

IN THE HIGH COURT OF SINDH, ATKARACHI

C.P No. D-253 of 2015

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Adnan-ul-Karim Memon

Petitioners Faraz Sherwani & another through
Mr. Muhammad Arshad Khan Tanoli
Advocate.

Respondent No.1 Through Mr. Muhammad Aslam Butt,
DAG.

Respondents No.2 & 3 Through Mr. Ahsan Shahzad and Mr.
Muhammad Akram Javed, Special
Prosecutor NAB.

Date of hearing **17.08.2017**

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: By invoking extraordinary Constitutional jurisdiction of this Court under Article 199 of Constitution of Islamic Republic of Pakistan, 1973, the Petitioner has filed the instant Petition with the following prayer(s):-

- i) *Declare the Impugned notification dated 27.05.2014, as unlawful, Malafide, void & discriminatory as same is passed in contravention to the statutory rules framed by Respondent No.2, meant for promotion of Petitioners and so also made in flagrant disregard to fundamental rights of Petitioners as enshrined in chapter I of the Constitution of Pakistan 1973.*
- ii) *Direct the Respondent No.2, to consider the Petitioners for promotion against the post of Assistant Director (BPS-17) w.e.f. 24th July 2012 the date when Petitioners become eligible for promotion as in accordance with their 25% prescribed quota available for promotion.*

2. The gist of the case of the Petitioners is that the Petitioners are serving as Private Secretary (BPS-17) in National Accountability Bureau of Pakistan/ Respondent No.2.(NAB)

3. In the memo of Petition, the Petitioners have averred that they were initially appointed as stenographers in (BPS-15) on 23.07.2004 and 24.07.2004, respectively, on regular basis. They added that the post of stenographer was up-graded vide Office Memorandum dated 23.12.2011 and the Respondent No.2 issued the Notification dated 31.07.2012. They further averred that the Petitioners were promoted as Personal Assistant in BPS-16 vide Notification dated 05th July 2012, with effect from 27th June, 2012 and they submitted their joining reports on 09.07.2012 and 04.12.2012. As per averments, Petitioners filed Constitution Petition No.D-2056/2013 before this Court and this Court vide Order dated 11.12.2013 disposed of said Constitution Petition with the following observations:-

“The case of the petitioners is that they were promoted as Stenographers/Personal Assistants and are performing their duties in BS-16. The petitioners are claiming that the Respondents No. 5 & 6 were juniors to them in service, but in the DPC they have been considered and promoted to the posts of Private Secretaries/Assistant Directors in BS-17. It is further alleged by the learned counsel for the Petitioners that the petitioners were promoted from the post of Stenographers to the Personal Assistants, while the Respondents No. 5 and 6 were promoted from the post of Stenographers/Personal Assistants to the post of Private Secretaries/Assistant Directors. The petitioners prayed that they may be treated at par and may not be discriminated while they are also serving with the Respondent No. 1 for the last several years.

Mr. S. Amjad Ali Shah, learned Spl. Prosecutor for NAB/Respondents No. 1 to 4 as well as Mr. Muhammad AsifMangi, learned Standing Counsel both have contended that the case of the Petitioners will be considered in the next DPC and if they will be found eligible, they will be promoted on the basis of their performance and previous ACRs and they will be treated alike with the Respondents No. 5 & 6. Upon

such statement, learned Counsel for the Petitioners are satisfied.

This petition is disposed of with the directions to the Respondents No. 1 to 4 to consider the case of the petitioners in the next DPC.”

4. The case of the Petitioners was placed before the Departmental Promotion Committee (DPC) and Respondent No.2 (NAB) issued impugned Notification dated 27.05.2014 by promoting the Petitioners to the post of Private Secretary (BPS-17) on regular basis w.e.f. 22.05.2014 and both the Petitioners assumed charge of the office of Private Secretary (BPS-17) vide Certificate of Transfer of Charge dated 22.05.2014. But, the Petitioners made a representation against the impugned Notification dated 27.05.2014 regarding their promotion as Private Secretary instead of Assistant Director (NAB), on the premise that as per Terms and Conditions of Service (TCS) 2002, framed and notified vide SRO No. 780(I) 2002 dated 26th October, 2002, published in official Gazette of Pakistan on 7th November, 2002, the promotion of the Personal Assistant in next higher grade is Assistant Director (NAB). Petitioners asserted that as per corrigendum issued on 28th September, 2004 the post of Private Secretary had been deleted under Employees Terms & Conditions of Services (TCS), 2002; therefore, the promotion of Personal Assistant in next higher grade is Assistant Director. They further added that the subject promotion was required to be reviewed and re-notified as Assistant Director (BPS-17) as per Rules and Regulations framed/amended from time to time. Per Petitioners, after issuance of aforementioned corrigendum, the post of Private Secretary does not exist in hierarchy of NAB. Petitioners, being

aggrieved by and dissatisfied with the impugned Notification dated 27.05.2014, has preferred the instant Petition on 13.01.2015.

