

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Constitution Petition No. D-389 of 2024

(Dr. Imamuddin & another Vs. Province of Sindh & others)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
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Before;
Adnan-ul-Karim Memon, J;
Muhammad Abdur Rahman, J;

Date of hearing 08-05-2024.

Date of Order 08-05-2024.

Mr. Nisar Ahmed Bhanbhro, advocate for the petitioners.
Mr. Sarfraz Ali M. Abbasi, advocate for respondents No. 2 to 5.
Mr. Ali Raza Baloch, Assistant Advocate General, Sindh.

ORDER.

Adnan-ul-Karim Memon J:- Through this Constitutional Petition, petitioners have challenged advertisement dated 14.03.2024 issued for the purpose of appointment to the posts of Assistant/Associate/ Professor (BPS-19 to 21), by Promotion, in the Shaheed Muhtarman Benazir Bhutto Medical University Larkana (SMBBMU), through Selection Board. Petitioners also seek direction to the respondent-university to convene Departmental Promotion Committee (DPC) to fill 50% Posts of academic staff by way of promotion, through DPC.

2. The case of the petitioners in nutshell is that the respondent-university has invited applications to fill teaching faculty posts in the University and its constituent college Ghulam Muhammad Mahar (GMC) Sukkur; without adhering to the resolution passed by the Syndicate of the university in its 13th meeting held on 14th July 2012 and resolved that 50% of the teaching faculty position shall be filled by promotion through Departmental Promotion Committee and issued such notification dated 01-09-2012 and the Syndicate in its 20th meeting held on 17-12-2013 resolved to assign the functions of Departmental Promotion Committee to the University Selection Board and decided to refer the promotion cases to university Selection Board after getting recommendation from committee concerned and after completion of necessary formalities; the university was bound

down to implement the decisions of syndicate but respondent-university failed, which led to filing of the Constitution Petition No.1646 of 2017 seeking indulgence of this Court for implementation of decisions made by Syndicate of the University and by consent, the said petition was disposed of vide order dated 26-03-2019 with direction that 50% positions of the faculty members shall remain vacant to be filled through promotion and the present petitioners were also petitioners No.2&3 in the said petition, the said order of this Court was challenged before the Supreme Court in Civil Appeal No.1620 of 2019 (Re. SMBBMU Vs. Dr. Rafique Ahmed Memon & others) which was also disposed of as withdrawn vide order dated 20-02-2020 and then the petitioners time and again filed representations with respondent-university to convene meeting of Departmental Promotion Committee for filling the 50 % vacancies of the academic staff by way of promotion.

3. It is contended by learned counsel for the petitioners that petitioners, are working in respondent-university for quite some time as Associate Professor BS-20, are qualified for appointment to the post of Professor BS-21 on the basis of qualification fixed by the H.E.C. in its policy criteria and conditions for appointment to the said post, hence, respondent-university be directed to consider their case for appointment against the post of Professor BS-21 without seeking strict compliance of the criteria fixed by the respondent-university in the impugned advertisement.

4. It is noted that through advertisement dated 14.03.2024, respondent-university advertised vacant posts in Daily "Dawn, inter alia, for the post of Assistant/Associate/ Professor (BPS-19 to 21) with closing date 28-3-2024 and with the following eligibility criteria:

5. The question is whether the qualification for appointment to the post of Assistant/Associate/ Professor (BPS-19 to 21), has been correctly fixed or otherwise, and before dilating upon the subject issue it is noted that this Court vide order dated passed in C.P.D-1646 of 2017 (Re. SMBBMU Vs. Dr. Rafique Ahmed Memon & others), in similar circumstances, reached to the conclusion that the respondent-university may continue with the recruitment of Assistant Professors and Associate Professors, whereas 50% seats shall remain vacant in the appointment of Professors and 50% recruitment of professors is to be made by promotion, in case 50% of the Professors are directly recruited, these petitioners shall have the rights, and directed that Departmental Promotion Committee be

convened for consideration of their case as per rule. It also noted that the aforesaid decision was challenged in Supreme Court, however later on the respondent-university opted to withdraw the Petition which was allowed to be withdrawn vide order dated 20.2.2020.

