

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Aftab Ahmed Gorar
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D-3961 of 2020

Ghulam Abbas Sangi &
Perwaiz Ahmed Mahar
Petitioners through : Mr. Rafiq Ahmed Kalwar, advocate and
Mr. Muhammad Yasir, advocate

Respondent No.1
Through : Mr. Muhammad Nishat Warsi, DAG

Respondents No.2&3
Through : Ch. Muhammad Ashraf Khan, advocate

Date of hearing
& order : **24.01.2022**

ORDER

ADNAN-UL-KARIM MEMON, J. Through this petition, the petitioners have challenged the retrospective effect of the Promotion Policy of 2017 introduced by the National Bank of Pakistan (**NBP**) over the promotion of the petitioners as Vice President and the letters dated 18.06.2020 and 23.06.2020 issued by the respondent-NBP, with a further prayer that the petitioners are entitled to be promoted to the post of Vice President in the wake of the Promotion Assessment Scoring System (**PASS**) prevailing according to Promotion Policy of 2016 with back benefits.

2. The case of petitioners is that the petitioners being eligible for the promotion from Assistant Vice President (**AVP**) to Vice President (**VP**) under the PASS score as per Promotion Policy 2016, for attaining the threshold marks and were declared eligible for the promotion in next rank vide office order dated 17.08.2017; that despite the clear vacancies, qualifying the PASS parameters including the seniority and interview, the petitioners were kept in the lurch and were not promoted to the post of Vice President; that the petitioners were deliberately neglected, disregarded from promotion in clear violations of the Promotion Policy 2016; that to prejudice the promotion of the petitioners with malafide intentions, the respondents radically changed the Promotion Policy 2016 vide NBP President Office Circular No.02/2017 dated 30.11.2017 (Promotion Policy 2017); that the 2017 Policy reduced the minimum PASS score from 38 to 20 in minimum eligibility criteria and further changed the scoring criteria of PASS system and extended great discretion in the interviews by increasing numbers from 20 to 50 and thus great discretion was given to higher management to manipulate with the promotions of the employees and scoring of the PASS system; that the respondents promoted their blue-eyed juniors on the day when the 2017 Promotion Policy was introduced; that the petitioners moved several grievance petitions/appeals, but to no avail, compelling them to approach this Court.

3. Mr. Rafiq Ahmed Kalwar, learned counsel for the petitioners, has argued that the retrospective application of the impugned Promotion Policy 2017 over the promotion process of the petitioners initiated and completed under Promotion Policy of 2016 is illegal, unlawful, malafide, discriminatory, unconstitutional and thus void; that admittedly the case of the petitioners for their promotion was taken up by the respondents under Promotion Policy of 2016 and the whole process of interviews was completed thereunder, then the respondents were required under the law to have issued notification of promotion of the petitioners under the Promotion Policy of 2016; that unilateral change in the Promotion Policy of 2016 and introduction of revised Policy of 2017 and its retrospective application on the petitioners' case is in violation of Articles 9, 14 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973; that the promotion made by the respondent No.2 are in violation of principles of transparency competitiveness and merit basis in the light of observation of the Hon'ble Apex Court; that the act and omissions on the part of the respondent-Bank are in express violation of Section 24-A of the General Clauses Act, 1987. In support of his contentions, he relied upon the cases of *Shafqat Ali v. Government of Sindh through Chief Secretary and 3 others*, **2010 PLC (CS) 536**, *Senior Member BOR and others v. Sardar Bakhsh Bhutta and another*, **2012 SCMR 864** and unreported **judgment dated 16.11.2020** of this Court passed in *HCA No.253 of 2019*. He lastly prayed for allowing the instant petition.

