

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No. D-5066 of 2024

(Ayaz Hussain & others v Province of Sindh & others)

Date	Order with signature of Judge(s)
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Before:

Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Adnan-ul-Karim Memon

Date of hearing and order:- 19.12.2024

M/s. Zamir Hussain Ghumro, Muhammad Saleem Khaskheli, Muhammad Nasir Arain, and Faizan Hussain Memon advocate for the petitioners.

Mr. Jawad Dero, Additional AG

Syed Muhammad Saulat Rizvi advocate for intervener No.44

Mr. Akhtiar Hussain Soomro advocate for the interveners / Haq Nawaz and others

ORDER

Adnan-ul_Karim Memon, J: Through this constitutional petition, Petitioners have prayed as follows:

1. *Declare that the failure of Respondents to nominate the Petitioner for mandatory departmental training for promotion to BS-18 is illegal, arbitrary, fanciful, discriminatory, unconstitutional, and against the principles of natural justice, fairness, and equity;*
2. *Direct the Respondents to nominate the petitioners for mandatory departmental training and consider them for promotion to BS-18 in a fair, reasonable, and objective manner.*
3. *Declare that the Respondents cannot hold a meeting of the Departmental Promotion Committee for the promotion of Head Masters/ Head Mistresses (BS-17) based on a tentative seniority list;*

2. The facts of the case are that the Petitioners, Head Masters/Mistresses (BS-17), have been working for Respondent 2 since 2017. They were initially appointed on contract after qualifying for the written test and interview. Despite their experience, qualifications, and satisfactory performance, they have been denied equal treatment compared to other employees, particularly in terms of training and promotion opportunities. The Petitioners were regularized in 2023 after a lengthy process, but they believe they should have been considered for regularization and other benefits earlier. They seek relief to address this disparity and ensure fair treatment. Petitioners have averred that they have the required service to be promoted to BS-18 and have completed mandatory training. However, despite repeated requests, they have not been nominated for promotion. They further asserted that the respondents have also issued a tentative seniority list and called for objections, but later issued a working paper for promotion without considering the Petitioners' objections. The Petitioners believe this is unfair and seek this court's intervention to address their grievance by nominating them for mandatory departmental training for promotion to the next rank.

3. Learned counsel for the petitioners has contended that the Respondent's failure to nominate them for mandatory training is illegal,

discriminatory, and unfair. This denial of training will hinder their career progression and deprive them of their right to be considered for promotion to BS-18. Additionally, the Respondents' decision to hold a Departmental Promotion Committee meeting without finalizing the seniority list is arbitrary and unlawful. The Petitioners believe that the final seniority list should be issued first, followed by the DPC meeting. Learned counsel next argued that the State is obligated to ensure the well-being of its citizens, including their career progression. The Respondents' failure to send them for mandatory training violates this obligation. Additionally, the discriminatory treatment of the Petitioners compared to similarly placed employees is against the principles of equality enshrined in the Constitution. Learned counsel argued that the Respondents' actions violate their fundamental rights guaranteed by the Constitution, including the right to equality and social justice. The Respondents' failure to follow established procedures and exercise discretion reasonably further exacerbates the injustice faced by the Petitioners. On the issue of counting contractual service, learned counsel argued that the petitioners were appointed in 2015/2017 and their service was later regularized in 2023 not from the date of the initial appointment. He emphasized that the term "regularization" refers to making a temporary situation legal or official, however, it does not create a new job but rather secures the existing employment of contract employees by removing the uncertainty of termination. Regularized employees should be treated equally to those appointed regularly on the same day. However, new recruitment rules were introduced in 2021, requiring five years of relevant experience and mandatory training; such recruitment rules introduced in 2021 do not affect the service of the petitioners. The order refusing their seniority from the date of the initial appointment is deemed illegal and ineffective and despite meeting these requirements, the Petitioners were not considered for promotion to next rank. Learned counsel emphasized that under the law contract employees after regularization can maintain their seniority with effect from the date of their initial appointment on a contract basis. Therefore, they request this court to order the petitioners' promotion as per their seniority. He next contended that the petitioners have the requisite length of service for consideration for promotion to BS-18, however, as per the recruitment rules, the petitioners are required to undergo mandatory departmental training, but the respondents have failed to nominate them for training without any reason or plausible explanation. In support of his contention, he relied upon the cases of Salma Aziz v Government of Gilgit-Baltistan **2020 PLC (CS) Note 35**, Naseem Khan and others v The Government of Khyber Pakhtunkhwa **2024 SCMR 1341**, Wadhu Mal v Province of Sindh & others **2023 PLC (CS) 1310**, Muhammad Zahir Raja v Federation of Pakistan **2012 SCMR 971**, Rash

