

IN THE HIGH COURT OF SINDH AT KARACHI

CP. No. D-1015 of 2021

(Muhammad Saleem Jehangir v Province of Sindh & others)

Date

Order with signature of Judge

Before:

Mr. Justice Muhammad Karim Khan Agha

Mr. Justice Adnan-ul_Karim Memon

Date of hearing and Order: 27.01.2025

M/s. Ahmed Ali Ghumro & Abdul Samee advocate for the Petitioner.

Mr. Ali Safdar Depar, AAG.

ORDER

Adnan-ul Karim Memon, J: The petitioner Muhammad Saleem Jehangir requests this court to:

1. *Direct the respondents to consider the petitioner, with his batch matches as per recruitment rules, for promotion to the senior most officer in Bureau of Supply & Prices Sindh against the vacated post of Deputy Director BS-18 simultaneously to the vacant post of Director (BS-19) Bureau of Supply & Prices, Sindh as per promotion policy.*
2. *Direct the respondents not to take any coercive action against the petitioner.*

2. The petitioner, Muhammad Saleem Jehangir, is working as an Assistant Director (BS-17) in the Bureau of Supply & Prices department of the Sindh government. The departmental Promotion Committee (DPC) meeting held on 04.10.2021 recommended the petitioner for promotion to the post of Deputy Director (BS-18); however, the same has not been actualized, which needs to be implemented under the law.

3. The counsel for the petitioner has contended that the respondent's failure to assign the petitioner seniority from the date of his Sindh Public Service Commission's (SPSC) recommendation, is illegal, unconstitutional, and violates the petitioner's fundamental rights under Article 9 and 25 of the Constitution of Pakistan. He further submitted that based on the Supreme Court judgment reported in **2015 SCMR 456**, the Petitioner, being the most senior officer in the Bureau of Supply & Prices, department, is eligible and qualified for seniority assignment as directed, all promotions (including to the position of Deputy Director (BS-18) and Director (BS-19)), and all accompanying benefits, as per recruitment rules and promotion policy in vogue. He argued that respondent No. 2, according to the Supreme Court judgments, repatriated the Petitioner to his parent department (Agriculture, Supply & Prices) on February 2, 2017, and up till now his seniority issue has been unresolved despite his best efforts. He added that the Petitioner is the most senior Assistant Director (BS-17) in the Bureau of Supply & Prices, department, with 15 years of service, and is eligible for pending promotion with his batch-mates as per

recommendation of DPC in the year 2021. He next argued that the Deputy Director (BPS-18) position is vacant, for which the Petitioner is eligible and should be promoted according to the respondents' promotion policy and recruitment rules. He emphasized that the Supreme Court ruled that repatriated officers should be granted due benefits, including pending promotions with their batch-mates and placement in their rightful seniority within their cadre. He lastly submitted that the Departmental Promotion Committee (DPC) meeting held on 04.10.2021 had recommended the petitioner for promotion to the post of Deputy Director (BS-18), however the same is not actualized based on the wrong interpretation of the law, which needs to be implemented.

4. Mr. Ali Safdar, the Assistant Advocate General, argued that the Petitioner was recommended for promotion to the post of Deputy Director (BS-18) by the DPC on October 4, 2021. However, Section Officer-III, a DPC member, raised objections to the promotion, citing an ongoing NAB reference No. 02/2022 against the Petitioner. He argued that the Petitioner belongs to the Technical (Economics) cadre, and seniority is maintained separately for Technical and General cadres, therefore, promotions should occur within the respective cadres, and the petition should be dismissed.

5. We have heard the learned counsel for the parties and, with their assistance, perused the material available on record and case law cited at the bar.

6. The question for our determination is whether a civil servant be promoted while facing criminal charges or a NAB Reference.

7. The prime contention of the AAG is that no employee has a vested right in promotion, that is the correct position of the law but where rules, regulations, and policy have been framed for regulating appointment and promotion, any breach or deviation for mala fide reasons or due to arbitrary act of the competent Authority, the aggrieved person would be entitled to challenge it. The Supreme Court in the case of *Ch. Muhammad Insha Ullah and others v. Chief Conservator of Forests (P & E) and others* (PLD 1988 SC 155), observed that "Even if, no vested right exists if a principle of policy is given effect to and the principle of policy is such which has not matured into a vested right, none can say that in the absence of the vested right, the principle of policy should not be recognized or enforced". Further, the Supreme Court in the case of *Muhammad Sarwar v. The government of Punjab and others* 1990 SCMR 999, has held that all actions taken against civil servants concerning employment can be challenged on the ground of mala fide of law or mala fide of fact. Mala fide of law is involved where an authority not competent has taken an action or the mandatory procedural requirements for taking the action or

the jurisdictional requirements for it remain unsatisfied. Mala fide relates to those cases where personal bias, grudge, or vindictiveness is the prompting force for action ostensibly in proper form and content. The latter category of actions is as much a violation of terms and conditions of employment as is the first category because public power is never entrusted or reposed in functionary to be exercised for achieving personal ends like unjust enrichment, vindictiveness, or revenge. Terms and conditions of service embrace bona fide discharge of public duties by the repository of public power.

