

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-7229 of 2021

Capt. Rizwan Saif Khan Ghauri
Petitioner through : Malik Naem Iqbal advocate assisted by
Barrister Faizan Hussain Memon

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

Respondent 2 and 3
through : Mr. Muhammad Arshad Khan Tanoli, advocate

Respondent No.4
through : Nemo

Date of hearing : **19.04.2022**
Date of order : **29.04.2022**

ORDER

Adnan-ul-Karim Memon, J. Through this Constitutional Petition, the petitioner has assailed his out of Cadre transfer and posting order dated 18th October 2021 as Director (Cargo Operation) BS-20, on a current charge basis, issued by the Director (HRM), Port Qasim Authority (PQA), rather than Director (Marine Operation) in BPS-20. Petitioner also seeks his regular promotion to the post of Director (Marine Operation), inter-alia on the ground that he is the senior-most officer of BPS-19 in Marine Operation Cadre in PQA and as per his experience, he is entitled to be promoted to the aforesaid post as the said post is vacant for the substantive appointment and his posting out of cadre is illegal and violates principles of law enunciated by the Hon'ble Supreme Court of Pakistan in its various pronouncements.

2. Malik Naeem Iqbal, learned counsel for the petitioner, has submitted that the impugned office order dated 18.10.2021 to the extent of the petitioner is ex-facie malafide since on one side, the respondents 2 and 3 recommended case of re-employment of the respondent No.4 on the ground of shortage of trained pilots and simultaneously they are keeping the petitioner out of his cadre posting, which is not permissible under the law and liable to be reversed. Learned counsel referred to rule 8 (b) (3) of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1974 and argued that promotion in BPS-20 could be made on a current charge basis; that he has been posted out in another cadre and respondent No.4 has been accommodated as Director (Marine Operation) in violation of Port Qasim Authority Employees Service Regulations, 2011 and enabling laws. Learned counsel has submitted that his posting in another cadre is in blatant violation of principles of law enunciated by the Hon'ble Supreme Court of Pakistan in the case of *Contempt Proceedings against Chief Secretary Sindh, 2013 SCMR 1752* and *Ali Azhar Khan Baloch v. Province of Sindh, 2015 SCMR 456*. Per learned counsel the petitioner is

at Serial No.1 in the seniority list of BPS-19 officers of Marine Operations Cadre, thus his posting in another cadre of (Cargo Operation) is illegal. Learned counsel also referred to the Resolution of the Board meeting of PQA held on 16.10.2021 whereby the private respondent has been accommodated on re-employment after his retirement on 17.7.2022 which is against the dicta laid down by the Hon'ble Supreme Court of Pakistan in the aforesaid cases. He prayed for allowing the instant petition.

3. Mr. Muhammad Arshad Khan Tanoli, learned counsel representing PQA, has submitted that the petitioner is unable to perform and continue his duties as Director (Cargo Operation) BS-20 on a current charge basis on medical grounds and his family has been residing in Canada, and he used to visit his family often and used to apply Ex-Pakistan leave; that he has already exhausted more than two years Ex-Pakistan leave, hence because of the foregoing, the petitioner is not fit to be posted against the post of Director (Marine Operation) which is in BPS-20, whereas presently petitioner is an officer of BPS-19, more so criteria for appointment against the selection post is merit. Respondent No.4 is the second senior-most officer of BPS-19 and he has been found eligible and fit to be posted against the vacant post of Director (Marine Operation) by the competent authority on account of his merit and eligibility and he has been performing his duties to the satisfaction of the Authority. He further submitted that unless it is established beyond any doubt that a person has guaranteed fundamental or legal right in his favor, causing legal injury or loss, does not arise. Learned counsel submitted that the post of Director Marine Operations is in BPS-20, whereas the petitioner is an officer of BPS-19, hence under the law, he cannot claim the promotion to a higher post on a current charge basis as a matter of right. He lastly submitted that it is not a case of sheer discrimination, because discrimination always involves an element of unfairness and bias and it is in that sense that the expression has to be understood. In support of his case, he relied upon the cases of Asadullah Mangi and others v. Pakistan International Airlines Corporation and others, 2005 SCMR 445 and Tariq Azizuddin's case 2010 SCMR 1301. Learned counsel further submitted that respondent No.2 being a statutory authority has the legitimate prerogative to amend, vary, modify, terms and conditions as well method of appointment of any post under the requirements of the authority; that the petitioner and respondent No.4 are officers of BPS-19 of the same cadre i.e. Marine Operation Cadre and after the return of the petitioner from abroad he was posted as Director Cargo Cadre on a current charge basis, therefore, no illegality was committed. Learned counsel further added that jurisdiction of this Court under Article 199 of the Constitution cannot be invoked in seniority and promotions matters as the petitioner has no locus standi and he is not the aggrieved person to call in question the posting of the private respondent. Learned counsel further submitted that it is a well-settled principle of law that merits include qualification for certain posts in statutory /public sector organizations and under section 50 of PQA Act, 1973, the PQA Board is empowered to appoint such officers and servants as it may consider necessary for the performance of its functions, on such terms and conditions as it may deem fit. Learned counsel referred to regulation 26 of PQA and submitted that eligibility for promotion of a post in BPS-20 has been given which is a selection post, thus a fit person is required to be promoted on the said post. Since the

