

Order Sheet
IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Adnan-ul-Karim Memon

Mr. Justice Adnan Iqbal Chaudhry

Constitutional Petition No. D – 4035 of 2019

Bashir Ahmed Kalwar

Versus

The Federation of Pakistan & others

Date of hearing : 22.04.2021

Mr. Abdul Salam Memon, advocate for the petitioner

Mr. Muhammad Khalil Dogar, advocate for respondent No.3.

Mr. Muhammad Nishat Warsi, DAG.

ORDER

ADNAN-UL-KARIM MEMON, J. Through this petition, the petitioner has prayed as under: -

- a) *Declare the supersession of the petitioner made by the Respondent No.02 / CSB and the competent authority through impugned order dated 06.06.2018 as illegal, malafide, unjustified, void ab-initio, whimsical, capricious, arbitrary, without lawful authority, in colorful exercise of discretion virtually coram-non-judice and of no legal effect.*
- b) *Direct the respondents to consider the case of promotion of petitioner in BPS-20, in terms of original reference of December, 2016, on the basis of policy prevailing then, from the date his batch mates / juniors were promoted with all consequential benefits, through circulation.*

2. Mr. Abdul Salam Memon, learned counsel for the petitioner, contended that the impugned supersession is penalty imposed upon the petitioner in the year 2018 which was in gross violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. Further that the action on the part of the respondents was arbitrary and capricious, thus untenable in law; that Section 24-A of the General Clauses Act, 1897, obliges every person exercising powers conferred by a statute, to act "reasonably, fairly, justly and for the advancement of the purpose of the enactment". It also stipulates that the person making any order under the power conferred by any enactment shall, so far as necessary or appropriate, "give reasons for making the order". Therefore, unreasoned order of supersession, without providing an Appellate forum is violative of various provisions of the Constitution and law; that impugned action was/is virtually Coram-non-judice and of no legal effect in the light of judgment dated

30.11.2017 passed by the learned single Bench of Islamabad High Court Islamabad; that there is no other efficacious and adequate remedy available with the Petitioner but to invoke the Constitutional Jurisdiction of this Court for the relief(s) as prayed in the Memo of Petition.

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

4. The instant petition relates to the service of the petitioner, whereby the respondents awarded punishment to the petitioner by imposing the penalty of supersession, on certain allegations, without inquiry, which he is asking for setting aside, through the instant Petition. An excerpt of the Office Order dated 06.06.2018 is reproduced as under:-

“The Departmental Representative presented the record of the officer and apprised the Board that the officer was superseded in 2016 due to category C. Departmental Representative further apprised the Board that in a writ petition filed by the officer, Islamabad High Court had passed the judgment on 30.11.2017 setting aside the recommendation of the CSB 2016 and directed that he be considered afresh and that his case be placed before the forthcoming meeting of the CSB. The Establishment Division has filed an Intra Court Appeal against this judgment which is pending adjudication in the Islamabad High Court. The Board reviewed the record and performance of the officer and noted that the officer demonstrated limited understanding of his service and public policy issues; he has average analytical and synthesizing skills and displayed limited capacity to work hard; he had non-serious attitude towards the prescribed training and his contribution in the assignments were not up to the mark and has limited potential for promotion. After discussion about officer’s record and his unsatisfactory performance, the Board recommended him for supersession as he failed to meet the required threshold of 70. The Board also place him Category-C.”

5. The pivotal question which needs to be addressed to reach a just decision is that when a civil/public servant is recommended for supersession by the Central Selection Board (CSB) and the recommendation of the CSB is approved by the competent authority, what is its effect, and whether supersession is punishment?

6. To elaborate on the issue of “supersession”, the word “supersession” can denote only the selection of a junior in preference to a senior according to their rank in the civil service; a supersession is only involved if there takes place a comparative examination of service records of two or more individuals by an authority competent to appoint and determine whether the senior of the two should be ignored from promotion. This necessarily involves an examination of and a decision on the comparative merits of service records of each individual

and without such comparison and ignoring of a senior officer, there can be no supersession. Such supersession would always imply punishment on account of allegations against the civil servant. On the aforesaid proposition, the decision rendered by the learned Division Bench of Peshawar High Court in the case of Saeed Muhammad Zai v. Secretary Government of Khyber Pakhtunkhwa (2017 PLC (C.S.) 738) is clear in its terms.

