

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No. 1118/2011;
Date of Institution. 15.07.2011;
Date of Decision. 01.01.2013.

Syeda Sabeen Naz, D/o Tassadaq Hussain Gillani, R/o Gilani Medical Store & Clinic District Headquarter Hospital Road, Kotli;

..... Petitioner

VERSUS

1. Prime Minister Azad Govt. of the State of Jammu and Kashmir through its Chief Secretary Muzaffarabad;
2. Azad Govt. of the State of Jammu and Kashmir through its Chief Secretary New Civil Secretariat Muzaffarabad;
3. Secretary Services & General Administration Department Azad Jammu and Kashmir Muzaffarabad;
4. Services & General Administration Department of Azad Government through its Secretary, Muzaffarabad;
5. Public Service Commission of Azad Jammu and Kashmir through Secretary Public Service Commission, Muzaffarabad;

.... Respondents

**WRIT PETITION UNDER SECTION 44 OF
THE AJ&K INTERIM CONSTITUTION ACT, 1974**

Before: - Justice Ghulam Mustafa Mughal, C.J.

PRESENT:

Mr. Farooq Hussain Kashmiri, Advocate for the petitioner.
Nemo for the respondents.

ORDER:

Through this petition filed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 a direction is sought to the respondents to decide the application of the petitioner dated 21.05.2011 and appoint her against the available post of Section Officer BPS-17 in the Services and General Administration Department of Azad Jammu and Kashmir Government.

Facts forming the background of the captioned petition are that some posts of Section Officers BPS-17 in the Services & General Administration Department of Azad Jammu and Kashmir were advertised by the Public Service Commission. Among others the petitioner herein competed for appointment against one of the posts allocated to the quota of District Kotli. After qualifying written test, interview was held on 13.01.2011, which was also qualified by her. It is alleged that before completion of selection process the Services and General Administration Department sent requisition of 16 additional posts of Section Officers according to the quota to different units and two posts of Section Officers were allocated to District Kotli, as is evident from the letter dated 28.07.2010. It is claimed that under the relevant rules it was enjoined upon the Public Service Commission to issue an amended advertisement to complete the selection process on all the posts at the one and the same time but it was not done with ulterior motives and mala-fide intention in order to deprive of the petitioner from her legal right. It is averred that had the respondents performed their legal duty in accordance with the Azad Jammu and Kashmir Public Service Commission (Procedure) Rules, 1994, the petitioner would have been among the successful candidates against the quota of District Kotli. It is alleged that respondents have withheld the available posts of Section Officers and have not included in the previous requisition which is negation of the settled position of law. The petitioner made an application on 21.05.2011 to the Chief Executive of the Azad Jammu

and Kashmir who also issued favourable order on her application and directed the respondents for her appointment as Section Officer in the Services & General Administration Department against the quota of District Kotli but the same has not been disposed of despite repeated requests by the petitioner.

Respondents have not filed any written statement despite availing several opportunities, therefore, their defence was closed on 11.10.2012.

Mr. Farooq Hussain Kashmiri, the learned Advocate appearing for the petitioner, while referring to the handout issued by the Public Service Commission on 15.01.2011 argued that advertisement No.1/2009 was issued in 2009 whereas test & interview were conducted from 10th to 13th January 2011. After test & interview the candidate who attained merit position was recommended and appointed whereas petitioner, herein, has been placed at serial No.2 against the quota of district Kotli. The learned Advocate submitted that on 28.07.2010, 16 additional posts of Section Officers against the quota of different units were referred to the Public Service Commission, out of which, 02 posts were reserved for District Kotli. In support of his submissions, the learned Advocate referred to and relied upon the requisition sent by the Services & General Administration Department on 28.07.2010. The learned Advocate contended that it was enjoined upon the Public Service Commission to complete the selection process of all the posts which were referred to it on the basis of advertisement No.1/2009 and

those which were referred to the Public Service Commission through the requisition dated 28.07.2010 (annexure "A/3") in one go but the Public Service Commission has violated its own rules of procedure and deprived of the petitioner from the right of her livelihood. The learned Advocate also referred to rule 9 of the Azad Jammu and Kashmir Public Service Commission (Procedure) Rules, 1994 in support of his submissions.

I have heard the learned Advocate for the petitioner and gone through the record made available with the petition.

