

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Const. Petition No. D-84 of 2016

Date	Order with signature of Judge
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Present:

Mr. Justice Aqeel Ahmed Abbasi &
Mr. Justice Muhammad Faisal Kamal Alam

1. For hearing of CMA No. 1380/2016.
2. For Katcha Peshi.
3. For Hearing of CMA No. 566/2016.
4. For Hearing of CMA No. 209/2016.

Date of hearing: 17-05-2016

M/s T. David Lawrence & Tahir Hussain Mangi, advocate for petitioner.

Mr. Saqib Jamal, Manager Legal, NADRA.

Mr. Yousuf Ali, Standing Counsel.

J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J. Through instant petition, the petitioner initially challenged the Office Order dated 02.01.2016, whereby the petitioner was suspended before even commencement of departmental enquiry, and also impugned the show-cause notice dated 04.01.2016 and sought the following relief:-

“a) To declare that the impugned suspension Office Order dated 2nd January, 2016 and impugned Show Cause Notice dated 04.01.2016 Annexure ‘A-9’ issued to the petitioner by respondents NADRA are illegal, unlawful, based on mala fide intention and ulterior motives, are coram non judice and of no legal affect, for the legal reasons that the questioned disputed of CNICs of the petitioner, her husband and her minor child stood resolved in terms of Annexure ‘A-2’, ‘A-3’, ‘A-4’, ‘A-5’, ‘A-6’, and ‘A-7’, and in particular to the statement made by the respondents NADRA in their comments specifically in para ‘H’ of the comments that “A fact finding inquiry was conducted against board that it is not necessary to conduct regular inquiry against the respondent No.6 as respondents No.6 and 7 got cleared their cards by paying the prescribed processing fee as per SOP/Policy

of Dup formulated under section 14 of NADRA Ordinance, 2000”.

b) To direct the respondents NADRA to withdraw the impugned suspension order dated 02nd January, 2016 ‘Annexure – A-10’ and impugned Show Cause Notice dated 04th January, 2016 ‘Annexure A-9’ and, restore the status/position of the petitioner, as she was enjoying before issuance of the said impugned suspension order and impugned Show Cause Notice viz; Deputy Director HR Branch HRQ Sukkur.

c) To direct the respondents NADRA to act strictly in accordance with the law in the light of their statement before this Hon’ble Court made in the comments in CP No. 2816/2012 ‘Annexure – A-7’, and the earlier decision made after the report of Fact Finding Board in letters / orders dated 20.01.2012 ‘Annexure A-1’, office order dated 22.02.2012 ‘Annexure A-4’, Regularization of Petitioner as regular employee as per letter/order dated 20.04.2012 ‘Annexure A-5’ and Office Order dated 02.10.2015, as the said documents pertain to the respondents NADRA and NADRA cannot back out of their said statement in the comments Annexure – ‘ ‘ and other made decisions in favour of petitioner after close of the Inquiry made by the Fact Finding Members.

d) To grant another relief which this Hon’ble Court deems fit and proper in the light of the above subject-matter of this petition, and to foster the ends of justice.

e) To award the cost of petitioner against the respondents NADRA”.

2. The brief facts leading to the filing of present constitutional petition are that the petitioner Mst. Samina Pathan is an employee of Respondent No.2, National Database and Registration Authority [NADRA] and at the time when instant petition was filed, she was working in the Regional Headquarter of respondent No.2 at Sukkur as Deputy Director (HR) (RHO Sukkur) in pay scale O-8 equivalent to BPS-18. As per the contents of petition, the petitioner joined the service of respondent No.2 way back on 25.4.2002 in NRC, Larkana and since then, she is in the regular employment of NADRA. Owing to some complaint against the petitioner that she was holding three CNICs [Computerized National Identity Cards] at a time, a fact finding investigation was ordered and the Fact Finding Board gave its finding and recommended that:-

“a. A court of inquiry may be ordered to carry out detailed investigation and also to check details of all family members serving/not serving in NADRA.

b. Dup transactions of all aforementioned CNICs should be checked.

c. It is also recommended that till finalization of the inquiry Ms. Samina Pathan should either be suspended or attached with RHQ Karachi”.

