

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-602 of 2022

Dr. Ayesha Iftikhar

Petitioner: Through Ms. Tayyaba Sadia, advocate

Respondent No.1: Nemo.

Respondent No.2 & 3: Through Mr. Ali Safdar Debar, AAG

Date of hearing
& Decision: 11.01.2023.

ORDER

ADNAN-UL-KARIM MEMON, J. – Through the captioned petition, the petitioner is seeking direction to respondents No.2 & 3 to consider her case for promotion against the existing vacant posts of Assistant Professor (BPS-18) under the law and promote her against the vacant post of Assistant Professor, Pathology (BPS-18) on seniority-cum-fitness basis.

2. The facts of the case, in nutshell, are that the petitioner was initially appointed as Lecturer, Pathology (BPS-17) at JPMC vide appointment letter dated 03.02.2010 (w.e.f. 12.12.2009) and has also completed her M.Phil in the same discipline in 2017; and, she was allowed the current charge to the post of Assistant Professor (Pathology) BPS-18 vide Notification dated 03-03-2017. According to the petitioner, her name was placed at serial No.1 in the seniority list amongst the Lecturers Pathology BPS-17 vide notification dated 10.06.2021. Petitioner has averred that she has already been allowed the current charge post just because of the absence of regular constituted DPC. Petitioner further submitted that she has not been considered for any tenurial promotion hence in the absence of any DPC, the services of the Petitioner are in a standstill position, which in turn badly affects the petitioner morally, socially, and economically. Per petitioner, at present there are 02 sanctioned vacant posts of Assistant Professor, Pathology BPS-18; very surprisingly, Respondent No. 2 on 07-12-2021 issued a Notification bearing No.SO (DM)6-76/2020/DPCJPMC

whereby they promoted one of the incumbents at Serial No.9. namely, Dr. Amtul Qudus to the position of Assistant Professor Pathology BPS-18), even though the post of Lecturer Pathology BPS-17 (Petitioner) is also a feeding post for promotion against the post of Assistant Professor (Pathology) BPS-18 under the existing promotion Rules as notified by the Health Department Govt. of Sindh vide Notification dated 16-12-2021, but the Respondent No.2 & 3 deliberately failed to consider the name & candidature of the petitioner against promotion to the post of Assistant Professor (Pathology) BPS-18. Moreover, the incumbent promoted (Dr. Amtul Qudus) was an Assistant Anesthetist (BPS-17) and she has her separate path of promotion in the discipline or specialty of Anesthesiology, that on 29-12-2021, Respondent No.3 issued a letter to the Petitioner whereby they informed the petitioner that her name was included in the panel for promotion to the post of Assistant Professor, but due to non-availability of clear vacancy she has not been considered. However, as a matter of fact, & record, there are 2 clear vacant posts of Assistant Professor BPS-18 still presently lying vacant against which the petitioner can be considered for promotion being the highly deserving and most eligible candidate, hence this petition.

3. Ms. Tayyaba Sadia, learned counsel for the petitioner, contended that the respondents have failed to discharge their official obligatory and mandatory duty by violating the Law, rules and Principles as per forth by the Hon'ble Apex Court; that the respondents have illegally and in violation of the Principles of good governance & equity issued impugned Notification Dated 07-12-2021 and not promoted the Petitioner despite she is senior most on the seniority list rather promoted an alternate irrelevant incumbent to the position of Assistant Professor BPS-18 and such acts of discrimination, unfettered discretion and pick & chose in favor of some blue eyed person are in contravention of the existing service rules and of course against the Fundamental Rights of Citizens as enshrined in the Booklet of the Constitution; that Respondents have no power and authority to act beyond the limits as prescribed and set by the Law, hence the Super structure built on illegal base/foundation falls to the ground without any remaining and rubble; that the Respondents have capriciously acted and taken away the right to life of the Petitioner, which has no legal bases and is violation of the Doctrine of due process of law; that it has been repeatedly observed and reiterated in plethora of Judgments that once a right is created in favour of either a civil servant or

public servant, then such act becomes vested right and no vested right can be abridged or taken away except in due process of law; that the aforesaid impugned act of the Respondents No.2 & 3 has discouraged a promising career of an officer to move further in career with unblemished record of service; that it is well settled principle of law that the discretion vested with the authority is not unbridled but requires to be exercised fairly, justly, honestly, and keeping in view of the circumstances faced by the petitioner the Respondents, nevertheless prefer to exercise discretion arbitrarily, malafidely, capriciously, and whimsically whereof the Hon'ble Supreme Court in the cases reported as 1995 SCMR 650, 2005 SCMR 25, 1990 SCMR 999, 2001 SCMR 256. She lastly submitted that the impugned act of the Respondents No. 2 &3 is tainted with malice, unlawful, illegal, unjust, and against the law; that the right of entering into a dignified and lawful profession/occupation is protected and guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan 1973.

