

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

C.P. No. D- 503 of 2009

Present

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon.

Niaz Hussain Petitioner

Vs.

Province of Sindh & others Respondents

Date of Hearing : 07.02.2019

Date of Announcement : 12.02.2019

Mr. Jhamat Jethanand, Advocate for the petitioner

Mr. Sher Muhammad Leghari, State Counsel

O R D E R

ADNAN-UL-KARIM MEMON, J.- Through instant petition, the petitioner is seeking declaration to the effect that the Office Orders dated 17.7.2009 and 21.7.2009 issued by the District Co-ordination Officer (DCO) Dadu, and Executive District Officer (EDO), Health Dadu, whereby the office order dated 1.12.2008, regarding up-gradation of the post of petitioner as Senior Dispenser in BPS-16 was cancelled, are illegal and unjustified.

2. Brief facts of the case, as per pleadings of the parties are that initially the petitioner was appointed as Dispenser in Pay Scale - 5 against the post of Male Staff Nurse at Taluka Hospital Mehar district Dadu, by Health Directorate Sindh Hyderabad vide order dated 3.3.1976; subsequently in the year 1978, he was posted against existing vacancy of Store-Keeper in Own Pay Scale (OPS) Basis vide order dated 4.7.1978. Petitioner has submitted that the post of dispenser was upgraded from BPS-5 to BPS-06 with effect from 15.3.1982 vide Finance Department's Notification dated 25.08.1982. Petitioner has submitted that Sindh Government vide

Notification dated 13.5.2006 sanctioned up-gradation of various posts falling in different categories of Health Department Government of Sindh, in the pay scale, resultantly the respondents issued the office order dated 27.11.2008, whereby he was allowed BPS-9 with effect from 13.5.2006. Petitioner has pleaded that his name was appearing at S.No.27 of category-I, which was subsequently sanctioned vide Office Order dated 1.12.2008 from BPS-06 to BPS-16; that he had been drawing salary in accordance with the aforesaid office order on the upgraded post of senior dispenser in BPS-16 in Civil Hospital Dadu and stood retired from service vide order dated 17.10.2018, on attaining the age of superannuation but the respondents are still pursuing the impugned orders dated 17.7.2009 and 21.7.2009 after his retirement from service, which act of the respondents is causing hardship to him in service benefits.

3. Upon notice Respondents No. 2 & 4 have filed para-wise comments, controverted the stance taken by the Petitioner.

4. Mr. Jhamat Jethanand, learned counsel for the petitioner has argued that the impugned orders are against the basic principle of natural justice and are liable to be struck down; that the aforesaid orders are issued without assigning any reason or justification under the law and thus are liable to be quashed; that Respondent No.3 had no jurisdiction and authority to cancel the order issued by Respondent No.4; that the order dated 1.12.2008 issued by Respondent No.4 was in pursuance of policy decision dated 13.5.2006 of Government of Sindh, which is legal and valid order and is liable to be acted upon; that the petitioner has attained the age of superannuation and retired from Government service vide order dated 17.10.2018. He lastly prayed for allowing the instant petition.

5. Mr. Sher Muhammad Leghari, learned State Counsel has raised the question of maintainability of instant petition and has argued that the Petitioner has 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