3. The petitioner further pleaded that after getting cleared from the above enquiry as such investigation stood completed and was filed, whereafter she continued her employment with respondent No.2 and worked in an efficient and diligent manner for which she also received appreciation certificate and different project allowances. According to petitioner in some previous constitutional petition No.D-2816/2012 filed by one Ghulam Hyder Khan as pro bono publico, the present petitioner and her minor son were also made respondents being respondents No.6 and 7. In that earlier petition baseless allegations were leveled against the present petitioner [Mst. Samina Pathan]. Present respondent No.2 [NADRA] in its parawise comments had categorically mentioned that the present petitioner had already cleared herself by following the procedure and paying the prescribed process fee for holding duplicate CNIC. To further substantiate her stance the present petitioner has also filed a copy of the parawise comments of present respondent [NADRA] which it filed in that earlier C.P.No. D-2816/2012 as Annexure A/7, which is available at page 55 of the present case file. The said petition was subsequently dismissed for non-prosecution by order dated 21.5.2014 passed by this Court, which has been appended as Annexure 'A-8'.

4. It would be advantageous to reproduce herein under the relevant portion of reply (Annexure A/7) submitted by respondent NADRA in the above disposed of petition (C.P.No.D-2816 of 2012):-

“2. That para No.2 is incorrect and vehemently denied. Further, the respondent No.6 was neither suspended nor any regular inquiry was conducted against her. The respondent No.6 got cleared her cards as per SOP/Policy of Dup formulated under section 14 of NADRA Ordinance, 2000.

3. That para No.3 is incorrect. The respondent No.7 also got cleared his CNICs as per Dup clemency policy formulated under section 14 of NADRA Ordinance, 2000”.

According to petitioner’s counsel Mr. David Lawrence, the present petitioner was shocked to learn that the respondent/NADRA reopened the above mentioned closed and settled issue of duplicate National Identity Cards (**DUP CNIC**) and issued the petitioner above mentioned impugned show cause notice (04.01.2016) purportedly in terms of Rule 2(4) of Government Servants (Efficiency and Discipline Rules), 1973, which was duly responded by the petitioner through her counsel vide missive dated 08.01.2016, within seven days as given in the show cause notice.

5. However, prior to issuance of the said show cause notice, the petitioner was suspended by respondents vide above referred suspension order of 02.01.2016, compelling the petitioner to invoke the extra ordinary constitutional jurisdiction of this court under Article 199 of the Constitution. Notices were issued to respondent/NADRA on 11.01.2016 for 26.01.2016. However, on 20.01.2016, that is, in the intervening period, the petitioner moved an urgent application (CMA No. 565 of 2016) for ante-dating the present petition on the ground that after service of notice of the instant proceedings, the petitioner has been terminated by the Office Order dated 13.01.2016. Consequently on 20.01.2016 this Court has been pleased to observe that the impugned termination letter will be subject to further orders of this Court, whereas, respondents were restrained from taking further action pursuant to termination letter of petitioner. On 26.01.2016, the respondent/NADRA filed its comments and raised an issue of maintainability of instant petition which was responded to by the learned

counsel of petitioner (Mr. T. David Lawrence), by contending that since the petitioner is not a civil servant, therefore, the bar contained under Article 212 of the Constitution of Islamic Republic of Pakistan 1973, shall not be attracted to the present proceedings, whereas, it was further argued that since the action of respondent/NADRA, is purportedly illegal and against the principle of natural justice, as admittedly she (petitioner) was never given a personal hearing before imposing major penalty of dismissal from service, therefore, it amounts to denying due process and fair trial, hence constitutional petition is maintainable.

6. In the comments filed by respondent/NADRA to the instant petition, much emphasis is laid on the legal aspect of the case and corresponding paragraphs of the petition relating to factual aspect of the entire controversy has not been as such refuted.