5. Mr. Muhammad Arshad Khan Tanoli, learned Counsel for the Petitioners has contended that the impugned Order regarding promotion of Petitioners against the post of Private Secretary (BPS-17) is against the Employees Terms & Conditions of Services (TCS), 2002; that the Respondents have issued Corrigendum dated 19.02.2003, introduced an amendment at Serial No.6 at page 3177 of the Statues under the term "conditions of appointment" and rows are added after Serial No.7; that the Respondents thereafter issued another Corrigendum dated 28.09.2004 at Serial No. 6,9 and 10,whereby Corrigendum dated 19.02.2003 was cancelled, consequently legal effect of Corrigendum dated 28.09.2004, which is of no effect since then and both the Corrigendum have been notified in the Official Gazette of Pakistan; that the Respondents are conscious of existing method of promotions of Petitioners as Assistant Director (BPS-17)NAB, and sought advice of the Establishment Division vide their letter dated 04.03.2009;that in response to the letter dated 04.03.2009 and the Establishment Division vide their Office Memorandum dated 10.04.2009 advised for issuing combined seniority list of all categories of employees in (BPS-16) including the Petitioners, who are eligible for promotion to the post of Assistant Director/Investigation Officer (BPS-17) against promotion Quota and their seniority may be determined under the Civil Servants Act 1973 and Rules framed there under i.e. on the basis of their date of regular appointment/promotion in (BPS-16); that despite clear advice of Establishment Division, Respondents No. 2 and 3 are not willing to issue final combined

seniority list of all categories of (BPS-16); that Establishment Division desired the copy of Notified Recruitment Rules of Junior Investigating Officers, Superintendents, Accountants and Personal Assistants, which was sent to them by the Respondent No.2 vide letter dated 11.03.2010; that in order to resolve the controversy of promotion of Personal Assistant (BPS-16) against the post of Private Secretary or Assistant Director (BPS-17), Establishment Division has forwarded its exhaustive comments to Respondent No.2; that Establishment Division has clarified in its comments dated 14.06.2010, as forwarded to the Respondent No.2, that under Notational Accountability Bureau (NAB), Employees Terms and Conditions of Service (TCS), 2002, Personal Assistants (BPS-16) are, inter alia, eligible for promotion as Assistant Director (BPS-17); that present Petitioners are only concerned for enforcement of their legitimate vested right arising out of their Statutory TCS Rules, 2002, which by no stretch of imagination can be allowed to be infringed, as these are protected under Article 4, 10-A, 25 & 37 of the Constitution and as such Petitioners are entitled to be dealt with in accordance with law; that right from the beginning of the creation of service structure of Respondent No.2, not a single Personal Assistant (BPS-16) has been considered and promoted as Assistant Director (BPS-17), which shows violation of Statutory law, on the basis of discrimination, nepotism, favoritism and malafide exercise of public power by the authorities of Respondent No.2; that Respondents No. 2 & 3 have made promotions from all the three categories of the employees of (BPS-16) except the Petitioners, hence, their quota of promotion as Personal Assistant as provided in TCS Rules 2002 has been badly

