

IN THE HIGH COURT OF SINDH AT KARACHI

Before:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 3191 of 2022

(Dr. Shaista Shoukat Ali v. Federation of Pakistan and 03 others)

Mr. Zamir Hussain Ghumro, advocate for the petitioner

Ms. Amina Saeed Ghani advocate for JPMC a/w Dr. Muhammad Suleman, Joint Executive Director, JPMC

Mr. Yasir Shah, Assistant Attorney General

Mr. Ali Safdar Depar, Assistant Advocate General

Date of hearing

& Order:

20.02.2023

ORDER

Through the captioned Petition, the Petitioner is seeking the following relief(s):

- i. Direct the respondents to give effect to Petitioner's promotion as Assistant Professor (BS-18) (Radiology Department, JPMC) from April 2013 along with all ancillary benefits arising therefrom;
- ii. Direct the respondents to consider the petitioner for ante-dated promotion as Associate Professor (BS-19) (Radiology Department, JPMC) w.e.f. April 2018 along with all consequential benefits;
- iii. Set aside the findings of PSB-II on 11.02.2022 to the extent of Petitioner being illegal, arbitrary, mala fide, discriminatory, unconstitutional, and in violation of natural justice, fairness, and equity”

2. The case of the petitioner is that she was initially appointed as Medical Officer (BS-17) in the year 2008 on the recommendation of the Federal Public Service Commission (FPSC) and posted at Jinnah Postgraduate Medical Centre (JPMC). According to the petitioner, she completed the requisite five years' service and became eligible for promotion as Assistant Professor (BS-18) in the year 2013 as per recruitment rules notified on 26.02.1986, however, she was not considered on time due to no fault of her part and finally promoted as Assistant Professor (BS-18) in 2021, due to intervention of this court vide order dated 08.12.2020 passed in CP No.D-7916 of 2019. The petitioner submitted that she became illegible for promotion to the post of Associate Professor (BS-19) in 2020 after completing 12 years in BPS-17 with effect from 2008. According to the petitioner, her case for promotion to the next rank was placed before Provincial Selection Board-II (PSB-II) held on 11.02.2022, whereby her case for the post of Associate Professor (BS-19) was deferred on the plea that the petitioner has been promoted as Assistant Professor in BS-18 on 07.12.2021.

3. Mr. Zamir Hussain Ghumro, learned counsel for the petitioner, contended that the failure of the respondents to consider the petitioner for ante-dated promotion as Assistant Professor (BS-18) from April 2013 and as Associate Professor (BS-19) from April 2018 is illegal, mala fide, discriminatory and tantamount to violation of principles of natural justice, equity, and fairness. Learned counsel averred that the respondents have failed to take into account her ACR for the year 2021 and have denied her promotion on a false pretext that she did not earn ACR in BS-18, which is contrary to the record. The learned counsel submitted that Petitioner was promoted to Assistant Professor (BS-18) vide Notification dated 07.12.2021. She submitted her ACR for the year 2020-2021, in grade 18, on 07.01.2022, yet the same was arbitrarily ignored. The learned counsel submitted that the petitioner has more than five years of teaching experience as Assistant Professor (BS-18), which is the required criteria as per the recruitment rules 1986, as such, she was/is eligible for promotion and cannot be denied such right on false pretexts and extraneous considerations; that admittedly PMDC has recognized the fact that the Petitioner has more than five years teaching experience as Assistant Professor thus under the 1986 rules, the Petitioner is eligible for promotion as Associate Professor (BS-19); that the honorable Supreme Court in numerous cases given the benefit of the proviso of FR 17 (1) to the employees with directions to the Government to consider their cases from the date of accrual of vacancies.

4. Learned AAG referred to the statement filed by respondent No.3 and contended that the promotion cases of the employees of JPMC were not considered since the matter of devolved institutions post-18th amendment has been sub-judice and pending in the apex court. However, when the promotion cases of the employees of devolved institutions, including JPMC, were considered, the petitioner was also promoted to the post of Assistant Professor of Physiology (BS-18) through the Departmental Promotion Committee (DPC) on 07-12-2021. It is submitted by AAG that the working papers in respect of the petitioner for promotion to the post of Associate Professor (BPS-19)- forwarded by the Executive Director, JPMC, Karachi- were forwarded to the SGA&CD for placement in the Provincial Selection Board-II meeting, however, the board meeting held on 11-02-2022 deferred her promotion with an objection that she has been recently promoted to (BPS-18) and she did not earn ACR in her present grade. It is further submitted that when this department will receive at least one ACR in her present grade, the same shall again be forwarded to the SGA&CD for placement before the Provincial Selection Board-II meeting. Since her promotion has been deferred due to valid reasons, her prayer for the promotion to

the post of Associate Professor (BPS-19) merits no consideration. He prayed for the dismissal of the instant petition.

5. Ms. Amina Saeed Ghani learned counsel for respondent JPMC has adopted the arguments of the learned AAG and prayed for the dismissal of the instant petition.