Petitioner has come before this Court with unclean hands. He emphasized that the petitioner was appointed by Director Health Services Hyderabad on 4.3.1976 and in the intervening period of two years, he was posted as Storekeeper in Civil Hospital Dadu vide order dated 4.7.1978; that the petitioner was posted as junior Storekeeper but on the later stage, he made an departmental Appeal to Director Health Services Sindh Hyderabad for awarding him scale of senior storekeeper. His application was forwarded by Civil Surgeon Civil Hospital Dadu vide order dated 16.10.1982 and subsequently vide letter dated 21.1.1989, this process of communication was continued till 1990; that the seniority list of Senior storekeepers shows that the petitioner had been drawing salary of senior storekeeper and not of dispenser; that the petitioner had taken away his original service book from the office being the office bearer and did not produce the same during tenure of his service although he had no right to keep the same with him and from where the entries of Up-gradation from BPS-06 w.e.f. 15.03.1982 as per notification issued by Government could be verified. This act of the petitioner is illegal on his part; that the petitioner was awarded move over from BPS-06 to 11 as Senior storekeeper; that Respondent sanctioned up-gradation of various posts in the pay scales for categories (I) (II) (III) on 13.5.2006 do not relate to storekeepers; that the petitioner's up-gradation at S.No. 27 category-I does not relate to the post of storekeeper; that the order issued by Respondents for up-gradation from BPS-6 to 16 were on the commitment of the then Civil Surgeon, Civil Hospital Dadu who with malafide intention shown the petitioner as dispenser and not storekeeper by tampering the service record; that the petitioner's service book was prepared by Civil Surgeon, Civil Hospital Dadu by betraying the EDO (Health) Dadu and concealing the factual position and the status of post; therefore, their office requested DCO Dadu vide letter dated 8.6.2009 to cancel the orders and effect recovery of the amount drawn from 1.1.2009 through monthly salary of the petitioner; that the orders of up-gradation of the petitioner stood cancelled by the DCO Dadu, therefore, the entitlement of the difference of the pay and claim are absolutely wrong and not within the purview of rules; that

District Accounts Officer, Dadu has passed the bills of different persons who are entitled to Up-gradation as per Government Notification; that petitioner was served with show cause notice and explanation therefore Respondent No.3 rightly issued the cancellation orders being principal Accounting Officer of District Government Dadu; that since the orders passed by the Civil Surgeon Civil Hospital Dadu, who was in alliance with the petitioner recorded wrong entry showing him dispenser; that the storekeeper is not capable to hold the post of dispenser as per Government Notification; that disciplinary action against the petitioner is still subsisting. He lastly prayed for dismissal of 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. To appreciate the issue of maintainability, during the course of arguments, learned counsel for the petitioner has brought on record the Office Order dated 17.10.2018 issued by Civil Surgeon, Civil Hospital Dadu, whereby the petitioner has been shown to have retired from the post of dispenser in BPS-16 (Civil Hospital Dadu) on attaining the age of superannuation i.e. 60 years. If this is the position of the case, this petition is maintainable and can be heard and decided on merit, thus the objection on the aforesaid issue is over ruled.

9. Having decided on the maintainability of the instant Petition, questions which agitate the controversy at hand, could be reduced to the following:-

- i) Whether the initial appointment of the petitioner was Dispenser or Storekeeper in Civil Hospital Dadu?
- ii) Whether the post of Dispenser was up-graded by Government of Sindh from time to time lastly in BPS-16, which was a policy decision?
- iii) Whether the Respondents could continue with the impugned letters dated 17.7.2009 and 21.7.2009, initiated prior to the retirement of the Petitioner?

10. To elaborate on the above questions, we have to look at the Appointment Order dated 3.3.1976 issued by the Directorate of Health Sindh, Hyderabad in favor of the petitioner, an excerpt of the same is reproduced below for sake of convenience:-

APPOINTMENT ORDER

Mr. Muhammad Niaz Hussain s/o Muhammad Ramzan is appointed as Dispenser against the post of Staff Nurse at Rs.150/00 P.M. in Grade of Rs.150-6-180/8-220/-10-280 on ad-hoc / temporary basis at T. Hospital Mehar on the following terms and conditions:-