7. We have noticed that in service jurisprudence, the competent authority can take disciplinary action against the civil servant in the following cases:—

“(a) Where two or more penalties under the Government Servants (Efficiency & Discipline) Rules, 1973, have been imposed on a civil servant.

(b) Where overall grading of the ACRs is Average, and/or where adverse remarks in regard to acceptance of responsibility, integrity, reliability, output of work and behavior with the public were recorded in the ACRs (duly conveyed to the concerned civil servant and his representation against it finalized, as per rules).

(c) Where a civil servant is twice recommended for supersession by the Selection Board/DPC and the recommendation of the Selection Board/DPC is approved by the competent authority.

(d) Where other specific and cogent grounds, including the following, may warrant retirement of a civil servant:—

- (i) persistent reputation of being corrupt;
- (ii) possessing pecuniary resources and/or property etc. disproportionate to his known sources of income; and
- (iii) frequent unauthorized absence from duty.”

8. We are cognizant of the fact that the recommendations, as contained in the Establishment Division’s OM No. 1/3/2007/CP/ II dated 24th October 2007 “Promotion Policy”, also prescribed conditions for deferment and also required that the officers superseded/deferred by the competent authority be informed about the reason for his supersession/deferment to enable him to improve his performance and to complete his records or to make up any other deficiency, as the case may be.

9. Record reflects that petitioner was recommended for supersession, vide letter dated 06.06.2018 on the ground that during his service tenure, he demonstrated limited understanding of his service and public policy issues; he had average analytical and synthesizing skills and displayed the limited capacity to work hard; he had a non-serious attitude towards the prescribed training and this contribution in the assignments were not up to the mark and

has limited potential for promotion. *Prima-facie* these are serious allegations levelled against the petitioner, which ought to have been probed under the law; and, he ought to have been provided a meaningful hearing on the subject issue, but nothing could be brought on record to substantiate the allegations; even against his supersession, he was denied representation by resorting to the provision of The Civil Servants (Appeal) Rules, 1977, with the assertion that no appeal/ representation lies on the matters relating to the determination of fitness of the person to hold a particular post or to be promoted to a higher grade. Moreover, his case was placed before the CSB in its meeting held on 26.11.2018 to 13.12.2018 and the Board reviewed his case and on the same analogy recommended him for deferment to further watch his performance for one year in terms of revised Promotion Policy 2007, however, the episode did not end here; and, again his case was placed, for promotion, before the CSB in its meeting held on 27.5.2019 to 29.5.2019. However, the Board deferred his case for the next CSB meeting when his Evaluation Report (PER) 2018-19 become available.

10. At this stage, learned DAG assisted by Mr. M. Khalil Dogar, learned counsel for respondent FBR, categorically stated that the supersession of the petitioner had already been superseded due to his subsequent deferment in CSB meeting as discussed supra, as such the case of the petitioner, is required to be dealt with in accordance with law, for which learned counsel for the petitioner has no cavil to the aforesaid proposition; and, prayed that the respondent-CSB may be directed to consider his case for promotion in BPS-20 from the date his batch mates/juniors were promoted under the prevailing policy. In our view, the proposal as put forward by the learned DAG is fair enough.

11. Principally, in promotion matters to such post could not be made mechanically and a variety of factors, such as examination of service records, evaluation reports of training institutions, the record of disciplinary proceedings, reputation of integrity and efficiency, suitability for handling the particular assignment, etc. had to be taken into consideration. It is also a fact that a substantial amount of subjective evaluation of an officer's capabilities is involved. Therefore, normally questions of determination of fitness of a person to be promoted are not capable of being scrutinized based on judicially manageable standards. Nevertheless, such subjective evaluation is to be premised on an objective criterion with the object of evolving such objective criterion, the Government itself has been issuing promotion policy guidelines

and developed methods of quantifying confidential reports; which have been treated at par with statutory rules. It may be clarified that the assessment of an officer's performance during a year may completely depend on the subjective opinion of his Reporting Officer. The weightage required to be accorded to it to determine fitness for promotion entails an objective assessment. Indeed, the Courts will not sit in judgment over subjective evaluation but would indeed be competent to examine whether the required objective criterion was followed.