Khan v Additional Secretary to Government of Pakistan & others 1984 PLC (CS) 587, *Federation of Pakistan and others v Rais Khan* 1993 SCMR 609, *Syed Muhammad Abbas Rizvi and others v Federation of Pakistan* 2014 PLC (CS) 1363, *Deedar Hussain Jakhri and others v Federation of Pakistan & others* 2011 PLC(C.S) 203, *SHM Rizvi and others v Maqsood Ahmed and others*, **PLD 1981SC 612**. Following the Supreme Court's ruling in the aforesaid cases including the case of *Secretary (Schools), Government of Punjab, Education Department and others v. Yasmeen Bano* (2010 SCMR 739), the services of all eligible petitioners shall be treated regularized on the day of their initial appointment on contract basis. The learned counsel referred to the statement along with the opinion of the Regulation wing of the Sindh government and submitted that the Supreme Court of Pakistan, in Civil Petition No. 9 of 2014 [**2014 SCMR 1289**], decided by a bench of five judges, provided clear guidance on the regularization of civil servants, stating that seniority for civil servants should be calculated from their initial appointment date, not their confirmation or regularization. He further pointed out that the Sindh Civil Servant Rules, 1974 state that ad-hoc/contract service followed by regular appointment counts towards service length for seniority and promotion. Additionally, the Sindh Civil Servant Act 1973, requires the preparation of seniority lists and outlines eligibility criteria for promotions. The petitioners meet the recruitment criteria, including "service." He requests to allow the instant petition.

4. Syed Muhammad Saulat Rizvi advocate for intervener No.44 has argued that the interveners have a combined service of 30 years in gazetted posts. They were promoted to BPS-17 in 2019 after meeting all the required criteria. Due to a shortage of qualified Head Masters and Head Mistresses, some High School Teachers were also promoted to BPS-18. He further argues that previous confirmed/regular service in gazetted and non-gazetted posts can be counted towards promotion purposes. In support of his contention, he relied upon the cases of *Province of Sindh and others v Ghulam Shabbir and others* 2023 SCMR 686, *Federation of Pakistan and others v Raiz Khan* 1993 SCMR 609, and *Salma Aziz v Government of Gilgit Baltistan & others* 2020 PLC (CS) 35. The counsel for the other Interveners reiterated the submissions as made in their application under order 1 Rule 10 CPC.

5. Learned A.A.G., Sindh has contended that the petition is not maintainable and is based on false allegations. He contends that the Petitioners did not raise the issue of seniority during their regularization and that their seniority will be determined according to the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975. He requests the dismissal of the petition on the premise that seniority can be reckoned

from the date of regular appointment and the promotion will take place in terms of Recruitment Rules notified by the Government of Sindh vide Notification dated 15.01.2021 As such the petitioners have no length of service to claim promotion in BS-18, which is 5 years' service and completion of mandatory training which the petitioners lack.

6. We have heard the learned counsel for the Petitioners as well as learned counsel for the Interveners and AAG and have perused the material available on record and case law cited at the bar. Primarily the issue of nomination for training for promotion is subject to length of service i.e. 5 years of regular service and not contractual service, therefore the petitioners have to show their prima facie case on the aforesaid analogy.

7. The Sindh Education Department hired teachers/Head Masters/Headmistress on contract, and later regularized them, but refuses to count their contract period towards seniority and promotion. This has led to the petitioners approaching this court to seek promotion to the post of BS-18 based on their total length of service including contractual service in terms of their initial appointments.

8. The main legal question in this case is whether the contractual period of teachers should be counted towards their total service length for purposes of seniority, promotion, and other benefits, in the above context, we refer to Sub-Section (4) of Section 8 of the Sindh Civil Servants Act, 1973 reproduced herein below: -

“Seniority in a post, service or cadre to which a civil servant is promoted shall take effect from the date of regular appointment of such civil servant to that post, service cadre: Provided that civil servants who are selected for promotion to a higher post in one batch shall, on their promotion to the higher post, retain their inter seniority as in the lower post.”