petitioner has remained under medical treatment for a couple of years thus the aforesaid post cannot be given to him under the circumstances. Furthermore, in absence of any malafide or illegality the competent authority's decision to the posting in PQA cannot be interfered with in the Constitutional Jurisdiction of this Court unless it is shown that the incumbent is not fulfilling the criteria for promotion set forth by the competent authority which is not the case in hand. He prayed for dismissal of the instant petition.

4. We have carefully examined the respective contentions of the parties in the light of relevant provisions of law and the record of the case as well as case law cited by them.

5. The questions for our determination are whether appointments shall be made through a competitive process or otherwise; and, whether out of cadre posting to another department of the PQA is permissible under the Port Qasim Authority Employees Service Regulations; and whether promotion should be made on seniority-cum fitness basis, coupled with the length of service and availability of vacancy in the cadre; and whether re-employment after retirement can be made in PQA under the Port Qasim Authority Employees Service Regulations.

6. This is a matter of grave concern that for several years, the out of cadre posting, appointment without advertisement, and re-employment after retirement issue persist, in Government-owned authorities, despite orders passed by the Honorable Supreme Court of Pakistan in its various pronouncements.

7. In principle appointments, posting, removals, and promotions must be made under the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent, and reasonable manner; and, in the public interest. The appointment in the public sector authority/institution is a trust in the hands of public authorities and it is their legal and moral duty to discharge their function as a trustee with complete transparency as per the requirement of law so that no person who is eligible to hold such posts, is excluded from the process of selection and is deprived of his right of appointment in service. The Constitutional requirement, inter alia, is enshrined in Article 18 of the Constitution which enjoins that "Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business" includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations, etc. based on open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness. The above objective enshrined in our Constitution cannot be achieved unless due publicity is made through a public notice for inviting applications with the aid of the leading newspapers having wide circulation; and if a person is appointed to any office under the Government hierarchy, without any advertisement, that appointment violates the rights of other citizens to equality of opportunity in matters relating to appointment to any office under the State guaranteed to them under Article 27(1) of the Constitution, which

provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence, or place of birth. The spirit of the said Article applies with equal force to appointments made in statutory bodies, autonomous bodies, authorities, and corporations owned and controlled by the Federal Government. The Full Bench of the Hon'ble Supreme Court in the case of Munawar Khan v. Niaz Muhammad, **1993 SCMR 1287**, raised a voice of concern in such a situation and held that "in future, all appointments shall be made after due publicity in the area from which the recruitments had to take place." Law to the said effect was also laid down by the Hon'ble Supreme Court in the case of Obaidullah v. Habibullah, **PLD 1997 SC 835**. The Honorable Supreme Court in the case of Lt. Col. (R) Muhammad Arif Zahid v. Azad Government of the State of Jammu and Kashmir, **2018 PLC (C.S.) Note 136**, a writ of quo warranto seeking the quashing of the appointment against the post of Director Armed Services Board for one year was allowed on the ground inter alia that the said post was not advertised before making the appointment. The Honorable Supreme Court in the case of Muhammad Muneer Malik v. Allama Iqbal Open University, **2016 PLC (C.S.) 896**, has held that the object of inviting applications from candidates through advertisements was to make certain that all eligible interested candidates might have an opportunity to compete for appointment through a fair and transparent selection process. Furthermore, it was held as follows:-

"Transparency entails principles of equal opportunity in order to guarantee that the appointment is made on merit and of the most capable and qualified person. Persons eligible in terms of the prescribed criterion, qualification and conditions relating to experience have a right to be given fair consideration through a transparent process. Transparency is the key to ensuring a merit based selection and wide advertisement of the criterion and qualifications determining the eligibility of candidates is a pre-condition."