12. It has been pointed out that the Board has again deferred the petitioner's case for promotion for the next CSB due to the non-availability of his Evaluation Reports (PERs) 2018-19. If this is the position of the case, it may be observed that the preparation of PERs relates to the Efficiency and Discipline of a civil / Government servant, which is the function of the reporting officer. *Prima-facie* the evaluation reports play a vital role in considering the case of promotion under the prevailing promotion policy. However, the promotion depends upon eligibility, fitness, and availability of vacancy. It is essential for the competent authority to take prompt disciplinary action against the civil / Government servant under The Government Servants (Efficiency & Discipline) Rules, 1973, ('Rules') if he/she is found persistently corrupt; and/or is possessing pecuniary resources and/or property, etc. disproportionate to his/her known sources of income; and/or, remains frequently on unauthorized absent from duty. Furthermore, if two or more penalties under the Rules have been imposed on him/her; and, his / her overall grading of the PER was/is average, and/or adverse remarks regarding the acceptance of responsibility, integrity, reliability, the output of work and behavior with the public were recorded in the PER duly conveyed to the concerned civil servant and his representation against it finalized, as per rules; and, if he/she was/is recommended twice for supersession by the Central Selection Board CSB/DPC and the recommendation of the CSB/DPC was/is approved by the competent authority. As far as deferment of promotion of a civil / Government servant is concerned, his / her promotion can be deferred, if his / her seniority was/is under dispute or was/is not determined; or he/she was/is on deputation, training or leave; or disciplinary proceedings were/are pending against him/her, or he/she is not considered for promotion for any reason other than his / her fitness for promotion. In any of the above conditions, the Competent Authority is required to ensure that in future disciplinary action must be taken under The Government Servants (Efficiency and Discipline) Rules, 1973, against all Government / civil servants, against whom disciplinary and/or criminal proceedings are pending;

and, in case of disciplinary proceedings against them, the same must be concluded/decided expeditiously under law. Needless to say, if the Government / civil servant is exonerated of the charge(s) leveled against him, he/she shall be given the treatment provided for in The Government Servants (Efficiency and Discipline) Rules, 1973, and other enabling laws.

13. In our view, to qualify for the promotion, the least that is expected of an employee is to have an unblemished record. This is the minimum expectation to ensure a clean and efficient administration and to protect the public interest. An employee found guilty of misconduct cannot be placed at par with the other employees, and his / her case has to be treated differently. While considering an employee for promotion his / her entire service record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him / her promotion, such denial would not be illegal or unjustified under the service jurisprudence.

14. Coming to the issue at hand, the prime object of maintaining PER is to assess whether the officer under consideration is entitled to promotion or not, and such assessment, in addition to his / her performance and eligibility, would also include whether or not he / she has been awarded any major or minor penalty. The CSB/DPC, which is held to finalize the decision about promotion based on the above assessment, is required to make an overall assessment of the performance of the civil servant based on a working paper prepared by the department concerned. Therefore, preparation and presentation of PER is the duty of the department concerned and not of the civil / Government servant for the simple reason that PER is confidential documents to which the officer concerned cannot have any access. The law only requires that if any adverse remarks are made in PER, the officer concerned should be informed so that he/she may be able to improve his / her performance to make up for the deficiency.

15. Primarily the evaluation made by an Expert Committee should not be easily interfered with by the Court which does not have the necessary expertise to undertake such exercise that is necessary for such purpose. It is a settled proposition of law that subject to its powers and authority, the CSB/DPC has to assess every proposal for promotion on case to case basis under the law. In cases where the disciplinary case / criminal prosecution against the civil / Government servant is not concluded even after the expiry of two years from the date of the meeting of the first CSB/ DPC which kept its findings pending in

respect of the civil / Government servant, the appointing authority may consider his / her ad-hoc promotion in accordance with law.

16. In view of the above discussion, it is directed that the competent authority shall ensure that in future before convening the meeting of CSB and/or DPC for considering the cases for promotion of civil / Government servants, the department concerned shall provide the complete set of PERs of the concerned officer to CSB / DPC well in advance so that the cases for promotion should be decided without any delay. It may be observed that if the promotion of any civil / Government servant is deferred or delayed after passing of this order for want of PER, the Secretary of the department concerned, competent authority, and all officials responsible for deferring or delaying the promotion may be held personally responsible for defiance of the above direction of this Court.

17. With the above observations, the petition stands disposed of with no order as to costs with direction to the competent authority of respondents to consider the case of promotion of the petitioner in BPS-20 in the light of dicta laid down by the Hon'ble Supreme Court in the case of Federation of Pakistan v. Dr. Muhammad Arif, **2017 SCMR 969**; and, his earlier supersession as recorded hereinabove will not come in his way, while considering his case for promotion in next rank.

Karachi dated: _____

J U D G E

J U D G E