4. Ch. Muhammad Ashraf Khan, learned counsel representing the respondent-bank, has argued that petitioner No.1 was lastly promoted as AVP with effect from 01.01.2009, thereafter being eligible, he was considered in terms of Promotion Policies 2012, 2013, 2014, 2015, and 2017, but his marks were less than threshold marks as set forth under the Promotion Policy 2017, hence could not be promoted. Similarly, petitioner No.2 was lastly promoted as AVP with effect from 01.01.2010 thereafter being eligible, he was considered in terms of Promotion Policies 2013, 2014, 2015 and 2017, but his marks were also less than cut-off marks so that he could not qualify for promotion; that promotion to higher grade is not the constitutional/vested right of any employee; that the Board of Directors being competent authority has powers conferred upon the National Bank of Pakistan Ordinance 1949, to devise/review of change and approve Promotion Policy periodically or as and when required; that the Promotion Policy of 2016 was never implemented; that the objective of circulation of Policy on 30.11.2017 was to apprise the employees of the amendments approved by the Board of Directors, further that the implication of petitioners that parameters of PASS score and its weightage was changed to deprive them is baseless as Policy does not target any specific person or group of employees, it was applicable on all employees; that the policy of 2017 was neither retrospective nor any process under the Policy of 2016 was in progress; that the Policy of 2017 was/is neither in violation of the principles of transparency, fairness or competitiveness, nor based on nepotism or favoritism. He lastly prayed for the dismissal of the instant petition.

5. Mr. Muhammad Nishat Warsi, learned DAG has adopted the submissions of the learned counsel representing the respondent bank.

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

7. It is well settled that in promotion matters, the overall assessment of an officer's performance during a year may completely depend on the subjective opinion of his Reporting Officer; and, the weightage required to be accorded to it to determine his fitness for promotion, which entail an objective assessment. In principle, the Courts cannot play the role of assessing body and sit in judgment over subjective evaluation; however, can examine whether the required objective criterion for promotion was followed or otherwise in a suitable case subject to grave illegality and perversity in the action of the authority having domain to the affairs. On the aforesaid proposition, we are fortified with the decisions of the Honorable Supreme Court in the cases of *Khan M. Muti Rahman and others* 2006 PLC (C.S) 564, and *Tariq Aziz-Uddin in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009,* 2010 §CMR 1301.

8. Coming to the main issue, primarily in promotion cases there are certain conditions/criteria for consideration for promotion in the next rank i.e. seniority-cum-fitness, length of service, eligibility for the post and availability of the post; and, one being eligibility and the other being fitness, while the former relates to the terms and conditions of service, the latter is a subjective evaluation made based on objective criteria. It is for the Competent Authority, who could make appointments, determine seniority, 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 thereunder. In our view, neither any seniority nor any promotion can be claimed or granted without fulfilling the promotion criteria under the relevant promotion policy/law. On the aforesaid proposition, we are fortified by the decision rendered by the Hon'ble Supreme Court in the case of *Chairman FBR v. Muhammad Asfandyar Janjua and others* (2019 §CMR 349).

9. Basically, it is for the respondent-bank to determine the eligibility criteria of promotion and it is essentially an administrative matter falling within the exclusive domain and policy decision making of the respondent-bank and the interference with such promotion policy matters, at this stage, is not warranted on the premise that no vested right of a Bank employee is involved in the matter of promotion, or the rules determining his eligibility or fitness. It is also settled law that Courts ordinarily refrain from interfering in the policymaking domain of the Executive of the Public Sector entities, until and unless the same offends the fundamental rights of the parties. More particularly, in the light of the ratio of the latest judgment of the Honorable Supreme Court in the case of *Khyber Medical University, etc. vs. Aimal Khan, etc.* vide order dated 4.1.2022 passed in Civil Petition No.3429 of 2021. In principle, it is the prerogative of the respondent bank to promote a person in a bank according to fitness and capability required for the post. On the aforesaid proposition, we are guided by the judgments of the Hon'ble Supreme Court of Pakistan rendered in the cases of *Dr. MIR ALAM JAN VS Dr. MUHAMMAD SHAHZAD,* 2008 §CMR 960, *ARSHAD ALI TABASSUM VS The REGISTRAR, LAHORE HIGH COURT, LAHORE,* 2015 §CMR 112, *ASIF HASSAN VS SABIR HUSSAIN,* 2019 §CMR 1720 and an *unreported*

judgment passed in CP No.D-5616/ 2014, Dr. AKHTAR HASSAN KHAN VS FEDERATION OF PAKISTAN, 2012 §CMR 455 and SAID ZAMAN KHAN VS FEDERATION OF PAKISTAN through Secretary Ministry of Defence, 2017 §CMR 1249.

