

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-1691 of 2022

(Dr.Uroosa Khan and others v.Province of Sindh and others)

Constitutional Petition No.D-1993 of 2022

(Dr. Abdul Majeed and others v.Province of Sindh and others)

Constitutional Petition No.D-130 of 2022

(Dr.Shahzad Ali and others v.Province of Sindh and others)

Constitutional Petition No.D-3507 of 2022

(Dr. Mohsin Ali and others v.Province of Sindh and others)

Constitutional Petition No.D-2218 of 2022

(Dr. Zeba Shahid v.Province of Sindh and another)

Constitutional Petition No.D-2217 of 2022

(Dr. Nusrat v.Province of Sindh and another)

Constitutional Petition No.D-2109 of 2022

(Dr. Mehrun Nisa Depar v. Province of Sindh and others)

Constitutional Petition No.D-6871 of 2022

(Dr. Mishab-ul-Hassan v.Province of Sindh and others)

Moulvi Iqbal Haider, advocate for the petitioners in C.P Nos. 1691, 1993, 130, and 3507 of 2022.

Mr. Israr Ahmed Abro, advocate for the petitioners in C.P Nos. D-2217, 2218 and 2109 of 2022.

Nemo in C.P No.D-6871 of 2022.

Mr. Abdul Jalil Zubedi, Additional Advocate General Sindh.

Dr. Liaquat Ali Abro, Consultant Law to Chief Secretary, Government of Sindh.

Date of hearing : 08.03.2023.

Date of Order : 17.03.2023

ORDER

Through these Constitutional petitions, the petitioners have prayed for regularization of their services under section 3 of the Regularization of Doctors Appointed on Contract or Adhoc Basis Act, 2018 (Act, 2018), in the Health Department, Government of Sindh.

2. Petitioners have submitted that they are serving as Medical officers (BPS-17) in the Health department and have the legitimate expectation for appointment on regular basis in terms of the statutory law. In the alternative, petitioners seek directions to the respondent-health department to send their

candidature to the Sindh Public Service Commission (`SPSC`) to assess their suitability for the posts of Medical Officers.

3. Moulvi Iqbal Haider, learned counsel for the petitioners has argued that the petitioners are serving as Medical Officers in different hospitals of the government of Sindh on a contract basis. The learned counsel submitted that SPSC advertised 313 posts of Doctors (BPS-17) vide advertisement dated 01.12.2021 without looking into the factum that the petitioners have already been recommended for the subject posts by the Selection Committee constituted by the Government of Sindh vide Notification dated 30.4.2020 and performing their duties diligently. Learned counsel contended that the selection of contract employees in BS-17 through SPSC is barred under Rule 4 of the Sindh Public Service Commission (Function) Rules, 1990; It was further submitted by the learned counsel that as the cases of the petitioners squarely fall within the ambit of the Act of 2018, their services are to be regularized under Section 3 thereof which specifically provides for regularization of employees who were appointed either on contract or ad-hoc basis and were holding such posts before the commencement of the Act of 2018. Learned counsel further submitted that the petitioners did not lack the requisite qualification, therefore, the petitioners cannot be penalized who accepted the employment on a contract basis in an emergency and in good faith to earn a livelihood to support their families. Learned counsel submitted that a vested right has accrued in favor of the petitioners and subsequent requisitions in the ordinary course to re-advertise the vacancies would, on the one hand, frustrate the basic object of the Act of 2018, and on the other hand, would deprive the petitioners of their jobs; after having successfully served for a considerable period, if the petitioners are removed from service, they shall be seriously prejudiced. Learned counsel asserted that there was/is no inherent disqualification in the candidature or appointment of any of the petitioners as Medical Officers and they have undergone the process of training and have acquired the requisite expertise in their field, therefore, they are required to be regularized as provided in Section 3 of the Act of 2018. Per learned counsel, the petitioners are not required to undergo the fresh process of recruitment as they have already faced the rigorous test i.e. written/interview conducted by the recruitment committee for the subject posts. The learned counsel for the petitioners referred to various documents attached with the memo of the petitions and submitted that under the Sindh Civil Servants, Act, 1973, and rules framed thereunder, the petitioners have already occupied the 313 regular posts, however on a contract basis, thus their posts have already been occupied

by them need not be re-advertised. The learned counsel prayed for allowing the petitions as prayed.

4. Mr. Israr Ahmed Abro, advocate for the petitioners in C.P Nos. D-2217, 2218 and 2109 of 2022 contended that the learned counsel for petitioners in C.P Nos. 1691, 1993, 130, and 3507 of 2022 have extensively argued the matter by covering every aspect of the case. It was, however, added by him that the main question of regularization involved in these cases has already been decided by a learned Division Bench of this Court in its various judgments by holding, inter alia, that the petitioners therein shall be deemed to have been validly appointed on regular basis. It was also contended by him that it would be prejudicial to the petitioners if they are not regularized at this stage after serving for a considerable period and after spending the prime period of their professional life with the respondents. According to the learned counsel, if the petitioners are not regularized and their services are eventually dispensed with, they will not be able to seek fresh employment at any other place, and in such an eventuality their professional career will come to an end much before their expected age of superannuation.

5. None present on behalf of the petitioners in C.P No.D-6871 of 2022, though they have been served, and perhaps, they have chosen to remain absent. However, their case is akin to the case of the rest of the petitioners, in C.P No.D-6871 of 2022.