6. At this stage learned counsel representing the respondent-university has objected and raised the question of the maintainability of the petition on the premise that as per First Statutes of SMBBMU Larkana, Selection Board of University is Competent to recommend suitable candidates for appointments of teachers and officers in BPS-17 and above. He added that that there is no concept of Departmental Promotion Committee at all Universities of Pakistan. The faculty is selected through University Selection Board and DPC is only for employees of BS-01 to BS-16. However he agreed that the petitioners may be allowed to compete for the subject posts applied for, through competitive process, through Selection Board.

7. It is also important to note that promotion is not the vested rights of a public servant, therefore, promotion could not be claimed or granted without the actual length of service on account of vested rights more particularly against the selection post which is based on purely merit. In principle, there are at least four discernable components of promotion decisions for purposes of a court exercising judicial review of the decision: (i) mandatory legal requirements, the failure to observe which can lead to procedural impropriety; (ii) objective criteria i.e. eligibility requirements that can be verified by the court based on available record; (iii) the subjective evaluation of the competence, fitness or potential of an employee that falls within the domain of primary decision-maker; and (iv) the reasoning of the decision-maker which if perverse or reflecting bias or malice or based on extraneous consideration can result in an illegal or irrational decision that can be reviewed by a constitutional court.

8. Given these components of a promotion decision, this Court would intervene and exercise judicial review of such decision where (i) there is in breach of principles of procedural fairness or natural justice, (ii) where employment rules and criteria for promotion prescribed therein have been breached, or irrelevant and extraneous consideration have informed the decision leading to illegality, (iii) when the objective criteria regarding eligibility for promotion have been misapplied and such misapplication is evident from the record (i.e. miscalculation of years of service, etc.), and (iv) where discrimination or malice is floating on the

surface for the record or the reasoning of the decision-maker is perversely leading to the conclusion, without the court indulging in any factual controversy, that the decision undermines the fundamental right of the employee to be treated under law and without discrimination. It has been explicitly held by the Supreme Court that the question of what criteria to be applied while considering an employee for promotion falls within the domain of policy, which warrants no interference by the courts. The Supreme Court in Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar and others vs. Hayat Husain and others.(2016 SCMR 1021).

9. 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.

10. 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 not fit for promotion 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 his/her promotion is denied to him / her, such denial would not be illegal or unjustified under the service jurisprudence.

11. 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 there under. This principle finds

support from the judgment of the Supreme Court in the case of 'Government of NWFP and others Vs. Buner Khan and others' (1985 SCMR 1158).

12. It is also well settled that the prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-making authority. This eligibility condition has to be fulfilled by the public servants to be eligible for being considered for promotion. When qualifications for the appointment to a post in a particular cadre are prescribed, the same has to be satisfied before a person can be considered for the appointment. Seniority in a particular cadre does not entitle a Civil/public servant for promotion to a higher post unless he fulfills the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor can it override in the matter of promotion to the next higher post. 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 SCMR 349)

13. When confronted to the parties the legal position of the case in promotion matters, they after arguing the matter at some length both the parties agreed to refer the matter of promotion of the petitioners to Selection Board of the respondent-university for re-consideration and decision thereon in the light of order passed by this Court as discussed supra and the observation recorded in the preceding paragraphs, however at the same time the Selection Board shall examine all the aspect of the case of the petitioners so far as their request for promotion on the aforesaid analogy is concerned and if their case falls within the ambit of criteria as set forth under the law, appropriate decision shall be taken within two weeks, subject to providing all concerned meaning full hearing.

14. This petition is disposed of along with pending application(s) in the terms discussed supra.

Judge

Judge

Ihsan/PA