violated, whereas other three categories of employees (BPS-16) have been promoted in routine manner vide Notification dated 04.06.2008, 18.11.2009 & 27.12.2013; that 46 Junior Investigation Officers of (BPS-16), 12 Superintendents and 4 Accountants, respectively, have been promoted as Assistant Directors in (BPS-17); Learned counsel for the Petitioners in support of his contention has relied upon in the case of **Nasimul Haque Malik Vs. Chief Secretary Government of Sindh (1996 PLC (CS) 921 R 927) Federation of Pakistan Vs. Azam Ali (1985 SCMR 386)**, and argued that if promotion is made in violation of prescribed quota, such promotion would be treated as officiating in nature and effected employees would be deemed to have been senior than such promotees, hence the other three categories of employees of (BS-16) have been promoted in excess of their prescribed quota, hence their promotions may be treated as ad-hoc till the date, when the posts in their line of quota becomes available and Petitioners, if found eligible are entitled to have been promoted/regularized against said posts; that Petitioners became eligible for promotion in year 2012, after having requisite length of service, as provided under the TCS Rules 2002, but they were not considered for promotion as Assistant Director(BPS-17) against the promotion quota; that in view of Constitutional protection, Petitioners are entitled to be treated in accordance with law for promotion/seniority. In support of his contention, he relied upon the case of **I.A Sherwani vs. Government of Pakistan (1991 SCMR 1041 R 1086)**. He lastly prayed for allowing the instant Petition.

6. Mr. Ahsan Shahzad, learned counsel representing the Respondent No.2 has contended that instant Petition is not maintainable in law; that no civil servant of a non-cadre post can be transferred out of cadre or to be absorbed to a cadre post, which is meant of recruitment through competitive process; that instant Petition is not maintainable being hit by the doctrine of laches; that SRO. No. 193(i)/2003 dated 19.02.2003 was cancelled/withdrawn by Competent Authority through corrigendum dated 28.09.2004 in a lawful manner in terms of established Government principles for promotion of Private Secretaries; that no vested right was created in favour of the Petitioners either by issuance or by cancellation of SRO in 2003/2004; that Such SRO was issued and cancelled lawfully through corrigendum on 28.09.2004 as per law laid down in General Clauses Act 1897; that the instant Petition is bad in law for non-joinder of necessary and proper parties and the grievance of Petitioners allegedly arose due to up-gradation of post of stenographers (BPS-15) as Personal Assistant (BPS-16) announced by Finance Division vide Office Memorandum dated 23.12.2011; that by virtue of the said Office Memorandum, the next line of promotion was clarified by re-designation of the post of Stenographers as Assistant Private Secretary (BPS-16)(APS) and amendment in Rules is underway in NAB after vetting of same by Establishment Division & Finance Division, Govt. of Pakistan; hence the Petitioners have no locus standi to enforce their unlawful plea by invoking writ jurisdiction; that the Petitioners have not shown violation of any legal or fundamental Constitutional rights to invoke the Constitutional jurisdiction of

this Court; that the Impugned Order dated 27.05.2014 is lawful and made in a bona-fide manner in accordance with the Establishment Division Rules adopted by the Respondent No. 2 and the Government of Pakistan Policy regarding up-gradation of Stenographers (BPS-15) to Stenographers/APS (BPS-16); that Petitioners enjoyed benefit of up-gradation of their posts under the adopted Rules, which benefit could not have been available to them under Rule 3.02 of Employees Terms & Conditions of Services (TCS), 2002, therefore, Petitioners are not entitled for promotion as Assistant Director (BPS-17); that the Terms & Conditions of Services (TCS), Committee has finalized the Rules regarding terms and conditions /method and qualifications, wherein the post of Personal Assistant (BPS-16) has been abolished as a feeding cadre for promotion to the post of Assistant Director(BPS-17).Having submitted his pleas as above, he prayed for dismissal of the instant Petition.

7. Mr. Muhammad Aslam Butt, learned DAG, has supported the stance taken by the learned counsel for Respondent No. 2 and 3.

8. We have heard the learned counsel for the parties and perused the material available on record and case law cited at the bar.

9. Now, we address the question of jurisdiction of this Court to entertain the Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

10. We have noted that National Accountability Bureau has Statutory Rules of Service called as National Accountability Bureau (NAB) Employees Terms and Conditions of Service, (TCS) 2002. The said Rules, which have been made pursuant to Section 28-C of National Accountability Bureau Ordinance, 1999(The NAB Ordinance). In this regard, we are 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. Javed Ahmed (2013 SCMR 1707)*** that an aggrieved person can invoke the Constitutional jurisdiction of this Court against a public authority. The same principle has been enunciated in the case of ***Muhammad Rafi and another vs. Federation of Pakistan and others (2016 SCMR 2146)*** also. National Accountability Bureau employees are not civil servants as defined in Section 2(I) (b) (ii) of the Civil Servants Act, 1973 as well as under Section 4 read with Section 2(I) of the Federal Service Tribunal Act, 1973. Therefore, they cannot file an appeal before the Federal Service Tribunal, as such; the only remedy available to them is under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Reliance is placed upon the case of ***Federation of Pakistan vs. Ali Naseem and others (2016 SCMR 1744)***. In view of the forgoing, this Petition can be heard and decided on merits by this Court in exercise of its Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

11. Having decided on the maintainability of the instant Petition, the following question which needs to be resolved:

- i) Whether the Petitioners can be appointed by promotion to the post of Assistant Director (BS 17) as per National

Accountability Bureau Employees Terms and Conditions of Service, (TCS) 2002?

