

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-608of 2015

Sajad Hussain & others Petitioners

Versus

Federation of Pakistan & others Respondents

Date of hearing: 14.02.2018

Mr. Abdul Salam Memon, Advocate for Petitioners.

Mr. Zubair Zia Siddiqui, Advocate for Respondents No. 2 & 3.

Mr. Shaikh Liaquat Hussain, Assistant Attorney General.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Through the instant Petition, the Petitioners have prayed for the following relief(s).

- i. To declare the office order dated 11.02.2008 as inconsistent with the promotion policy and thus liable to be struck down by this Hon'ble Court.**
- ii. To declare that the Petitioners are entitled to be promoted to the post of Deputy Managers (I.A) BS-17 from the retrospective effect i.e. 17.01.2009, and also for further promotion to next higher grade as and when such promotions accrued to them.**
- iii. Declare that petitioners have been seriously discriminated by the respondents regarding their promotion, in comparison to other batch mates and juniors.**

2. Brief facts of the case are that Petitioners were appointed as Stock Auditors / Stock Verifier in BPS-15 in Internal Audit

Department of Port Qasim Authority (PQA), on different dates during 1989 to 1990. Petitioners have submitted that there was no venue for their promotion in their cadre, constraining them to move applications to the Chairman/ Director (HRM), Port Qasim Authority Karachi, through proper channel, for promotion from BS-15 to BS-17 in accordance with policy or in alternate up-gradation of their posts. Petitioners have averred that the Competent Authority of PQA issued office order dated 17.01.2009, upgraded the post of Petitioners from BPS-15 to BPS-17 by re-designation as Deputy Manager. Petitioners have asserted that in compliance of the office order dated 17.1.2009; they resumed their duties as Deputy Manager in Internal Audit Department. Petitioners have voiced their grievance that all of sudden PQA issued another office order dated 11.02.2009 by nullifying the effect of earlier office order dated 17.01.2009, imposed certain conditions that the up-gradation will be personal to the officers and upon their retirement, the post shall be deemed to have been reverted to its original position. Petitioners have further submitted that Respondents have personified the upgraded post of the Petitioners with the aforesaid rider, which is not acceptable. Petitioners being aggrieved by and dissatisfied with the impugned conditions imposed, through the office order dated 11.02.2008, by the Respondent-Authority (correct date is 11.02.2009) has filed the instant petition.

3. Upon notice Respondents No. 2 & 3 have filed para-wise comments, controverted the stance taken by the Petitioners.

4. Mr. Abdul Salam Memon, learned counsel for the Petitioners has contended that the Petitioners have been serving in the Respondent-Authority for about more than 24 years without any promotion. Learned counsel has further contended that Petitioners deserves to be promoted substantively from that year when their posts were upgraded on 17.01.2009 which is in accordance with the rules and policy and guideline approved by the Federal Government; that the impugned office order dated 11.02.2009 purportedly issued by the Respondent Authority, in supersession of the earlier office order dated 17.01.2009, modified the basic sprit of up-gradation and made it person specific up-gradation, which is nullity in the eyes of law; that Petitioners are entitled for further promotion in next rank after up-gradation of their posts but due to issuance of office order dated 11.02.2009, the future promotion of the Petitioners has been brought to an end, which is against the basic principle of law and promotion policy framed by the Federal Government from time to time; that Petitioners cannot be deprived of their legitimate right to claim for promotion and seniority in the cadre.

4. During the course of arguments learned counsel for the Petitioners realized and submitted that the Petitioners are confining their arguments to the extent of conditions imposed by the Respondent-Authority, through office order dated 11.02.2009 and they do not claim promotion through the instant petition. However they reserve their right to claim the same in other proceedings if the need be. The proposal seems to be reasonable

thus restrict us to dilate upon only the issue of propriety and legality of the office order dated 11.02.2009, issued by Respondent-Authority.

5. Mr. Zubair Zia Siddiqui, learned counsel for Respondents No. 2 & 3 has contended that the captioned petition is not maintainable under the law; that the Petitioners have no locus standi to file the present petition; that there are factual controversies involved in the matter which restricts the jurisdiction of this Court to adjudicate the matter; that the promotion cannot be claimed as a matter of right; that under the policy a number of employees of PQA have been allowed personal up-gradation in next pay scale, thus Petitioners cannot claim different treatment than others employees; that Petitioners have come before this Court with unclean hands. Learned counsel emphasized that the Petitioners intend conversion of personal up-gradation into promotion; that personal up-gradation to various employees, including Petitioners was allowed on the basis of completion of 18 years' service in one scale without any promotion; that the impugned order dated 11.02.2009 was issued to rectify the previous order dated 17.01.2009, which was inadvertently issued to bring in conformity with the policy of up-gradation; that the Petitioners while enjoying the up-gradation in terms of said policy cannot impugn the same being illegal and thereby simultaneously seeking conversion of the same into promotion despite non availability of the requisite posts, which is not permissible under the law. He lastly prayed for dismissal of the instant petition.

