

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No. D-4965 of 2023

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: 24.1.2025

Mr. Danish Rashid Khan advocate for the petitioner.
Mr. Ali Safdar Depar, Assistant AG
Mr. Nadeem Hussain Qureshi, Law Officer, Law Department, Government of Sindh

ORDER

Adnan-ul-Karim Memon, J. – The petitioner Saleem Khan has filed this Constitutional Petition under Article 199 of the Constitution of the Islamic Republic Pakistan, 1973, with the following prayer: -

- A) *To Declare the Postings of Respondents No.04 to 08 on OPS/Additional and Look-after charge basis being the junior Officers and the same is in violation of law laid down by the Hon'ble Supreme Court of Pakistan Judgments of Hon'ble Supreme Court of Pakistan reported in 2010 SCMR 1301, 2014 SCMR 1189 and 2018 SCMR 1411.*
- B) *To Direct the Official Respondents to convene the meeting of the Departmental Selection Board and consider the Petitioner who is the Senior officer as Deputy District Public Prosecutor BS-18 for his further promotions against the available vacant posts of District Public Prosecutor BS-19 in accordance with law as early as possible.*
- C) *To direct the Respondents to consider the Petitioner for proforma promotion against the post of District Public Prosecutor (BS-19), in the light of principles of Law laid down by the Honorable Supreme Court in the case reported in 2023 PLC (CS) 336.*
- D) *To Direct the Respondents to withdraw all the OPS/Additional Charge/look-after, Postings in the Respondent's Institution henceforth.*
- E) *To direct Respondent No. 1 & 2 to decide the pending summary with regard to the time-scale of the employees of Sindh Criminal Prosecution Department within 30 days from the date of passing of the Order.*
- F) *To restrain the Respondents from making any appointment /promotion against the vacant post of District Public Prosecutor BS-19 without observing due process of law, during the pendency of the above petition.*

2. The petitioner, a Deputy District Public Prosecutor (DDPP) since 2002, has not been promoted to the post of District Public Prosecutor (DPP) despite eligibility including seniority in terms of the seniority list vide Notification dated 12.9.2023, despite his juniors being appointed to higher positions on a look-after or OPS basis, causing resentment and hindering promotions for deserving officers. The Apex Court in **2014 PLC (CS) 151** ruled that OPS appointments are

illegal and demoralizing for senior officers. Petitioner alleges that he is eligible for promotion to District Public Prosecutor (DPP) based on seniority and fitness.

3. Learned counsel for the petitioner argued that the official respondents have unlawfully granted additional charges of DPP positions to the private respondents, violating the Supreme Court orders. He added that this action is malicious and deprives the petitioner of his rightful consideration for promotion. Per learned counsel, the respondent's actions are illegal and arbitrary, and amount to humiliation and victimization. The petitioner's counsel argues the Apex Court has ruled that junior officers cannot be given additional charge of higher positions when senior officers are available as such respondents' actions violate this established legal principle as such their actions are unsustainable in law. The petitioner has sought the order to recall the illegal additional charge appointments and prayed for a direction to the official respondents to consider the case of the petitioner for promotion to the DPP position now proforma promotion as he retired from service in January 2024.

4. The learned AAG submitted that before retirement, the respondents submitted a working paper on November 7, 2022, recommending eight Deputy District Public Prosecutors (DDPPs) for promotion to District Public Prosecutor (DPP). The petitioner, ranked 10th on the DDPP seniority list dated April 14, 2022, and was not included in this panel of eight. Consequently, he was not considered for promotion to DPP despite the vacancies existing, therefore, this action is justified under the law. He submitted that petitioner Saleem Khan retired from government service on February 3, 2024, as per notification dated January 16, 2024. However, a working paper was submitted on August 23, 2024, after his retirement as such he has no case under Rule 7-A of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, to claim proforma promotion. He emphasized that another working paper was submitted for promotions to four vacant District Public Prosecutor (BS-19) positions, whereby M/s. Asher Emanuel, Rajab Bhatti, Altaf Hussain Soomro, and Aijaz Mustafa Samtio were promoted on October 29, 2024. He lastly submitted that the petitioner had already retired before these promotions as such the question of proforma promotion does not arise. He prayed that this Court dismiss the instant petition as not maintainable.

5. We have heard the counsel for the parties and perused the record with their assistance.

6. It seems that the case of regular promotion of the petitioner was not placed before the competent authority for determination of his merit to the post in BPS-19 in time in terms of the Notification dated 12.9.2023 and allowed the petitioner to retire from service on 16.1.2024. The record does not reflect that the petitioner

was not eligible to be considered for promotion in BPS-19 when his colleagues were granted promotion in BPS-19 when the first DPC was conducted and they waited for a longer period to convene another DPC for consideration of his promotion, perhaps due to lethargic attitude. Learned AAG has disputed the eligibility of the petitioner for promotion in BS-19 on the premise that since the petitioner has retired from service; therefore, he cannot be granted antedated promotion i.e. proforma promotion. This assertion does not align with the law and decisions made by the Supreme Court.