9. Section 2(b)(ii) of the Sindh Civil Servants Act, 1973, defines a civil servant, an excerpt whereof is as under:-

2.(b) “Civil servant’ means a person who is a member of an All-Pakistan Service or a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does not include – (ii) A person who is employed on contract, or on the work-charged basis or who is paid from contingencies;

10. We refer to Rules 10(1) and (2) of the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975, which deal with seniority and confirmation, an excerpt whereof is as under:-

“10 (1) subject to the provision of rule 11, the seniority of a civil servant shall be reckoned from the date of his regular appointment. (2) No appointment made on an ad-hoc basis shall be regularized retrospectively.”

11. The Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975 state that seniority is determined by the date of regular

appointment. Therefore, even after regularization, seniority cannot be granted retroactively.

12. We refer to Section 2(a) of the Sindh Civil Servants Act, 1973, which defines "Ad-hoc service", an excerpt whereof is as under:-

(a) "ad hoc appointment" means appointment of a duly qualified person made otherwise than in accordance with the prescribed method of recruitment, pending the recruitment in accordance with such method;

13. In essence, ad-hoc appointments cannot be regularized retroactively. Seniority is calculated from the date of regular appointment, not from the start of ad-hoc or contract service. Therefore, the request for retroactive regularization and seniority is incorrect. The contract period of a civil servant or government employee is not included in their seniority after regularization. Seniority is only calculated from the date of the regular appointment. However, a contractual employee who is later regularized may be eligible for pensionary benefits if they meet the conditions as set forth. The Contract employee, who is not recommended for regularization by the Commission or, as the case may be, the Scrutiny Committee, shall be terminated forthwith. A contract employee, who is regularized, shall be placed at the bottom of the seniority list of the respective cadre and shall rank junior to the other civil servants. The Supreme Court has ruled that regularizing a contract employee means a fresh appointment, not a retroactive one. This means the individual becomes a civil servant from the date of regularization. The Supreme Court in the case of *Vice Chancellor Agriculture University Peshawar v Muhammad Shafiq* **2024 SCMR 527** has held that the regularization takes effect prospectively from the date when a regularization order is passed.

14. The Supreme Court has also held that seniority and merit are to be considered for promotions to selection posts, while seniority-cum-fitness is to be considered for non-selection posts. Service rules determine eligibility for promotion, while fitness is a subjective evaluation based on objective criteria. While consideration for promotion is a right, it cannot be claimed as a matter of right. The government has the authority to determine eligibility criteria, amend rules, and decide on promotions in the interest of service efficiency. The Courts generally avoid interfering with the government's decisions on promotion unless there's a violation of law or infringement of vested rights. The questions raised are answered accordingly.

15. The High Court's jurisdiction under Article 199 of the Constitution is limited by Article 212. This means the High Court cannot interfere in matters falling within the exclusive domain of tribunals established under

the 1974 Act. Even pleas regarding fundamental rights violations by civil servants do not automatically confer jurisdiction on the High Court under Article 199. On the aforesaid proposition, we are guided by the decision of the Supreme Court in the case of I. A. Sherwani v. Government of Pakistan (1991 SCMR 1041).

16. Given the legal analysis on the subject issue, we are of the view that the claim of the petitioners for retroactive regularization from their initial contract appointment and seniority and promotion thereon, from that angle is not legally sound, besides promotion and seniority, not absolute rights, they are subject to rules and regulations if the recruitment rules of the subject post permit the case of the petitioners for promotion may be considered, however, we are clear in our point of view that contractual service cannot be considered for seniority and promotion as the seniority is reckoned from the date of regular appointment and promotion depends upon seniority cum fitness, subject to availability of vacancy subject to the approval of the competent authority. The regularization of the petitioners shall be considered from the date of their regularization. On the aforesaid proposition, we are guided by the decision of the Supreme Court in the case of Deputy Director Food Faisalabad Division, Faisalabad, etc. vs Muhammad Tauqir Shah and others vide order dated 10.03.2021 passed in **C.P.43-L/2021 to C.P.58-L/2021**.

17. This petition is found to be not maintainable and is dismissed accordingly with pending application (s).

JUDGE

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