1. His / Her services are purely temporary and liable to be terminated at any time without assigning any reason or formal notice. In case he / she wishes to resign from service, one month's notice will be necessary failing which one month's salary shall be forfeited in lieu thereof. If however, his / her resignation is not accepted and he / she absconds he / she will be proceeded against under the Essential Services Act, 1958, and will also be liable for dismissal and debarred from future govt. service.
2. As long as the post remains temporary and thereafter during the period of probation his / her services are liable to be terminated without any reason being assigned, but after confirmation he / she will be governed by the provisions of the relevant __rules.
3. His / Her appointment is subject to the production of Fitness Certificate from the Civil Surgeon Dadu.
4. His / Her age should not be less than 18 years or more than 25 years at the time of joining service.
5. He / She will have to gain typing speed of 30 words per minute within 3 months (for Ministerial Esstt: only).
6. His / Her appointment is subject to his / her being domiciled in Sindh Province.
7. He / She shall be liable to serve anywhere in the Province of Sindh.
8. His / Her appointment is subject to verification of his / her character and antecedent.
9. He / She will not be entitled to any Travelling Allowance for presenting himself / herself for Medical Examination at __joining the first appointment.

If he / she accepting the post on these conditions he / she should report himself / herself for duty to the District Health Officer, Dadu within 7 days from the date he / she is failing which this offer will stand automatically cancelled and no further communication will be entertained.

In case he / she was a stipendiary student and under bond to serve the Government and fails to report for duty within the stipulated time, the

recovery of the Scholarship amount will be affected as per terms and conditions of the bond executed by him / her.

DIRECTOR HEALTH SERVICES
SIND, HYDERABAD.

Copy for information and necessary action to:-

1. Mr. Miss, Mrs. Niaz Hussain at Hyderabad for compliance with reference to his / her application dated 2.3.1976.
2. The Civil Surgeon / Medical Superintendent, Dadu.
3. The District Health Officer, Dadu. Mr. Niaz may please be posted as Dispenser against the post of Staff Nurse. As soon as the service of a qualified Staff Nurse becomes available, the service of Mr. Niaz will be terminated unless otherwise ordered.
4. The Secretary, Govt. of Sind, Health & Social Welfare Dept. Karachi, _ to Govt. letter No. _ dated 3.3.1976.
5. General File / Personal File (to be opened)
6. Nursing Section.

DIRECTOR HEALTH SERVICES
SIND, HYDERABAD.

The following particulars duly supported by the attested copies may please be supplied:-

(1) Registration Certificate (for professional service only). (2) Qualification Certificate (3) Domicile Certificate (4) Character Certificate from the Head of Institution last attended and from other two responsible persons not being his/her relatives who are well acquainted with him / her (5) Date of Birth (6) Date of joining service (7) Permanent Home address (8) Mailing address (9) Verification Roll duly verified from the Police authorities (action is to be taken by the Head of the office).

11. From bare perusal of the appointment order of the petitioner, we have found that prima-facie; there are certain discrepancies in the service record of the petitioner, his initial appointment as Dispenser was against the post of Male Staff Nurse on ad-hoc basis with the condition that as and when the service of a qualified Staff Nurse becomes available, the service of the petitioner would be terminated, which would mean that the appointment was not made against a sanctioned post and that there was no clear vacancy available at the time of his initial appointment. Prima-facie the said appointment was in deviation from recruitment/service rules and procedures. It is a well settled law that aforesaid post can only be filled after

advertisement and fulfillment of all codal formalities and every candidate has a right to be considered for appointment in the substantive vacancy, if he possesses the requisite qualifications. We would not dilate further on the matter of initial appointment of the petitioner on the basis of material available on record. However, it is pertinent to say that after retirement of the petitioner, the impugned action on the part of Respondents has lost its sanctity for a simple reason that no concrete action was taken against the petitioner on the aforesaid allegations during his tenure of service. Record does not reflect that any enquiry was conducted on the charges leveled in the impugned letters and no initial appointment letter has been produced by the Respondents to show that the petitioner was initially appointed as Storekeeper in the Civil Hospital Dadu to appreciate the arguments of learned State Counsel.

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

13. 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 Sindh Civil Servant Act, 1973 or Rules framed therein.

14. 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.

15. To justify up-gradation, Respondents are 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).

16. Perusal of Record reflects that the competent authority approved and notified the service structure of Para Medical Staff of Health Department from BPS-1 to 15 and accorded sanction for up-gradation of various posts in pay scale (category-I, category-II, category-III) vide Notification dated 18.5.2006.