12. The case of the Petitioners is that Petitioners were promoted to the post of Private Secretary (BPS-17) instead of Assistant Director (NAB) by Departmental Promotion Committee-I on the premise that as per National Accountability Bureau Employees Terms and Conditions of Service (TCS), 2002 notified vide SRO No. 780(I) 2002 dated 26th October, 2002, the promotion of the Personal Assistants in next higher grade is Assistant Director and not Private Secretary, therefore the same may be re-notified as Assistant Director (BPS17). Whereas, learned counsel for the Respondents has refuted claim of the Petitioners and contended that SRO No.193 (I)/2003 dated 19.02.2003 was superseded through corrigendum dated 28.09.2004 by the Competent Authority in exercise of powers vested in it under General Clauses Act, 1897. And, even otherwise no vested right in favour of the Petitioners was created under the SRO dated 19.2.2003.

13. Perusal of record clearly shows that in pursuance of Section 28-C of National Accountability Bureau Ordinance, 1999 the Chairman NAB prescribed terms and conditions of service of the employees which were published in official gazette of Pakistan dated 07th November 2002; wherein the posts of Assistant Director / Investigation Officer / Section Officer all in (BPS 17) are to be filled in the following manner:-

METHOD OF APPOINTMENT

Sr. No.	Nomenclature of post	BPS	By promotion	By initial appointment	Remarks
7	Assistant Director/Investigation Officer/Section Officer	17	25%	75%	-

CONDITIONS FOR PROMOTION

Sr. No.	Nomenclature of post	BPS	Person eligible for promotion	Conditions
5	Assistant Director/Investigation Officer/Section Officer	17	Inspector / Superintendent/ Accountant / Personal Assistant (BPS-16)	3 years' service in BPS-16 or 8 years' service in BPS-11 and above.

14. We have noted the following factual aspects of Petitioners case placed before this Court which are as follows:

- i. *Petitioners were appointed as Stenographers (BPS-15) on temporary basis vide office order dated 29.07.2004.*
- ii. *The post of Stenographer (BPS-15) was upgraded to (BPS-16) vide office memorandum dated 23.12.2011 issued by Finance Division, Government of Pakistan.*
- iii. *Petitioners were promoted in their respective higher post as Personal Assistant BPS-16 vide Notification dated 05th July 2012 with effect from 27th June, 2012 and they submitted their joining report on 09.07.2012 and 04.12.2012 respectively.*
- iv. *Petitioner No. 2 filed C.P. No.D-2056 of 2013 before this Court and obtained Order dated 11.12.2013 that their case for promotion be considered by the Department with direction to Respondents No.1 to 4 to consider the case of the Petitioners in the next Departmental Promotion Committee (DPC).*
- v. *The case of the Petitioners was placed before DPC and on its recommendations Respondent No.2 issued Notification dated 27.05.2014 by promoting the Petitioners to the post of Private Secretary BPS-17 on regular basis w.e.f. 22.05.2014 and both Petitioners assumed charge of the office of Private Secretary (BPS-17) vide Certificate of Transfer of Charge dated 22.05.2014.*

15. During the course of arguments, learned Counsel for the Respondents placed on record a copy of NAB Corrigendum bearing SRO No.1106 (1)/2015 published in the Gazette of Pakistan dated 16.02.2016 Part II whereby, National Accountability Bureau of

even number dated 11th November,2015 regarding methods of appointment and qualifications (MAQ) of NAB employees were amended as under:

NATIONAL ACCOUNTABILITY BUREAU
CORRIGENDUM

Sr. No.	Page/Section/ Clause/Title	For	Read As
3	Page No.3714 Serial No.5 under head conditions for promotion (Column No.2 ,3 and 4)	Assistant Director 17 Deputy Assistant Director <ul style="list-style-type: none"> • Superintendent (BPS-16) • Accountant (BPS-16) • DCS (BPS-16) For promotion as AD(AD) Admn, Finance and IT)	Assistant Director 17 Deputy Assistant Director <ul style="list-style-type: none"> • Superintendent (BPS-16) • Accountant (BPS-16) • DCS (BPS-16) For promotion as AD(AD) Admn, Finance and IT)