8. Principally, Promotion and seniority are not vested rights. Sections 8 and 9 of the Sindh Civil Servants Act, 1973 are very clear in their terms that 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 or 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-se-seniority as in the lower post. Whereas, a civil servant possessing such minimum qualification as may be prescribed shall be eligible for promotion to a higher post for the time being reserved under the rules for departmental promotion in the service or cadre to which he belongs. It is also provided that in case of selection post, based on selection on merit; and in the case of non-selection post, based on seniority-cum-fitness. From the above, it is clear that consideration for promotion and seniority is a vested right of a civil servant subject to the qualification enumerated under the law. So far as, section 4 (1)(b) of Sindh Service Tribunals Act, 1973 is concerned, it is settled that a civil servant may not be able to file an appeal to get seniority or determination of fitness for promotion but he can file an appeal to get meaningful consideration for his seniority/promotion in terms of the ratio of the judgment rendered by the Supreme Court of Pakistan in the case of *Tariq Aziz-Uddin in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009, 2010 SCMR 1301*. It is also well-settled law that when considering a civil servant for a promotion, his/her length of service (seniority) is taken into account alongside overall performance and suitability for the new role (fitness), essentially prioritizing those who have been with the department longer while still ensuring they are qualified for the higher position.

9. The question arises of how the seniority of a civil servant is to be determined and the way he becomes eligible for the promotion are detailed in sections 8 and 9 of the Sindh Civil Servants Act, 1973 and the Rules framed thereunder.

10. A perusal of Rule 10 of the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 reflects that the seniority of a civil servant shall be reckoned from the date of his regular appointment. Rule 8 of APT Rules-1974 provides that no promotion on a regular basis shall be made in Basic Scale 18 to 21 unless the officer concerned has completed such minimum length of service as may be notified by the government. Rule 8-A of ibid rules provides that where the appointing authority considers it to be in the public interest to fill a post reserved under the rules for departmental promotion and the most senior civil servant belonging to the cadre or service concerned who is otherwise eligible for promotion does not possess the specified length of service, the authority may appoint him to that post on acting charge basis.

11. The above provisions leave no doubt in our minds that the seniority of a civil servant on the initial appointment to service, cadre, or post has to be reckoned from the date of his joining the post after being recommended by the Departmental Promotion Committee and not from a date prior thereto as portrayed by the petitioner. Even Rule of the Seniority Rules empowers the Government to determine the seniority of the probationers after the confirmation of service/final passing out examination. It is now well-settled that the seniority of a civil servant is always determined keeping in view his regular appointment to a post and, thereafter the continuous service in that particular grade.

12. It is also important to note that neither seniority nor promotion is the vested right of a civil servant, therefore, neither any seniority nor any promotion could be claimed or granted without the actual length of service on account of vested rights. The purpose of prescribing a particular length of service for becoming entitled to be considered for promotion to a higher grade, of course, is not without logic as the officer who is initially inducted to a particular post needs to serve on the said post to gain experience to hold the next higher post and to serve the public in a befitting manner. It is also important to note that granting of seniority to a civil servant without the actual length of service virtually violates the entire service structure as a civil servant inducted in Grade 17 by claiming such benefit without any experience be directly posted in any higher grade, which is neither the intention of the law nor of the equity.

13. Touching the issue of promotion, 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.

14. 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.

15. It has been explicitly held by the Supreme Court that the question of what criteria to apply 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).

16. The Sindh Civil Servants Act, 1973, and rules framed thereunder, provide that a civil servant, possessing such minimum qualification as may be prescribed, shall be eligible for promotion to a higher post, for the time being, reserved under the rules for departmental promotion in the service or cadre to which he/she belongs. The proviso has distinguished posts and has provided that such posts will be filled under the manner and subject to such conditions as may be prescribed in this regard. Promotion to a selection post is based on 'merit' and in the case of a non-selection post the criterion is 'seniority-cum-fitness'. 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 entails an objective assessment. In principle, the Courts cannot play the role of assessing the 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. On the aforesaid proposition, we are fortified with the decision of the Supreme Court in the cases of Khan M. Muti Rahman and others **2006 PLC (C.S) 564**.