8. It is well-settled law that in public sector authorities and institutions, before finalizing a fit candidate by the competent authority or Selection Board, for the appointment, the testimonials and antecedents of each candidate shall be considered under the prescribed benchmarks, to maintain a level playing field and evenhanded competition amongst all candidates, the qualification and competency in all fairness should be considered and adjudged under the qualification notified. The dictum laid down by the Honorable Supreme Court in the case of Government of Punjab through Secretary (S&GAD) Lahore and another vs. Zafar Maqbool Khan and others, **2012 SCMR 686**, has held that the eligibility of a candidate had to be determined under the advertisement for the post, service rules governing the appointment and any amendment or instruction backed by the law.

9. Touching the vires of the action of the PQA on the touchstone of the case law discussed supra, the impugned notification stipulates that the junior officer of BPS-19 was posted/transferred in "own pay and scale" and out of cadre posting was given to respondent No.4 as Director (Marine Operation) which post is in BPS-20. The Honorable Supreme Court in the case of Province of Sindh v. Ghulam Fareed 2014 SCMR 1189, it was

held, that posting/transferring a civil servant on his pay and scale (OPS) is not legally permissible:

"11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on a higher grade/post 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. We have examined the provisions of the Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appoint [of] any officer on higher grade on "Own Pay and Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has also 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."

10. On the issue of re-employment, essentially, a retired public servant shall not ordinarily be re-employed under the Federal Government unless such re-employment is necessary for the public interest, and was/is required to be made in the exercise of discretionary powers; such discretion must be employed in a structured and reasonable manner; and, in the public interest, for that, we have to examine that aspect along with other issues raised hereinabove, on the next date of hearing in the light of ratio of the judgments pronounced by the Honorable Supreme Court on the subject issue from time to time. Parties are directed to come prepared along with relevant law.

11. In this case, the post of Director (Marine Operation) (BS-20) is a selection and cadre post as provided under regulation 26 of PQA, which is meant for recruitment through by way of promotion and person eligible of BPS-19 officer of Operations Cadre having 05 years' service in BPS-19 or 17 years' service in BPS-17 and above. Learned counsel for the respondent PQA has informed that the post of Director (Marine Operation) is now required to be filled through a competitive process and the petitioner is at liberty to compete as one post has already been exhausted by the respondent-PQA. Be that as it may, the competent authority of respondent PQA is required to appoint the Director (Marine Operation) BPS-20 a fit and proper person under the recruitment rules by way of promotion, if the officer eligible for the post is not available, the same post shall be filled on open merit. However, it is made clear that ad-hocism and current charge/OPS basis appointment in PQA shall be avoided and the person eligible and fit for the subject post should be appointed without further delay. Besides the above, it is well-settled law that a public servant cannot be transferred out of cadre to any other department of the Government; therefore this post needs to be filled on merit.

12. We, in the circumstances of the case, by following the ratio of the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases, *Khan Muhammad v. Chief Secretary Government of Baluchistan, and others*, **2018 SCMR 1411** and *Ali Azhar Khan Baloch v. Province of Sindh*, **2015 SCMR 456** direct the competent authority of PQA to adhere to all the principles as laid down by the Honorable Supreme Court on the subject issue of transfer and posting of officers on administrative posts.

13. In the proceedings of similar nature, arising out of CP No.D-6095 of 2021, we were apprised of the factual position to the extent that while appointing the officers in BPS-19 and 20 in different cadres in the year 2010, no codal formalities were fulfilled and the officers were inducted without advertisement, prima facie, which is an alarming situation, let the Chairman PQA to look into this aspect of the matter and ascertain whether the officers concerned were appointed under the recruitment rules or otherwise; and, whether before their appointment and induction in PQA the posts were properly advertised or otherwise. In the future, the competent authority of PQA shall ensure to appoint the Officers of BPS-17 to 20 in PQA as per recruitment rules, through a competitive process and regular mode of service, after proper scrutiny. Let such report be submitted to this Court on or before the next date of hearing positively.

To come up **after three weeks** along with **CP No.D-6095 of 2021**. Let a copy of this order be transmitted to the Chairman Port Qasim Authority for compliance within time.

J U D G E

J U D G E

Nadir*