6. We have heard the learned counsel for the parties and perused the material available on record.

7. First and foremost, we would address the question of the maintainability of the instant Petition.

8. The Port Qasim Authority Employees Service Regulations, 2011 are statutory Rules of Service and the same were framed by the Board of Directors of Port Qasim Authority with the prior approval of the Federal Government, pursuant to Section 51 of the Port Qasim Authority Act No. XLIII of 1973. In the given circumstances, we are fully fortified by the view enunciated by the Hon'ble Supreme Court in para 50 of the judgment in the case of Pakistan Defence Housing Authority vs. Lt. Col. Syed Javed Ahmed (2013 SCMR 1707) that an aggrieved person can invoke the Constitutional Jurisdiction of this Court against a public authority. The same principle is also enunciated in the case of Muhammad Rafi and another vs. Federation of Pakistan and others (2016 SCMR 2146). Accordingly, we are of the view that this petition could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

9. The second question which requires our decision is whether up-gradation is distinct from the expression promotion and whether up-gradation is restricted to the post and not with the person occupying it.

10. The basic grievance of the Petitioners is that the Petitioners' posts that is Stock Auditors / Stock Verifiers was upgraded and re-designated as Deputy Manager, upon completion of 18 years' service in Finance Division and Internal Audit Department vide office order dated 17.01.2009. The Petitioners claim is that they are also entitled to be dealt with in accordance with the aforesaid office order rather than subsequent office order dated 11.02.2009 as discussed supra.

11. We have noticed that the Competent Authority of PQA approved re-organization of Internal Audit Department and prepared working paper for up-gradation of BPS-15 staff in BPS-17 as Deputy Manager and subsequently issued office order dated 17.01.2009 to benefit them. Record reflects that PQA issued another office order dated 11.02.2009 by nullifying the effect of earlier office order dated 17.01.2009, imposed the following conditions:-

- i) The up-gradation will be personal to the officers and upon their retirement, the post shall be deemed to have been reverted to its original position.**
- ii) On their up-gradation they will continue to perform their duties in their present capacity i.e. Stock Auditor/Stock Verifier BS-17.**
- iii) They will also not claim any seniority/promotion of BS-17 officers.**
- iv) In case of any officer apply for re-designation or change of cadre he will cease to enjoy the benefits of up-gradation.**

12. To analyze the above proposition, we refer to the expression up gradation, which is distinct from the expression promotion, which

has not been defined either in PQA Act No.XLIII of 1973 or, the Port Qasim Authority Employees Service Regulations, 2011.

12. We are of the considered view that for up-gradation the following conditions are pre-requisite:-

- i) **Firstly up gradation is restricted to the post and not with the person occupying it.**
- ii) **Secondly up gradation of posts does not mean automatic up gradation of the incumbents of these posts as well, in fact the appointment against the up graded post is required to be made in the manner prescribed in the Recruitment Rules for that particular post.**
- iii) **Thirdly up-gradation cannot be made to benefit a particular and individual.**

13. To justify up-gradation, Port Qasim Authority is required to establish that the Department needs restructuring, reform or to meet the exigency of service in public interest, in the absence of the aforesaid pre-conditions, up-gradation is not permissible under the law. Our view is supported by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456).

14. On merit, perusal of the office order dated 11.02.2009 explicitly show that the Petitioners post have been upgraded which is person specific and certain conditions have been imposed that the up gradation of the post of the petitioners would be continued till retirement of the petitioners, then the post shall be reverted into its original position. In view of this aspect of the case, we are of the opinion that condition imposed through the aforesaid office

order is highly unjustified action on the part of respondents and not sustainable in law.

15. We have noticed that once the policy decision is taken by the Competent Authority of PQA, more particularly in service matters and upon fulfill the pre-conditions as discussed supra the post is up graded, pursuant to that policy decision, the same post cannot be reverted back to its original position, for the simple reason that a vested right is created of the incumbents of the post.

17. In view of the above discussion, the office order dated 11.02.2009 discussed supra, which prima-facie show that the Respondents have reversed the policy decision dated 17.01.2009 of up gradation/promotion of the Petitioners from BPS-15 to BPS-17, They cannot take the decision unilaterally, without providing the petitioners an opportunity of being heard, thus we are not impressed and convinced with the assertion of the learned counsel for the Respondent-Authority; that the person specific up-gradation is permissible under the law and policy framed by the Federal Government to impose certain conditions through office order dated 11.2.2009 is justified.

18. Looking through the above perspective and keeping in view the factual position of the case, we firmly infer that the Petitioners post ought to have been upgraded on completion of 18 years of required length of service in the Respondent's Authority as decided by the competent Authority of PQA vide office order dated

17.01.2009, subsequent insertion of adverse condition vide office order dated 11.2.2009 is not called for.

19. The explanation offered by the Respondents is a clear negation of policy decision taken vide order dated 17.01.2009 and not acceptable.

20. In the light of above facts and circumstances of the case, the instant Petition is partly allowed in the terms, whereby the condition imposed through office order dated 11.02.2009 is declared to be without lawful justification.

21. The captioned Petition is disposed of in the above terms.

Karachi
Dated 14.02.018

JUDGE

JUDGE

ShafiMuhammadP.A