7. Mr. Saqib Jamal, Manager Legal of respondent/NADRA has argued that the instant constitutional petition is pre-mature also, as the petitioner has already preferred a departmental appeal against the above referred impugned termination order and as per the learned counsel, his client respondent/NADRA will decide the said appeal in accordance with law and after giving opportunity of hearing to the petitioner. In his comments, he has relied upon number of judicial precedents mentioned herein under, in support of his arguments, crux of which is that if the alternate remedy is available, then invoking Article 199 of the Constitution is barred and instant constitutional petition being not maintainable merits dismissal. Following case law is relied upon by the respondents in support of their arguments:

- i. PLD 2010 SC 969
[Muhammad Abbasi Vs. S.H.O. Bhara Kaho & 7 others]
- ii. 2011 MLD 1976.
[Shaheen Vs. The State]

- iii. 2011 PTD 647
[BP Pakistan Exploration and Production Inc., Karachi Vs. Additional Commissioner Inland Revenue B. Enforcement and Collection Division-1, Karachi and another]
- iv. 2015 PTD 448
[Arslan Poultry (Pvt.) Ltd. Vs. Officer Inland Revenue and others]
- v. 2015 M L D 1147 {incorrect citation}
- vi. 2002 PLC (C.S) 1240.
[Tariq Mehmood, acting Sub-Divisional Officer; and others Vs. The Government of Baluchistan Through the Secretary Education Department and others]
- vii. 2015 PLC 279
[Mst. Riffat Siddique Vs. District Coordination Officer and others]
- viii. 2011 MLD 1402
[Anjum Niaz Choudhary and 8 others Vs. Managing Director, Sui Northern Gas Pipeline Limited and two others]
- ix. 2015 PLC (C.S) 1362
[Amin-ur-Rehman and others Vs. Government of Khyber Pakhtoonkhwa & others]
- x. 2012 YLR 174.
[Mehmood Medical Store through proprietors Vs. Services Hospital, Lahore through Medical Superintendent & three others]

8. During pendency of instant petition, the petitioner has also filed an application-CMA No. 1380/2016 (on 08.02.2016) under Order 6 Rule 17 of C.P.C, seeking amendments in the present petition and the relief sought on account of her post termination scenario, which has been opposed by the respondent/NADRA by filing objections thereto.

9. Petitioner counsel vehemently argued that in blatant violation of above E & D Rules as well as the Statutory Regulations relating to disciplinary proceedings, the petitioner has been terminated from service. It was further contended that above impugned act of respondent is tainted with sheer mala fide as in order to strangulate the present proceedings, petitioner has been awarded major penalty of dismissal from service surreptitiously and in an undue haste. The petitioner side also argued that

in order to impose major penalty in terms of E & D Rules, respondent/NADRA was required to follow Sub-Rule (iv) of Rule (5), which ordains that for imposing a major penalty the authorized officer or enquiry committee, as the case may be, has to forward case to the competent authority, which in the present case is the Chairman NADRA (Respondent No.3) alongwith charge and statement of allegations served on the accused and her response thereto and findings thereupon alongwith recommendations regarding penalty to be imposed. It was further contended that above mentioned detailed reply of petitioner to the impugned show-cause notice was not even considered by respondents and such fact is ex-facie evident from the language of the subsequent Dismissal Order/Office Order dated 13.1.2016 (now impugned).

10. The above submissions have been controverted by counsel representing Respondents namely, Mr. Yousuf Ali, Standing Counsel for respondent No.1 (Federation of Pakistan) and Mr. Saqib Jamal, Manager Legal, NADRA. As per their rebuttal, due process has been followed and since the petitioner has preferred departmental appeal, therefore, she has alternate remedy to defend herself and consequently present constitutional petition merits dismissal on this ground alone in view of the cited case law hereinabove.

11. On a query of this court as to why the petitioner was not heard in person during disciplinary proceedings, as mentioned in the above impugned Show Cause notice and why the reply so furnished by petitioner in writing through her counsel has not been considered, the learned counsel for the respondents replied that since Rule 10-A of the aforesaid E & D Rules, 1973 bars appearance of an advocate on behalf of party against whom disciplinary proceeding has been initiated, therefore, no hearing opportunity was extended to the petitioner. In our considered view, this argument of respondent is fallacious and misconceived, as right

of hearing and fair opportunity of trial is a fundamental right of an individual in terms of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