16. In the light of above referred SRO No.1106 (1)/2015, the Petitioners failed to justify their eligibility for appointment by promotion as Assistant Director (BS-17). Therefore, they cannot claim appointment by promotion as Assistant Director (BS 17) under the Rules (supra), which have been framed under the statutory power within the ambit of the relevant statute, if the same do not offend against any law or any Constitutional or legal rights of the Petitioners. In addition, the Government is empowered to change the promotion policy and prescribe the qualification for a particular post through amendment in the relevant Rules, and it is for the Government and not for the Courts to make such policies.

17. Reverting to the question raised by the learned Counsel for the Petitioners that under National Accountability Bureau Employees Terms and Conditions of Service (TCS), 2002 notified vide SRO 780(I) 2002 dated 26th October, 2002, Petitioners were eligible to be promoted to the post of Assistant Director (BPS-17), *w.e.f. 24th July 2012, in accordance with their 25% prescribed quota.* Suffice it to say; under the SRO 780(I) 2002, Petitioners

were not eligible to be considered for promotion to the post of Assistant Director (BS 17) as they had no length of 3 years' service in BPS-16 or 8 years' service in BPS-11 and above. As per record the post of stenographer (BPS-15) was up graded to (BPS-16) on 23.12.2011. Record further reveals that Petitioners were promoted in their respective higher post as Personal Assistant BPS-16 vide Notification dated 05th July 2012 with effect from 27th June, 2012, pursuant to that Petitioner No.2 filed Constitution Petition No. 2056 of 2013 before this Court for consideration of their case for promotion to the post of Private Secretary (BS-17) which was allowed and their promotion was notified vide Notification issued on 27.05.2014. But, even on that date of impugned Notification, Petitioners were not eligible for promotion as Assistant Director (BS 17) because, they did not meet the criteria/conditions i.e. length of service as embodied in the Rules (TCS), 2002.

18. We are of the view that in service cases there is two pronged criteria, one being eligibility for promotion and the other being fitness for promotion, while the former relates to the terms and conditions of service, the latter is a subjective evaluation made on the basis of objective criteria. We are conscious that in service matters, the promotion depends upon eligibility, fitness and availability of vacancy and no one including the Petitioners can claim promotion as matter of right. It is for the Competent Authority, who could make appointments, determine, eligibility, fitness and promotion and other ancillary matters relating to the terms and conditions of the employees as prescribed under the Act and Rules framed there under.

19. The Petitioners failed to point out any malice on the part of Respondents or infringement of their right warranting interference of this Court in its Constitutional jurisdiction.

20. Fair and meritorious appointment to public office is requirement of law under Article 18 of the Constitution of Islamic Republic of Pakistan 1973. Accordingly, Respondent No.2 has issued impugned Notification dated 27.05.2014. The judgment rendered by the Hon'ble Apex Court in the case of **Ghulam Rasool vs. Government of Pakistan & others (PLD 2015 SC 6)** provides guiding principle in this regard.

21. It is well settled law that no civil servant can be transferred from his cadre to another cadre and absorbed another cadre post. We are fortified by the decision rendered by the Hon'ble Supreme Court in the **Suo Moto Case No.13 of 2016 (action against illegalities, contravention and violations in appointments within NAB) reported in (2017 SCMR 8380)** wherein, it has been held that method, academic qualifications, experience and terms and conditions prescribed for the post, requisite academic qualification and experience must be possessed by a person at the time of his appointment. It is further held that:-

“We are aware that the recruitment rules of NAB exclude recruitment through the FPSC, but in the larger public interest, the FPSC shall undertake this exercise and the post shall be filled in by observing the mandate of Article 240 and 241 of the Constitution, as these posts are extremely sensitive and only the most qualified candidates should be appointed.”

22. The case law cited by the learned counsel for the Petitioners is distinguishable on the facts of the case in hand.

23. In light of the above facts and circumstances, we conclude that there is no illegality, infirmity or material irregularity in the impugned Notification dated 27.05.2014 issued by National Accountability Bureau/Respondent No.2. Consequently, the instant Petition being devoid of merit is dismissed along with listed application(s).

JUDGE

JUDGE

Shafi/PA