10. In principle, this Court cannot perform the functions of a recommending / selection authority in service matters to substitute its opinion for that of the competent authority. On the issue, we are fortified with the decision of the Honorable Supreme Court in the case of *Sh. Muhammad Sadiq vs. Federal Public Service Commission and others, 2013 §CMR 264, Dr. Mir Alam Jan vs. Dr. Muhammad Shahzad and others, 2008 §CMR 960* and *Dr. Shamim Tariq Vs. International Islamic, University Islamabad through President and others 2020 §CMR 568.*

11. Primarily, it is a settled principle of law that our Constitution is based on Trichotomy as the law laid down by the Honorable Supreme Court in *Ziaur Rehman's case (PLD 1973 §C 49)* and this Court has only jurisdiction to interpret the law. This Court has no jurisdiction to take the role of the policymaker in the garb of interpretation as the law laid down by the Honourable Supreme Court in the cases of *Zamir Ahmad Khan's case (PLD 1975 §C 667)* and *Zamir Ahmad Khan's case (1978 §CMR 327).*

12. Reverting to the arguments that the petitioner was eligible for promotion to the post of VP, suffice it to say that eligibility for promotion does not mean the same as a vested right to be promoted under all circumstances. This is also evident from the promotion policy 2017 which has been annexed with the instant constitutional petition by the petitioner; that also envisages that the criteria which lay down the minimum condition for eligibility do not imply that those who meet them become automatically entitled to be promoted; and, this is couched in the promotion policy-2016 & 2017. Further, it has been provided in that policy that promotion for the position of VP will be considered after the interview and it will be the sole discretion of the management to determine the number of vacancies for promotion in each grade, which will carry 20 marks in addition to the aforesaid criteria, for which prima-facie the petitioner failed to meet at the relevant point in time as opined by the respondent-Bank. Thus we cannot substitute our view in place of the finding of the competent authority. In our opinion, the impugned action taken by the competent authority of the respondent bank vide appellate orders dated 18.6.2020 & 23.06.2020 was proper and based on reasonable grounds as well as in the terms of the promotion policy in vogue. An excerpt of the order dated 18.06.2020 is reproduced as under:

"From the very outset it is mentioned that NBP Board in exercise of powers conferred upon it under the National Bank of Pakistan Ordinance, 1949, enacted the By-laws, duly approved by the Federal Government and in terms of By-Law 51(2) of the NBP Bye-Laws, the Board is empowered as well as competent to frame its policies.

In this regard, you are advised that above mentioned Promotion Policy was reviewed and amended by Board of Directors during 2017 and updated Promotion Policy after incorporating all changes was circulated vide President's Office Circular No.02/2017 dated 30.11.2017 and Promotions were released under said promotion Policy while Promotion Policy dated 28.10.2016 was never implemented. The changes in the said Promotion Policy were implemented on all employees and it did not specifically targeted any employee or group of employees.

Being eligible, you were considered for promotion as VP in terms of Promotion Policy-2017 but your attained marks were less than cut-off marks, hence not promoted. Moreover, your earlier appeal received in light of HRM Circular No. HRM/HRDD/CMW/431 dated 21.12.2017 was also scrutinized but no anomaly was found. The final decision regarding all such appeals was communicated to Regions/Groups vide letter NO. HRMG/HRDD/APA2015-2016 & Promotion 2017/2016 dated 30.05.2018."

13. We have also attended the factum of discrimination as raised by learned counsel for the petitioners, however, we do not see any malafide on the part of respondent-bank to single out the petitioners for the subject promotion, thus no case on discrimination point is made out. However, we make it clear that if the petitioners at any stage and point in time fulfill the criteria for promotion in the next rank as outlined in the promotion policy, the respondents shall give due consideration to the case of petitioners for promotion under law as they have not been declared ineligible yet, however, the only ground agitated by the respondent-bank that the petitioners failed to meet the threshold marks for which this Court has already shown reservation to deal with such situation and it is for the respondent-bank to decide under law.

14. The case law cited above is not helpful to the case of the petitioners, which is essentially on a different proposition of law; and, is distinguishable from the facts obtained in the present case.

15. In the light of the above facts and circumstances of the case, the instant petition is meritless, which is accordingly dismissed along with pending applications.

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Nadir*