6. Mr. Abdul Jalil Zubedi, learned AAG has submitted that in the wake of the COVID-19 pandemic Health department hired the services of the petitioners for 89 days. He further submitted that the names of the contract employees cannot be forwarded to SPSC for assessment of their suitability. He prayed for the dismissal of the petitions.

7. We have heard learned counsel for the petitioners and the learned Additional Advocate General Sindh at great length and with their assistance have minutely examined the material available on record and case law cited at the bar.

8. The question is whether the services of the petitioners can be regularized under Section 3 of the Regularization of Doctors Appointed on Contract or Adhoc Basis Act, 2018, and whether the suitability of the petitioners as Medical Officers BPS-17 could be sent to SPSC.

9. To appreciate the aforesaid propositions, it is expedient to have a look at the rule position of the case. In this regard, Rule 10 of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, is clear in its terms, which provides that initial appointment to the posts in BS 16 to 22 “shall” be made (a) by the Commission based on examination or test to be conducted by the Commission if the posts fall within the purview of the Commission; or in the manner, as may be determined by the Government if the posts do not fall within the purview of the Commission.

10. Perusal of the above-mentioned Rule 10 of the Rules of 1974 and Rule 3(1)(i) of the Commission Rules 1990 clearly shows that initial appointments to the posts in BS 16 to 22 are to be made only by the SPSC based on examination or test to be conducted by it if the posts fall within its purview; and, because of the word “shall” used therein the legislature intended to make this condition mandatory, which condition cannot be ignored, waived, relaxed, done away with, exempted and or bypassed on any ground whatsoever.

11. To address the enology put forward by the learned counsel for the petitioners, there is no cavil to the proposition that contractual employees are not civil servants and the above mandatory requirement of appointment through the SPSC does not apply to them. However, the petitioners cannot take advantage of this legal position by seeking exemption therefrom as it is not their case that they want to retain their posts on contract till superannuation. As they want their said posts to be regularized on a permanent basis by changing their status from that of contractual employees to civil servants under the Sindh Civil Servant Act, 1973, if this is the position, they shall have to go through the same mandatory competitive process of selection that is required/prescribed for the appointment of a civil servant; and, unless they succeed in that prescribed mandatory competitive process of selection, they cannot be treated at par or equated with the other civil servants serving on that post who were selected and appointed through the said prescribed mandatory competitive process.

12. During arguments, we have been informed that the petitioners who have served the respondent department as Medical Officers during such difficult times of the pandemic, primarily deserve to be given a fair chance for assessment of their suitability to hold the subject post by SPCS in the given situation as they are still holding the regular posts in Health Department Government of Sindh without the security of service.

12. In the light of the above analogy and more particularly the principles outlined in the judgment passed by the Supreme Court of Pakistan in the case of Dr. Naveeda Tufail and 72 others v. Government of Punjab and others, 2003 SCMR 291, we find it appropriate to direct the competent authority of the respondent-health department to refer the candidature of the petitioner to SPSC to assess their suitability for appointment on the subject posts by conducting their interview within one month from the date of order of this Court, and the result of the interview shall be announced and recommendations shall be forwarded to the competent authority for consideration of their appointment regularly, while considering their case for the said purpose, the ratio of judgment passed by the Honorable Supreme Court in the case of Dr. Naveeda Tufail supra must be kept in mind, in the intervening period, the posts which were being held by the petitioners shall not be filled. An excerpt of the judgment rendered in the case of Dr. Naveeda Tufail is as under:

“12. We having examined the above scheme find that in the similar circumstances, the Federal Government while giving fair treatment to its employees appointed on ad hoc basis successively framed policies for regularization through the process of selection by the Public Service Commission. It is stated that all Provincial Governments, except Government of Punjab, following the Federal Government also adopted the policy of regularization and gave their employees the equal treatment. The petitioners, being ad hoc employees of Provincial Government, cannot claim regularization as of right in the light of policy of Federal Government but the principle of equality as embodied in Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, would demand that they while facing the similar circumstances should be treated in the same manner. The principle of equality would impliedly be attracted in favour of the petitioners as they being ad hoc lecturers in the Provincial Government would stand at par to that of the ad hoc employees of the Federal Government and therefore, it would be fair, just and proper to consider their cases for regularization. We having heard the learned counsel for the petitioners and Mr. Maqbool Ellahi Malik, learned Advocate-General Punjab, assisted by Mr. Tariq Mahmood Khokhar, Additional Advocate-General, are of the view that since substantial questions of public importance are involved in the present petitions, therefore, the technical objection that the, questions not raised before the Tribunal, cannot be allowed to be raised before this Court, is not entertained. The authorities in the Education Department, Government of Punjab, while adopting the method of ad hoc appointments as a continuous, policy, created a legitimate expectancy in the mind of petitioners for their retention on regular basis and therefore, we deem it proper to direct that the respondents while seeking guidance from the scheme of regularization of ad hoc employees of Federal Government referred above, will initiate the process of regularization of the petitioners through Punjab Public Service Commission giving the concession as mentioned in the reply filed by the respondents in the Punjab Service Tribunal within a period of one month and meanwhile without prejudice to title right of the selectees of the Public Service Commission for appointment on regular basis, the posts which were being held by the petitioners shall not be filled. It is clarified that the cases of the petitioners shall be sent separately to the Public Service Commission and shall not be tagged with the direct recruits. In case any of the petitioners is not found suitable, by the Public Service Commission, he shall not be entitled to be retained in service. 13. We in the light of above discussion, convert these petitions into appeals and dispose of the same with no order as to costs.”

13. For the reasons given above, these petitions are disposed of in the above terms.

JUDGE

JUDGE

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