Government Post Graduate College Rawalakot were placed in Mirpur University of Science and Technology on deputation basis vide notification dated 27.04.2016. The learned Advocate further argued that appointment of Dr. Tassaddaq Hussain as Assistant Professor Statistics B-19 was approved by the Senate in its meeting held on 22.01.2018 vide notification dated 20.03.2018, thus, the post had become available with the department from the dated of notification dated 02.03.2018 irrespective of the fact that the appointee was on probation for two years. The

learned Advocate further proceeded that respondents anomalously withheld the post at the time of requisition to the Public Service Commission and if the respondents performed their duty honestly and in a legal manner, the petitioner would be accommodated and appointed. He finally prayed that respondents may be directed for appointment of the petitioner against withheld post of Lecturer Statistics. The learned Advocate in support of his submission placed reliance on 2014 SCR 479 and 2019 SCR 926.

The learned counsel for the respondents controverted the arguments advanced by the learned counsel for the petitioner and submitted that respondents did not withhold any post and the post claimed by the petitioner, fell vacant due to transfer of Dr. Tassaddaq Hussain in MUST was not available for requisition as appointee was on probation for a period of two years. The learned counsel stated that as the petitioner could not attain merit position against one advertised post, hence, he cannot claim appointment against the post which has not been advertised yet, therefore, the writ petition is liable to be dismissed.

I have heard the learned counsel for the parties and gone through the record of the case with due care and caution.

Perusal of record annexure PC/1 reveals that three candidates including the petitioner were short listed against the quota of District Poonch after written test and call letter annexure PC/2 was issued to the petitioner for interview to be conducted on 02.08.2019. Vide handout/press release annexure PC/3, one Sayyad Khurshid S/o Muhammad Khurshid Khan was recommended by the Public Service Commission for appointment as Lecturer Statistics B-17 against the quota of District Poonch. The Public Service Commission in para 4 of the comments which were treated as written statement has mentioned that Mohammad Awais Tabassum placed at serial No.2 of the merit list against the quota of District Poonch has been appointed in the light of notification dated 18.01.2007 as no one could qualify from refugees settled in Pakistan, so, it is very much obvious from the record that the petitioner has qualified the test and interview and presently is at the top of the waiting merit list. The stance taken by the respondents is that the post fell vacant due to transfer of Dr. Tasadaq Hussain was not permanently available because his appointment was confirmed vide notification dated 02.03.2018 and he was on probation for a period of 2 years hence, they did not deny the availability of the vacancy at the time of requisition to the Public Service Commission. In view

of the stance taken by respondents the point whether during probation period of a civil servant the post shall be deemed to be vacant or not for the purpose of requisition? requires resolution by this Court. Section 5 of the Azad Jammu and Kashmir Civil Servant Act, 1976 defines word 'probation'. Sub-section (3) of section 5 of the Act provides that where the satisfactory completion of probation includes passing an examination, test, course, complete training and the person appointed on probation fails to pass such examination, test, complete course or training may be discharged or reverted, as the case may be, hence, in my considered view if the appointment/ promotion/ transfer of a civil servant is subject to passing any examination, test or complete training or course then during probation period the post cannot be termed as completely vacant and in other case the same shall be deemed as vacant. The provisions of Fundamental Rules 192 are also in line with it. In the instant case, a perusal of annexure PD/1 notification regarding permanent appointment of Dr. Tasadaq Hussain as Assistant Professor Statistics in MUST depicts that no condition regarding passing of prescribed examination, test or course or successful completion of any training was attached to his appointment, thus, despite the fact that the appointment of Dr. Tasadaq Hussain in MUST was on probation for a period of 2 years but

as stated above no condition regarding any exam, test, or course was attached to his appointment therefore, from the date of his appointment the post was vacant for appointment. The Federal Service Tribunal in PLJ 2000 Tr.C (Services) 494 at page 498 attended such like controversy and observed that a lien cannot be indefinitely held as a person could not place in two departments at the same time and lien is terminated when a person is appointed on permanent basis to the new post. As the appointment of Dr. Tasadaq Hussain had confirmed on 02.03.2018, thus, the post at the time of requisition was vacant hence, has been withheld by the respondents in flagrant violation of the rules.

A perusal of written statement filed by Higher Education reveals that respondents as per contents of para 5 of the written statement the respondents requisitioned the post fell vacant due to transfer of Dr. Tasadqq Hussain on 31.12.2019 without waiting two years probation period which was to be completed on 02.03.2020 thus, the respondents take contrary steps on the one hand they did not requisition the said post on the ground that transferee is on probation for 2 years and before completion of 2 years the post cannot be requisitioned and on the other hand, without waiting 2 years of probation period of the transferee they requisitioned the post to the Public Service Commission thus,

this conduct of the respondents is highly regrettable coupled with malice.

The nutshell, sum and substance of the above discussion is, the instant writ petition is hereby accepted and respondents are directed to issue appointment order of petitioner as Lecturer Statistics B-17 within a period of one month against the post fell vacant due to permanent induction of Dr. Tasaddaq Hussain in Mirpur University of Science and Technology.

*Muzaffarabad,
09.06.2022.*

*-Sd-
JUSTICE*

Approved for reporting.

*-Sd-
JUSTICE*