As stated above, respondents have not filed written statement despite availing several opportunities, therefore, their view point is not before the Court and there is no alternative for the Court except to consider the documents relied upon by the petitioner for the purpose of decision of the controversy raised in this petition. The procedure for disposal of the petition filed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, is enumerated in Azad Jammu and Kashmir High Court Procedure Rules, 1984. The provisions of the Code of Civil Procedure are also applicable. Under Rule 38 of the Azad Jammu and Kashmir High Court Procedure Rules, 1984, the petitions are to be decided on the basis of averments made in the petitions, documents appended with the petition, written statement and affidavits of the parties. If the respondents fail to file written statement, this Court has to dispose of the petitions considering the averments made in the petition, documents appended thereto and affidavits of the

petitioner, which is a legal evidence. The same practise has been approved by the apex Court Azad Jammu and Kashmir in a case titled Muhammad Ajaib Khan V. Public Service Commission and 3 others [1996 S.C.R. 351]. At page 357 of the report, it was observed as under:-

“The learned members of the full bench also failed to notice that an affidavit was duly filed by the appellants in support of the averment that the commission illegally awarded extra marks to respondent No.4 and thus deprived the appellant of his success which he had achieved in the interview. This affidavit is legal evidence in light of rule 38 reproduced above. Requirement of rule 38 is that questions have to be decided upon affidavits and documents. An affidavit was available in support of the assertion. There was no counter affidavit because the stage of filing the counter affidavit had not reached. Therefore, in over view the High Court could not brush aside the averment under reference as it would amount to violating rule 38.

In light of the documents and the affidavit mentioned above the writ petition raised a legal point whether the Public Service Commission was empowered to grant extra marks to respondent No.4 for M.Phil. degree so as to give preference to respondent No.4 as alleged by the appellant. In our view this point necessitated admission of the writ petition.”

A perusal of the handout dated 15.01.2011 reveals that test & interview for the post of Section Officers referred to the Public Service Commission in 2009 have been conducted from 10th to 13th Jan, 2011 whereas vide requisition dated 28.07.2010, 16 additional posts of Section Officers were referred to the Public Service Commission by the Services & General Administration Department. In this requisition, 02 posts were allocated to District Kotli. Had these posts been included in earlier requisition; petitioner definitely would

have been in the successful candidates. The Azad Jammu and Kashmir Public Service Commission (Procedure) Rules, 1994 postulate the manner when similar additional vacancies are referred to the Public Service Commission and process of selection on the earlier referred posts is still awaited. Rule 9 is reproduced as under:-

“If the requisitioning authority intimates additional vacancies to the Commission before the date of test/ examination or interview is fixed, keeping in view the time factor, a fresh advertisement/amendment to the previous advertisement shall be issued and fresh application shall be invited. The candidates, who had already applied in response to the original advertisement, may not be required to apply again.”

A perusal of the above reproduced rule would show that if requisitioning authority intimates the commission about the additional vacancies before the date of test/examination or interview is fixed for earlier vacancies the Public Service Commission, keeping in view the time factor shall issue fresh/amended advertisement. In this case the Public Service Commission has not followed its own mandatory procedure although the subsequent requisition for additional vacancies was sent to the Public Service Commission on 28.07.2010, much before the date of test & interview conducted for appointment on the posts advertised vide advertisement No.1/2009. The interview was conducted on 10th to 13th Jan, 2011. In view of the above stated position issue of time frame was not involved. Law is well settled that no person can suffer for an act of the authority who is bound to pass an order strictly in accordance with law. A reference

can be made to Ahmed Latif Qureshi's case [PLD 1994 (Lah.) 3]. It was observed as under:-

“It is an established proposition of law that no one can suffer on account of the act of the authority, who has to pass an order or who has taken some action. In the case in hand, it stands established that it is the respondents who are at fault and if the petitioner would not have illegally been proceeded against and the paper would not have been snatched away from him if successful he could have been declared to have passed the said examination in the first attempt, and, therefore, depriving the petitioner of the opportunity of passing in the 1st annual examination is, definitely an act which is illegal and without a lawful authority-----”

The Public Service Commission has violated its procedure in the instant case and other official respondents have also not specifically denied the fact of withholding the posts which have subsequently been referred to the Public Service Commission. Therefore in my view, two things have been amply proved; one violation of rule 9 of the Azad Jammu and Kashmir Public Service Commission (Procedure) Rules, 1994 and the other withholding of the post as alleged in ground “C” of the writ petition, therefore, in my view petitioner cannot be penalized for an illegal and unlawful act of the respondents because she has earned a right for her adjustment against one of the posts referred to the Public Service Commission vide requisition dated 28.07.2010. The petition is, therefore, accepted and it is directed that the Public Service Commission shall recommend the petitioner against one of the withheld posts of Section Officers B-17 which stood referred vide letter dated 28.07.2010 and the Government shall appoint the

petitioner on the basis of recommendations of the Public Service Commission.

Muzaffarabad
1st Jan, 2013.

CHIEF JUSTICE