7. The right to promotion is neither an illusionary nor a perfunctory right that could be ignored casually. Non-considering of an officer being equally eligible for promotion is a matter that not only undermines discipline but creates serious bad blood and heartburn among colleagues. Petitioner has required length of service in his credit besides there was/is no issue of eligibility of the petitioner to be considered for promotion in BS-19 when his colleagues were considered. However, respondents continued to award postings to the junior officers on higher posts (OPS) for longer periods depriving the petitioner of promotion ultimately he retired from service in 2024. The OPS promotion has been declared a nullity by the Supreme Court in its various pronouncements, it is well-settled if a person is not considered due to any administrative slip-up, error, or delay when the right to be considered for promotion is matured and without such consideration, he/she reaches to the age of superannuation before the promotion, then obviously the avenue or pathway of proforma promotion comes into the field for his rescue. On the aforesaid proposition, we are guided by the decision of the Supreme Court in the case of *Federation of Pakistan v. Jahanzaib* (Supra).

8. Coming to the main case, the concept of Proforma Promotion is to remedy the loss sustained by an employee / civil servant on account of denial of promotion upon his/her legitimate turn due to any reason but not a fault of his own.

9. To appreciate the controversy from a proper perspective, we think it appropriate to have a glance at Rule 7-A of the Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974. A departmental working paper on the petitioner's promotion was delayed, preventing his timely consideration before retirement, thus the petitioner cannot be held responsible and on the contrary respondent department can be held responsible for this departmental lapse.

10. From the above it is clear that a civil servant is entitled to proforma promotion. In this context, the Supreme Court of Pakistan in the case of *Secretary Schools of Education and others v. Rana Arshad Khan and others* (2012 SCMR

126) while granting Proforma promotion to retired public servants has held as under:-

“Much before the retirement of the respondents, a working paper was prepared by the department with regard to their promotion but the matter was delayed without any justifiable reason, and in the meanwhile, respondents attained the age of superannuation. They cannot be made to suffer on account of the departmental lapse.”

11. The Supreme Court in the case of Federation of Pakistan through Secretary, Ministry of National Health Services v. Jahanzaib and others (2023 PLC (C.S.) 336) has held that if a person is not considered due to any administrative slip-up, error, or delay when the right to be considered for promotion is matured and without such consideration, he reaches the age of superannuation, then obviously the avenue or pathway of proforma promotion comes into the field for his rescue.

12. The Supreme Court in the case of Homeo Dr. Asma Noureen Syed v. The Government of Punjab and others (2022 SCMR 1546) has held that a retired civil servant may be considered for a grant of proforma promotion, which was declined by the Service Tribunal and the matter was remanded to the Service Tribunal for decision afresh.

13. It is well-settled that while considering the case of regular promotion of civil servants, the competent authority has to consider the merit of all the eligible candidates and after due deliberations, to grant promotion to such eligible candidates who are found to be most meritorious amongst them. Since the petitioner was held to be senior to his colleagues who were promoted in BS-19, the petitioner was ignored by the respondent department just to extend favor to the blue-eyed candidate based on OPS, which is apathy on the part of the respondent department.

14. In the light of the position explained above, it is concluded that a civil servant has a fundamental right to be promoted even after his retirement by awarding proforma promotion; provided, his right of promotion accrued during his service but could not be considered for no fault of his own and meanwhile he retired on attaining the age of superannuation without any shortcoming on his part about deficiency in the length of service or in the form of inquiry and departmental action was so taken against his right of promotion.

15. Thus we are inclined to entertain the request of the petitioner in the matter. On the aforesaid proposition, we are fortified by the decisions of the Supreme Court rendered in the cases of Dr. Syed Sabir Ali v. Government of Punjab through Secretary Health Punjab and others, (2008 SCMR 1535), Federation of Pakistan and others v. Amir Zaman Shinwari, Superintending Engineer, (2008

SCMR 1138) and Dr. Muhammad Amjad v. Dr. Israr Ahmed, (2010 SCMR 1466).

16. We for the aforesaid reasons, dispose of this constitutional petition and direct the competent authority of the official respondents to re-consider the case of the petitioner for proforma promotion in BS-19, after his retirement, by way of circulation within two months subject to the availability of vacancy in BPS-19 under the Recruitment Rules. As the petitioner has already retired on February 3, 2024, therefore, his proforma promotion will not affect the seniority of any person already in service and he would be entitled to his emoluments and pensionery benefits under the law.

JUDGE

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