17. 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 on 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.

18. Coming to the main issue, primarily in promotion cases there are certain conditions/criteria for consideration for promotion to the next rank i.e. seniority-cum fitness, length of service, eligibility for the post, and availability of the post; 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 to 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 thereunder. 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 civil 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 to 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).

19. Coming to the case of the petitioner, the Petitioner was recommended for promotion in 2021 by DPC but the notification was withheld due to a pending NAB reference. The Petitioner's counsel argues that this withholding is illegal, citing the *Salahuddin Mughal case (2012 PLC(C.S.) 1018)*. The Additional Advocate General submits that the Petitioner's case also involves a seniority discrepancy related to his appointment letter dated March 17, 1999. Learned AAG pointed out that the Administrative Department sent the DPC meeting minutes for signature by the Section Officer (S-III), who represented a member of the SGA&CD. However, he disagreed with the promotion recommendations, citing a pending NAB reference against the Petitioner and insufficient service lengths. He returned the minutes with a dissenting note, recommending against regular promotion. Learned AAG pointed out that the petitioner applied to the Chief Secretary on October 1, 2024, requesting directions to the Administrative Department regarding his pending promotion. This application, along with two others, was forwarded to the Administrative Department on October 11, 2024. The Administrative Department has been instructed to provide comments, including the current status of the NAB reference, and to afford the Petitioner a personal hearing. The Chief Secretary Sindh has to decide the Petitioner's application considering all grievances, including promotion, in light of relevant Civil Servant Service Rules.

20. Section 9 of the Sindh Civil Servants Act 1973 mandates promotions to non-selection posts based on seniority-cum-fitness. Since the Petitioner is facing a NAB reference, his fitness for promotion to a higher grade regularly is questionable.

21. The Sindh Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2022, Rule 7 (Conditions for deferment): (i) A civil servant's promotion may be deferred if: They don't meet the eligibility criteria and haven't submitted their Performance Evaluation Report. Their service record is incomplete. Their performance needs further review (for up to 12 months). Disciplinary or departmental proceedings are pending (unless pending for over a year without the officer's fault). An inquiry/investigation is pending with anti-corruption agencies (unless pending for over two years without the officer's fault). However, this clause shall not apply to civil servants facing inquiries/investigations for more than two years, unless the delay is attributable to the officer.

22. The petitioner is facing NAB reference. The law allows deferring cases for civil servants facing investigations. Generally, a civil servant cannot be promoted in his job if he/she has a pending criminal case against him/her, as the competent authority will hold off on promotions until the

case is resolved and the civil servant is either acquitted or convicted; essentially, the principle is to not reward someone while under a cloud of suspicion of criminal activity under the Sindh Civil Servants (APT) Rules, 1974. In this context, it may be observed that the writ jurisdiction of -5- this Court is not meant to be exercised to compel the competent authority to promote a Civil Servant against whom prima facie involvement in serious charges of misconduct was available, for the reason that any such direction would be disharmonious to the principle of good governance and canons of service discipline causing undue interference to hamper the smooth functioning of the departmental authorities. This view is fortified by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Mst. Ifat Nazir vs. Government of Punjab and others, **2009 SCMR 703**. It is a well-settled law that in case of promotion vested / fundamental rights cannot be claimed.

23. General of Police, N.W.F.P. Peshawar and 4 others (2000 SCMR 36) the Apex Court has held as under:-

“It is settled law that if an inquiry is pending against a civil servant under Efficiency and Discipline rules or the adverse findings have been recorded against him, then the delinquent civil servant is not considered for grant of selection grade or promotion till the inquiry is finalized.”

24. The rationale is to maintain balance for the alleged wrongdoing, deter future misconduct, and uphold good governance. Promoting a public functionary facing NAB charges would undermine service discipline.

25. No malafide is evident on the respondents' part. The petitioner was cleared for promotion, but the department withheld it if exonerated by NAB, the petitioner will be promoted retroactively. Issuing a directive for immediate promotion without the conclusion of NAB proceedings would undermine service discipline and encourage misconduct. Departmental authorities are best suited to decide such matters. The case law cited is of no help to the petitioner in terms of the findings recorded in the preceding paragraphs.

26. In view of the legal position discussed above, we are of the view that the case of the petitioner for promotion was rightly withheld by the competent authority, which is subject to the outcome of the NAB reference and such a decision does not call for any interference by this Court at this stage until and unless petitioner meets the criteria for promotion as discussed in the preceding paragraphs.

27. Accordingly, the petition stands disposed of along with the pending application(s) with no order as to costs.

JUDGE

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