12. Keeping in view the facts and circumstances of instant case, it would be appropriate to first take up objection as to maintainability of instant petition in view of availability of alternate remedy, as vehemently argued by learned counsel for respondents. It is an undisputed fact that vide impugned Office Order (02.01.2016) the Director General of respondent/ NADRA before initiation of disciplinary proceeding against the petitioner had first suspended her, inspite of the fact that it is not a pre-requisite for conducting disciplinary action. Secondly, the only justification the Respondents have pleaded for initiation of the subject disciplinary proceeding against petitioner is the news broadcast on various T.V Channels. It is also an un-deniable fact that Government Servants (Efficiency and Disciplinary) Rules 1973 (**E & D Rules**) are applicable to the employees of Respondent Organization and the same is also evident from the impugned show cause notice appended with the main petition as Annexure A-9 at page 69 of the case file. This show cause notice had been issued by Brig (R) Nasar Ahmad Mir, Director General (Operation) being the authorized officer, as envisaged under Rule 2(3) of the above referred E & D Rules. Thirdly, instead of affording an opportunity of hearing to petitioner, as also mentioned in the Show Cause notice, the impugned termination letter was issued, admittedly while this Court was seized of the matter. Fourthly, the employees of respondent/NADRA are not civil servants and status of respondent/NADRA is of an independent autonomous statutory body established and performing its functions under the National Database Registration Authority Ordinance, 2000 (**The Governing Law**). More so, respondent/NADRA has its own service rules, viz. The National Database Registration Authority Employees (Services)

Regulations 2002, which has been notified under SRO 118 (K.E)/2002, which were made in exercise of the powers conferred by Section 45 of the above governing law, meaning thereby the Service Regulations of respondent/NADRA are statutory in nature. By virtue of Regulations 23 under Chapter 3 (Conduct and Discipline), the afore mentioned E & D Rules to the extent mentioned in the said Regulations have been made applicable to the employees of respondent/NADRA and the provisions relating to disciplinary matters as provided under the above E & D rules have to be applied mutatis mutandis in disciplinary proceedings, therefore, the petitioner was also subjected to said E & D Rules and the relevant provision/Rules where under she was proceeded against are also mentioned in the impugned show cause notice; Rules 2(3), 2(4), 4(1)(b) and 5(iii), and the same are reproduced herein below for the sake of a ready reference:-

“3) "authorized officer" means an officer authorized by the authority to perform functions of an authorized officer under these rules or, if no officer is so authorized, the authority;

(4) "misconduct" means conduct prejudicial to good order or service discipline or contrary to Government Servants (Conduct) Rules, 1964 or unbecoming of an officer and, a gentleman and includes any act on the part of a Government servant to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government officer in respect of any matter relating to the appointment, promotion, transfer, punishment, retirement or other conditions of service of a Government servant;

4. Penalties.—(1) The following are the minor and major penalties, namely—

(b) Major Penalties:

(i) reduction to a lower post or time-scale, or to a lower stage in a time-scale;

(ii) compulsory retirement;

(iii) removal from service; and

(iv) dismissal from service.

5. (iii). If the authorized officer decides that it is not necessary to have an inquiry conducted through an Inquiry Officer or Inquiry Committee, he shall—

(a) by order in writing, inform the accused of the action proposed to be taken in regard to him and the grounds of the action; and

(b) give him a reasonable opportunity of showing cause against that action:

Provided that no such opportunity shall be given where the authority is satisfied that in the interest of the security of Pakistan or any part thereof it is not expedient to give such opportunity”.

13. To address and untie different knotty issues relating to service matters, recently, the Hon'ble Supreme Court has handed down judgments, particularly after decision of Mubeen-us-Salam case-PLD 2006 Supreme Court page-602, whereby Section 2A of the Service Tribunals Act, 1973 as it stood at that relevant time was partly struck down and as a consequence of which, employees of statutory corporations could no more agitate their grievance before the Service Tribunal. The two recent judgments are of relevance here. First one is the case of Pakistan International Airlines versus Tanveer-ur-Rehman and others (PLD 2010 SC 676) and the other one is the case of Pakistan Defence Officers Housing Authority v. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707). In the latter judgment, Mr. Justice Tassaduq Hussain Jilani (as his Lordship then was) writing for the Court has summarized the entire case law in paragraph 50 of the said judgment. Other celebrated judgment of Honourable Apex Court which squarely applies to the present case is reported in 1994 SCMR page 2232 (Anisa Rehman V/S PIAC), wherein, inter alia, it is held that an order affecting the rights of a party cannot be passed without an opportunity of hearing, being a basic principle of natural justice which is to be read as part of every statute, even if such provision of hearing has not been expressly provided in the statute. Crux of the above discussion is that if a statutory corporation has its own statutory service rules in place, which are framed by deriving powers from the main enactment but, which does not provide for an adequate or efficacious

remedy, then grievance of employees can be redressed through writ jurisdiction. Secondly, in all public employments, that is, those offered by statutory bodies governed by statutory Rules/Regulations, principle of natural justice cannot be dispensed with in disciplinary proceeding, unless, employment is purely of a contractual nature. Thirdly, when the action impugned in a service matter is about violation of procedural requirement and principle of natural justice then such an action is amenable to writ jurisdiction of this court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