4. Mr. Ali Safdar Depar learned AAG opposed the pleadings of the petitioner on the ground that the case of the petitioner was placed before DPC for promotion to Assistant Professor Pathology (BPS-18), but due to the non-availability of the vacant post of Assistant Professor, she could not be promoted. He further submitted that so far as the case of Doctor Amatul Qudus is concerned, he admitted that Dr. Amatul Qudus was appointed as Assistant Anesthesiast, whereas the petitioner was appointed as Lecturer Pathology, both the cadres have different seniority lists. Dr. Amatul Qudus fulfilled the required criteria for promotion as per the recruitment rules for Assistant Professors hence she was considered and promoted on the recommendation of DPC. He further submitted that Dr. Amatul Qudus is senior to the petitioner in terms of length of service, as the petitioner was appointed on 12.12.2009, whereas Dr. Amatul Qudus was appointed w.e.f. 11.07.2000. Learned AAG added that there were three sanctioned posts of Assistant Professor Clinical Pathology/Pathology at JPMC and as per recruitment rules the post of Assistant Professor is required to be filled in 50% by initial appointment and 50% by promotion. He further submitted that out of 03 posts, one post was occupied by Dr. Noshaba Rahat by initial appointment and the other post was (on lien) by Dr. Muhammad. Dr. Muhammad Anwar was appointed as Associate Professor of Pathology at JSMU w.e.f. 03.03.2016 and retained lien against the post of Assistant Professor for the

period from 03.03.2006 to 02.03.2023 vide notification dated 02.03.2016 and 09.02.2021, while the third post was required to be filled in by promotion which has been filled in by Dr. Amatul Qudus. However, learned AAG submitted that the case of the petitioner for promotion as Assistant Professor shall be considered by the DPC as soon as a vacancy occurs for promotion quota. He lastly submitted that the department of Pathology is a sensitive place, therefore, the petitioner being a suspected psychiatric patient cannot be posted at such place until her medical report is received from the Medical Board and the petitioner is avoiding appearing before the Board despite letters issued. He further submitted that there is a dispute between Federal Government and Provincial Government pending before the Hon'ble Supreme Court of Pakistan about the status of JPM. He lastly prayed for the dismissal of this petition.

5. On the contrary, the petitioner who is also present in Court along with her counsel submitted that she has not been allowed to perform her duties on the purported plea of being a psychiatric patient which is illegal action on the part of the respondents and prayed for annulment of the Constitution of Special Medical Board of Psychiatric evaluation of the petitioner. Petitioner has submitted that this is a lame excuse on the part of the respondents just to deprive her of promotion to the post of Assistant Professor, though the posts are lying vacant.

6. Heard learned counsel for the parties and perused the record.

7. As per the promotion policy, the minimum length of service for promotion in BPS-18 is 5 years of service in BPS-17. For posts in BPS-19, 12 years' service in BPS-17, and for posts in BPS-20, 17 years' service in BPS-17 is required and, it is well-settled law that in case of promotion vested/fundamental right cannot be claimed. As per learned AAG, the case of the petitioner shall be considered for promotion as soon as a vacancy occurs for the promotion quota. Be that as it may, since the dispute between the Federation and Sindh province, on the issue of the affairs of the management of the respondent-institute, is pending before the Honorable Supreme Court in Civil Review Petitions in *Dr. Nadeem Rizvi's case*, **2020 SCMR 1**, therefore at this juncture, we layoff our hands so far as the subject dispute between two governments, pending before the Honorable Supreme Court, is concerned. However, we make it very clear that in the intervening period, all decisions/actions taken by the Sindh Government on the

promotion in the respondent-institute, shall be subject to the outcome of the decision of the Honorable Supreme Court in the aforesaid Review Petition.

8. Under the circumstances of the case, we do not see any impediment to refer the matter of petitioner for consideration of her case for promotion to the next rank for the reason that the petitioner has been serving as Lecturer (Pathology) w.e.f. 12.12.2009 to 24.10.2016. Secondly, she has also served as Senior Lecturer (Pathology) w.e.f. 25.10.2016 to 02.03.2017 and Assistant Professor on a current charge basis w.e.f. 03.03.2017 till date as per certificate issued by the office of Executive Director JPMC vide certificate dated 28.12.2021 (Page 37 of the memo of the petition). Prima facie, the petitioner has the requisite length of service to claim promotion to the next rank which is subject to the promotion criteria, i.e. seniority-cum-fitness, eligibility for the post and availability of the vacancy.

9. We, for the aforesaid reasons, and in the given circumstances, dispose of the instant petition with a direction to the competent authority of the official respondents to place the case of the petitioner before DPC for consideration of her promotion to the next rank, in terms of length of service of the petitioner and subject to her eligibility and qualification for the subject promotion, within two weeks. However, this arrangement is subject to the observation made in the preceding paragraph. The petition is accordingly disposed of along with pending applications with no order as to costs.

JUDGE

JUDGE

Nadir*