17. The record further reflects that the aforesaid post of dispenser was upgraded to BPS-12, thereafter to BPS-14 and finally in BPS-16. We have also gone through the Office Order dated 1.2.2008 issued by EDO Dadu for up-gradation of the post of dispenser to BPS-16 as Senior Dispenser in Civil Hospital Dadu, which explicitly show that he has acted upon the policy decision of the Government of Sindh.

18. We have noticed that once the policy decision is taken by the Competent Authority of respondents, more particularly in service matters and upon fulfilling 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 incumbent of the post.

19. The only question remains to be answered is as to whether the petitioner stood retired from service of respondent as dispenser in BPS 16 or Storekeeper on OPS basis, is within the parameters of law?

20. To appreciate the issue of OPS, we have inquired from the learned State Counsel to show us any provision of law and or rule under which a Civil Servant can be appointed on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He,

however, submitted that in exigencies, the Government makes such appointments as a stop gap arrangement. This practice of appointment on OPS basis has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides blocks promotions of the deserving officers. In this respect, Rule 8-A of the Sindh Civil Servants Appointment, Promotion and Transfer) Rules, 1974, empowers the Competent Authority to appoint a Civil Servant on acting charge and current charge basis, it provides that if a post is required to be filled through promotion and the most senior Civil Servant eligible for promotion does not possess the specific length of service, appointment of eligible officer may be made on acting charge basis after obtaining approval of the appropriate Departmental Promotion Committee/Selection Board. We have also noted that Sub-Rule 4 of the afore-referred Rule 8 further provides that appointment on acting charge basis shall be made for vacancies lasting for more than 6 months and for vacancies likely to last for less than six months. This acting charge appointment can neither be construed to be an appointment by promotion on regular basis for any purposes including seniority, nor it confers any vested right for regular appointment. In other words, appointment on current charge basis is purely temporary in nature or stop-gap arrangement, which remains operative for short duration until regular appointment is made against the post. it is crystal clear that there is no scope of appointment of a Civil Servant on OPS basis except resorting to the provisions of Rule 8-A, which provides that in exigencies appointment on acting charge basis can be made, subject to conditions contained in the Rules.

21. We, on the basis of contentions of the parties with the material produced before us have reached the conclusion that the petitioner was not initially

appointed as storekeeper, but later on was posted as storekeeper on OPS basis, which was temporary in nature and obtained certain allied benefits and later on his application for permanent absorption on the aforesaid post was declined by the competent authority vide order dated 9.7.1978 (available at page 271 of the court file), therefore at this juncture no adverse inference can be drawn on the issue in hand.

22. Reverting to the contention of the learned State Counsel representing the Respondents that disciplinary action against the petitioner on the basis of impugned letters is still subsisting, we do not agree with the aforesaid contention, for simple reason that if a Government servant, during pendency of any inquiry into his conduct attains the age of superannuation before the completion of inquiry, the disciplinary proceedings against him shall abate.

23. As regards the contention of the learned counsel for the Petitioner that the impugned Office Order dated 17.7.2009 issued by the then District Coordination Officer have adversely effected the vested rights of the Petitioner so far as his service benefits are concerned. We have noted that under Sindh Local Government Ordinance, 2001 (Since repealed by Sindh Local Government Act, 2013) District Coordination Officer was appointed in a District under Section 28 of the Sindh Local government Ordinance, 2001 and in addition to the duties and functions assigned to him under rules, the D.C.O was the official head of District Administration and had powers to coordinate the activities of all groups of district offices and to call for any case or information from any district office. Therefore, this assertion of the learned counsel has no force.

24. In view of what has been discussed above, we are of the considered view that the petitioner stood retired from Government Service vide Office Order as discussed supra, therefore the impugned letters are of no consequences for the reasons as discussed in the preceding paragraphs. Our view is supported by Fundamental Rule 54-A.

25. Resultantly, this petition is disposed of in the above terms along with pending application(s).

JUDGE

JUDGE

karar_hussain/PS*