14. In the present case, besides violation of principle of natural justice, that is, not providing an opportunity of hearing, a flagrant violation of relevant disciplinary rules has taken place, that is, Sub-Rule (iv) of Rule 5 of E & D Rules, where under, the authorized officer after giving opportunity of hearing to petitioner should have done the following acts:

- (i) To forward the case of petitioner to the competent authority along with charge and statement of allegations served on accused;
- (ii) To forward the explanation of accused (in the instant case the petitioner) to the authority (as mentioned above);
- (iii) Findings of the authorised officer alongwith his own recommendations with regard to the penalty to be imposed.

The record is completely silent in this regard. Fourthly, an overall conduct of respondents in dismissing the petitioner is highly questionable. As observed in foregoing paragraphs, the petitioner was dismissed from service in an undue haste, which otherwise is a sufficient evidence that impugned action is tainted with mala fide. If we take into consideration the entire scenario then it is not out of place to mention and hold that even the very initiation of disciplinary proceeding was done without application of proper judicious mind, and also lacks a fair, just and reasonable exercise of discretionary power and authority. It is an undisputed fact that the basis

on which disciplinary proceedings were initiated and conducted against the petitioner, the same issue stood concluded in the earlier round of same proceedings and was a past and closed chapter, as respondents/NADRA itself in the above mentioned earlier petition had submitted parawise reply, inter alia, confirming the fact that present petitioner (Samina Pathan) was absolved from charges of holding duplicate CNICs around four years back. All these uncontroverted facts show that the **petitioner has been vexed twice** in respect of same charges / allegations. At least petitioner was entitled to be confronted with the material and record, which purportedly formed basis for passing an adverse decision of the nature, that is, termination from service, in such an arbitrary and slipshod manner. In this regard a decision of the Hon'ble Apex Court reported in 2009 SCMR Page 605 is of relevance.

15. As far as availability of adequate remedy in the form of departmental appeal is concerned, record shows, and has also been pleaded by petitioner's counsel that time and again petitioner has been informed through written communication by the respondents about the change of her scheduled date of personal hearing. Though, the petitioner has invoked the remedy of departmental appeal, but the same has become illusory, in the light of discussion hereinabove. Thus, case law cited by learned counsel representing respondents is clearly distinguishable and has no application to the facts of instant case. Even otherwise, no one should be punished merely on the basis of media reports by violating principle of natural justice and express provisions of law and the statutory rules as referred to hereinabove. We would rather observe that an adverse action against any person would be illegal if it is influenced by some hype created by media reports. An adjudicator, whether judicial or quasi-judicial has to apply a judicious and independent

mind before penalizing or passing any adverse order against a person. The same rule squarely applies to disciplinary proceedings.

16. Lastly, we may further observe that even in the governing law a provision is available for dealing with the issue of duplicate CNIC; Section 18 provides a complete procedure, as to how a holder of more than one CNIC can be dealt with. The respondent in terms of Section 18 can either cancel or impound more than one CNIC by way of an order but after giving an opportunity of hearing to the person against whom such order is to be passed. Even the governing law expressly provides an opportunity of hearing, which admittedly was not afforded to the petitioner. Accordingly, we have no hesitation to hold that subject disciplinary proceeding and termination of petitioner was void ab-initio, hence of no legal consequences, therefore, instant petition was allowed by a short order dated 17.5.2016 in the following terms_

“For the reasons to be recorded later-on, the Termination Order No.NADRA/HR/Disp/47/641/267 dated 13.01.2016 while imposing major penalty of removal from services upon petitioner Mst. Samina Pathan, is hereby set-aside. Petition stands allowed along with listed applications.”

These are the reasons for such short order.

JUDGE

JUDGE