

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D-6061 of 2019

Azra Parveen
Petitioner through : Mr. Ghulam Muhammad Barijo, advocate

Respondent No.1
Through : Mr. Muhammad Nishat Warsi, DAG

Respondent No.2
Through : Mr. Ali Safdar Depar, AAG

Respondents 3 to 8
Through : Mr. Moin Azhar Siddiqui, advocate assisted by
Mr. Ali Ahmad Turabi, advocate

Date of hearing : **17.05.2022**
Date of announcement : **23.05.2022**

J U D G M E N T

Adnan-ul-Karim Memon, J. Through this petition, the petitioner has prayed as under:

- i. To declare that the acts of respondents No.1, 2, and 3 are illegal, ab-initio unlawful due to continuous discrimination with the petitioner, and is a violation of Article 25 of the Constitution of the Islamic Republic of Pakistan.
- ii. To declare an act of issuance of approved summaries dated: 19.07.2019 and 22.07.2019 and upgradation of different posts of devolved cadre without DPC of NICH Karachi are ab-initio, unlawful, and is liable to be suspended and thereafter canceled after hearing of the parties, after issuance of Notification dated: 22.05.2019 by respondent No.1.
- iii. To declare that the act of respondent No.2 for up-gradation of the different cadre of NICH without DPC by respondent No.2 vide letter No.147/2016-17, dated: 21.05.2019, during the pendency of appeal filed by the respondent No.2 before the Hon'ble Court of Supreme Court of Pakistan is illegal, ab-initio and unlawful and liable to be suspended and thereafter canceled after hearing of parties.
- iv. To direct respondent No.3 to submit the list of promoted civil servants, from 2005 to date, 2019 to adjudicate the malafide discriminatory acts of respondent No.1 to 3 towards the petitioner."

2. Petitioner has averred that she was appointed as Charge Nurse on 23rd September 1992 in National Institute of Child Health Karachi (NICH), thereafter she was awarded Higher Scale (BPS-16) with effect from 27.08.2001. Subsequently, on the recommendation of the Federal Public Service Commission (FPSC), the petitioner was recruited to the post of Assistant Nursing Superintendent vide offer of appointment letter dated 08.08.2002. Per petitioner, she was promoted in BPS-17 on 04.03.2006 and since then she has been

working in BPS-17. Per petitioner, she was not considered in the DPC meeting held in the year 2011, whereas her juniors had been promoted/upgraded for which she moved several representations/applications, but all in vain. Petitioner further asserted that the dispute between the Federation and Sindh province, on the issue of its affairs and management of the respondent institute, is pending before the Honorable Supreme Court in Civil Review Petitions in Dr. Nadeem Rizvi's case 2020 SCMR 1, therefore the respondents out to have laid off their hands so far as the subject dispute between two governments, pending before the Honorable Supreme Court, is concerned. however, they continued with the up-gradation of posts and promotion matters despite knowing the fact that the Federal Government vide notification dated 22.5.2019 directed the Sindh Government to restore the subject 3 institutions to the Federal Government, thus all subsequent steps taken by the Sindh Government are a nullity in the eyes of law and dicta laid down by the Honorable Supreme Court in the aforesaid case. She prayed for allowing the instant petition.

3. Mr. Ghulam Muhammad Barijo, learned counsel for the petitioner, has argued that on the strength of the judgment passed by the Hon'ble Supreme Court of Pakistan in Dr. Nadeem Rizvi's case, supra, it does not vest with the Government of Sindh to deal with the promotion and upgradation of the posts of three institutions i.e. Jinnah Post Graduate Medical Centre, Karachi, National Institute of Cardiovascular Diseases, Karachi and National Institute of Child Health, Karachi and thus claims that all these promotions made by Provincial Government were/are null and void. Counsel averred that the acts of respondents 1 and 3 are illegal, void ab-initio, and unlawful due to continuous discrimination with the petitioner and in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. He next submitted that from the very beginning the petitioner has been discriminated against and was not promoted but private respondents were promoted without DPC, however, the respondents perpetuated the illegalities and upgraded the handpicked persons of their choice in violation of the law. He submitted that the procedure of issuance of the seniority list, calling objection and decision of seniority list is dubious without transparency and is not according to the law as the petitioner filed an application dated 10.07.2018 for issuance of the provisional seniority list, which was issued without date and office outward number, on her objection, respondent No.3 issued combined seniority list of Grade-17 of Head Nurse without date and outward number which received to petitioner on 19.08.2019. On the maintainability of the petition, learned counsel, submitted that this petition is maintainable and there is no bar of Article 212 of the Constitution as the relief sought by the petitioner is not entertainable by the Federal or Provincial Service Tribunal.

