

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-1693 of 2022

Amanullah Lakheer

Petitioner: Through Malik Altaf Hussain, advocate

Respondents No.1&2: Through Mr. Ali Safdar Depar, AAG

Date of hearing

& Decision: 11.01.2023.

ORDER

ADNAN-UL-KARIM MEMON, J. – Through the captioned petition, the petitioner is seeking direction to the respondent Health Department, Government of Sindh, to place the case of the petitioner before Departmental Promotion Committee (DPC) for proforma promotion.

2. The facts of the case, in nutshell, are that the petitioner was appointed as a Medical officer (BPS-17) on 02.06.1996 in the Health Department, Government of Sindh, and his services were regularized on 20.12.2003 in pursuance of Section 3 of the Sindh Regularization of Doctor's Appointed on Contract Basis Act, 2003. Per petitioner, his name was placed at Sr. No.2141 in the seniority list of Medical Officers (BPS-17) as stood on 31.12.2012, and in the year 2016 DPC meeting, the officers even placed at Sr. No.2321 of the seniority list promoted, but the petitioner was declined to be considered for promotion for which he applied for taking appropriate action strictly under law, but still, nothing has been done so far. According to the petitioner, on 13.06.2019 he intimated the respondent No.2 when he was about to reach the age of superannuation, therefore, his case may be placed before DPC for its consideration under law, however, respondent No.2 vide notification dated 19.12.2019 promoted the junior officers of the petitioner to BPS-19, hence, this petition.

3. Malik Altaf Hussain, learned counsel for the petitioner, argued that since the juniors of the petitioner have also been promoted to BPS-18 and 19, the petitioner had been made to work under his juniors, which is a constant agony, mental trauma, and a source of endless torture. He submitted that the petitioner has a guaranteed right of being treated under law and the spirit of Articles 4 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 protect the right of equality in so far as the petitioner is concerned and non-consideration of the case of the petitioner is illegal. He emphasized that if service, benefits have accrued to an employee but for one reason or the other such benefits could not be awarded to such an employee, then, irrespective of the fact of his/her having retired from service, the department concerned shall still have to further consider her/his case for such a promotion and to allow him/her benefits of such a promotion, even after retirement from service.

4. We have heard the learned counsel for the parties and pursued the record with their assistance.

5. The questions involved in the matter are whether the promotion of the petitioner to the next higher grade could be deferred for want of Annual Confidential Reports (ACRs); and, whether the petitioner has the requisite length of service to claim promotion to the next grade.

6. As per the record, the petitioner was appointed as Medical Officer (BPS-17) on contract basis in 1995, and his services were regularized in 2003 under the Regularization Act 2003 passed by Sindh Provincial Assembly. During his tenure of service, the petitioner was granted study leave for the period of two years from 2010 to 2012. Additionally, he again applied for two years deputation for Post-Graduate study i.e. M. Phil (Physiology). He requested one more leave extension and again one more year extension was granted, which was completed on 24.07.2018. Meanwhile, in 2016, Departmental Promotion Committee considered promotions of the doctors, whereby the petitioner was deferred for want of ACRs. In the meanwhile petitioner stood retired after attaining the age of superannuation in 2019, which means, he served for only 16 years in Government, but during these 16 years, he remained on study leave for more than 06 years, hence there are only fewer than 10 years of service at his credit,

hence the Competent Authority i.e. Chief Secretary Sindh has considered his case and regretted his proforma promotion.

7. The concept of Proforma Promotion is to remedy the loss sustained by an employee/civil servant on account of denial of promotion upon his legitimate turn due to any reason but not a fault of his own and in cases where a temporary embargo was created against his right for such promotion or a legal restraint was posed against his claim owing to any departmental proceedings inquiry etc. against him and the said obstacle is done away with ultimately then in such a situation, his monetary loss and loss of rank is remedied through proforma promotion.

8. In the present case, the petitioner's promotion to the next higher, the scale has been denied for want of PERs, and PERs have not been complied with on account of his study leave. No doubt promotion is not the vested right of a civil servant but where he is fully qualified for the promotion and there is no tangible clog in his service record, he has a right to expect that his case will be considered for promotion under law, rules, regulations and eligibility criteria/policy formulated for regulating promotion by the Government. Any breach or deviation therefrom for mala fide reasons or due to arbitrary acts of his superiors or peers or the competent authority is not warranted in law.

9. So far as the issue of the practice of Government departments to defer the cases of promotion of civil servants on the ground of want of ACRs and due to this reason the aggrieved civil / Government servant is constrained to approach this Court. Prima-facie the evaluation reports play a vital role in considering the case of promotion. However, the promotion depends upon eligibility, fitness, and availability of vacancies.

10. The prime object of maintaining ACR/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 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 ACRs is the duty of the department concerned and not of the civil / Government servant for the simple reason that ACRs are confidential documents to which the officer concerned cannot have any access. The law only requires that if any adverse remarks are made in ACRs, the officer concerned should be informed so that he / she may be able to improve his / her performance to make up for the deficiency.

11. As far as deferment of promotion of a civil / Government servant is concerned, his / her promotion can be deferred under Section 13 of the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 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.

12. Touching to the main issue, primarily a civil servant has a fundamental right to be promoted even after his retirement through awarding pro forma promotion provided his right of promotion accrued during his service and his case for promotion could not be considered for promotion for no fault of his own and he is retired on attaining the age of superannuation without any shortcoming on his part about deficiency in the length of service or the form of inquiry and departmental action was so taken against his right of promotion.

13. Adverting to the contention of the petitioner that he has the requisite length of service to claim promotion in BPS-18. In this regard, 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. At this stage, learned AAG informed that the petitioner lacks the length of service to claim promotion to the post of Senior Medical Officer (BPS-18).

14. We have scanned the record and found that the petitioner was appointed as a Medical officer (BPS-17) on 02.06.1996 and his services were regularized vide notification dated 20.12.2003, thus the petitioner has 16 years of regular service in his credit, whereas the requirement for promotion in BPS-18 is 05

years service in BPS-17. Additionally, the petitioner's case was deferred in 2016 for want of ACRs and his case for promotion ought not to have been deferred on the aforesaid analogy. So far as the issue of remaining on study leave for more than 06 years is concerned that is not disputed that the petitioner was granted study leave by the competent authority to pursue postgraduate study, thus the respondents are precluded not to raise the hue and cry at this stage when they granted him the study leave for valid reasons, therefore, no excuse could be made to defer his case for regular promotion. Since the petitioner stood retired from service vide notification dated 14.11.2022 and his case was erroneously deferred by the Departmental Promotion Committee which decision was/is a nullity.

15. In view of the above, the decision of the competent authority regretting his proforma promotion to the post of Senior Medical Officer (BPS-18) is set aside. Resultantly, the instant petition is allowed with the direction to the competent authority of Respondents to grant the petitioner proforma promotion to the post of (BS-18/19), if the petitioner is at all entitled to proforma promotion under the law and if he meets the promotion criteria, his proforma promotion shall be made by way of Circulation within one week.

JUDGE

JUDGE

Nadir*