4. Mr. Moin Azhar Siddiqui, learned counsel representing respondents 3 to 8, raised the question of maintainability of this petition on the ground that it is the duty and obligation of the Petitioner to point out that the action of the respondents violated the rules and regulations summaries; that the impugned notifications in this petition have been issued in compliance of order/judgment dated 09.10.2018 passed by this Court in CP No.2371 of 2011; that the petitioner was appointed as Charge Nurse (BPS-14) on 02.09.1992 instead of

23.09.1992; that there is no restriction from this Court on the issue of DPC and upgradation; that no discrimination had been meted out with the petitioner; that private respondents 4, 5 and 6 are senior to the petitioner, however, respondents 7 and 8 were appointed in BPS-17 through FPSC; that no favoritism has been given during upgradation as the same has been done in response to new Recruitment Rules approved by Federal Government in 2008 for nursing cadre; that two DPCs have been held after devolution at NICH and the DPC from BPS-16 and above is under process in the Health Department and the eligible candidates including petitioner will be considered for promotion in next rank; that the Health Department will issue seniority list in response to provisional seniority list issued by respondent No.3 and accordingly the petitioner has also been provided seniority list; that the case of petitioner is also under consideration for promotion; that petitioner has available next forum is Service Tribunal as her matter is related to promotion and upgradation, which comes under the domain of Service Tribunal, therefore she is not entitled for the extraordinary relief under Article 199 of the Constitution. He prayed for dismissal of the instant petition.

5. We have heard learned counsel for the parties and perused the material available on record.

6. Addressing the question of maintainability, We have considered the case of respondents in the light of the "function test" as made by the Honorable Supreme Court in the case of *Pakistan Defence Housing Authority & others vs. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707)*. The respondent-institute is performing the functions, in line with the command of the federal/provincial government, and exercising public power, by creating public employment. NICH is, therefore "person" within the meaning of Article 199(1)(a)(ii) read with Article 199(5) of the Constitution. And if the actions or orders passed by the competent authority of NICH, are violative of the Statute creating this Institute or of Rules/Regulations framed under the Statute, the same could be interfered with by this Court under Article 199 of the Constitution.

7. As per promotion policy, the minimum length of service for promotion in BPS-18 is 5 years' 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 had already been promoted in BPS-18 on 8.4.2021; and, has placed on record a letter dated 22.4.2022 which explicitly shows that the respondent department has prepared a working paper of the petitioner for promotion from the post of Nursing Superintendent {BPS-18} to the post of Deputy Chief Nursing Superintendent (BPS-19) at NICH. Per learned AAG the grievance of the petitioner has been redressed accordingly.

8. The aforesaid stance of the respondents has been refuted by the petitioner on the ground that nothing has been done actually, rather this is an eyewash to defeat the very purpose of filing this petition, in terms of the decision of the Honorable Supreme Court in the case of *Dr. Nadeem Rizvi's case*; and, just to condone the illegalities, which were

committed by the official respondents by favoring the private respondents. She prayed for the annulment of all up-gradations and promotions of the private respondents in terms of the ratio of judgment rendered in the case of Dr. Nadeem Rizvi's supra.

9. In our view, the promotion to a post depends upon several circumstances. To qualify for the promotion, the least that is expected of an employee is to have an unblemished record. An employee found guilty of misconduct cannot be placed on par with the other employees, and his case has to be treated differently. While considering an employee for promotion his entire service record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial cannot be termed as arbitrary, discriminatory, illegal, or unjustified. In our view, the evaluation made by an Expert Committee should not be easily interfered with by this Court which does not have the necessary expertise to undertake the exercise that is necessary for such purpose.

10. In principle appointments, posting, removals, and promotions must be made under the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent, and reasonable manner; and, in the public interest. The Constitutional requirement, inter alia, is enshrined in Article 18 of the Constitution which enjoins that "Subject to such qualifications if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business". Persons eligible in terms of the prescribed criterion, qualification, and conditions relating to experience have a right to be given fair consideration through a transparent process. Transparency is the key to ensuring a merit-based selection and wide advertisement of the criterion and qualifications determining the eligibility of candidates is a pre-condition.

11. Touching the issue of up-gradation, the Honorable Supreme Court in the case of Federal Public Service Commission and others Vs. Anwar-ul-Haq {private Secretary} Islamabad and others **2017 SCMR 890**, has held that up-gradation is often misconstrued as a promotion. It is well-settled law that the civil servants are appointed and/or promoted to the post and not to the grades. The Honorable Supreme Court in the case of Ali Azhar Khan Baloch **2015 SCMR 456**, in paragraph 138 has clarified the position on the subject issue and needs no further deliberation on our part.

12. Since, the dispute between the Federation and Sindh province, on the issue of the affairs of the management of the respondent-institute, is pending before the Honorable Supreme Court in Civil Review Petitions in Dr. Nadeem Rizvi's case, **2020 SCMR 1**, therefore at this juncture, we layoff our hands so far as the subject dispute between two governments, pending before the Honorable Supreme Court, is concerned. However, we make it very clear that in the intervening period, all decisions/actions taken by the Sindh Government on the subject of up-gradation and promotion in the respondent-institute, shall be subject to the outcome of the decision of the Honorable Supreme Court in the aforesaid Review Petition.

13. We, for the aforesaid reasons, and in the given circumstances, dispose of the instant petition with a direction to the competent authority of the official respondents to place the case of the petitioner before PSB- II for consideration of her promotion to the next rank, in terms of working paper prepared by the respondent-department, within two weeks. However, this arrangement is subject to the observation made in the preceding paragraph. The petition is accordingly disposed of along with pending applications with no order as to costs.

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