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

7. The questions are whether the promotion of the petitioner could be ante-dated to the vacancy occurring in Grade-18, reserved for promotion and whether non-consideration of the petitioner to Grade-18 with retrospective effect violates the principles of the natural justice and is against the dicta laid down by Honorable Supreme Court in its various pronouncements; and, whether the case of the petitioner for consideration of her promotion to the post of Associate Professor (BPS-19) could be deferred for want of ACRs in the present grade.

8. Dr. Muhammad Suleman, Joint Executive Director, JPMC has not denied the fact that the petitioner was awarded the post of Assistant Professor (BS-18) on a current charge basis in the year 2013 after competition of requisite length of service with effect from 2008. He further submitted that the petitioner was qualified to hold the post in PBS-18 and this was the reason she was given the current charge. He also agreed to the principle that the petitioner ought to have been considered for promotion to the Grade-18 post with effect from the date when the vacancy became available for promotion after completion of the requisite length of service i.e. 05 years service in BPS-17 with effect from her initial appointment in 2008. He further submitted that the dispute between the Federation and Sindh province, on the issue of the affairs of the management of the respondent-institute, remained pending before the Honorable Supreme Court in Civil Review Petitions in Dr. Nadeem Rizvi's case, **2020 SCMR 1** and this could be the reason, DPC and/or PSB could not take place, however, the competent authority decided to consider petitioner's case for the post of Assistant Professor (BPS-18) on regular basis vide notification dated 7.12.2021. However, the petitioner insisted that her promotion to BPS-18 needs to be effected from the date when she completed her 05 years of service as Lecturer in BPS-17 under the recruitment rules notified on 26.02.1986 and thereafter her further case for promotion as Associate Professor (BPS-19) needs to be effected after completion of 12 years' service in BPS-17 from the date of initial appointment under the recruitment rules discussed supra and this court has to decide the issue on merits.

9. Prima-facie, subject to the final say of the competent authority of respondents, the claim of the petitioner for her antedated promotion with effect from 2013 in BS-18 seems to be quite logical and rational when the post on which promotion was claimed was available under the recruitment rules 1986 and she was rightly given the current charge of the post in BPS-18, however, due to litigation between two governments in the Honorable Supreme Court as discussed supra, regular promotion of the employees of JPMC could not take place, for which petitioner could not be held responsible, finally petitioner's regular promotion was made in 2021 after a delay of 8 years and thereafter her case for promotion as Associate Professor was taken up by PSB-II which was deferred for want of ACR in her present grade vide minutes of the meeting of PSB-II held on 11.02.2022.

10. Primarily, before considering the promotion matter, the availability of posts is necessary for the service structure even for an antedated promotion. Though the promotion is not a vested right, it depends on the eligibility as well as fitness of the candidate. The concept of eligibility implies a qualification to be appointed or promoted, whereas the determination of fitness encompasses a person's competence to be chosen or selected for appointment or promotion subject to the availability of a post on which the credentials and antecedents of person could be examined for examining his/her merits and worthiness for promotion.

11. The learned counsel for the respondent university could not controvert the defense put forward by the petitioner about the date of creation of the post of Assistant Professor in BS-18 in 2013. It is a well-recognized principle of law that in case of a non-selection post, the promotion is made based on seniority-cum-fitness and no civil servant can ask for or claim promotion as a matter of right as it is within the exclusive domain of the government. Neither the promotion could take place automatically, nor is the seniority alone the deciding factor as many factors constitute fitness for promotion. While in the case of *Government of N.W.F.P. and others v. Buner Khan and others* (1985 SCMR 1158), the Honorable Supreme Court held that the promotee shall be considered for promotion for Grade-18 post with effect from the date when a vacancy in his/her quota became available.

12. In the present case petitioner also claims promotion of selection post-BPS-19 in JPMC, in this regard, the most vital yardstick is the fitness of the petitioner, which can be judged from her service record which includes ACRs,

qualification, length of service in a particular grade/scale, integrity, knowledge and proficiency in the work/ assignments, all of which are essential dynamics for weighing and appraising the merits for promotion to the selection post which is quite common procedure and practice articulated under the law for considering the promotions on merit, which could be seen by the competent authority.

13. The eligibility for promotion to the posts of Assistant Professor (BPS-18) and Associate Professor (BPS-19) as per Recruitment Rules 1986 is as under:

S.No	Name and BPS of Post	Present eligible	Condition of eligibility
1	Assistant Professor (BS-18)	Medical Officer (BS-17) and BS-18 including Lecturers, Registrars, Senior Registrars and Demonstrators etc. in the Federal Government Medical Institutions	<ol style="list-style-type: none"> 1. MBBS or equivalent Medical Qualification recognized by the Pakistan Medical and Dental Council (PMDC) or M.Sc. of a recognized University in case of Basic Science subjects in the relevant subject (for non Medical graduates). 2. Postgraduate higher diploma such as D.Sc. Ph.D. FCPS, MD, MS, M.Phil, etc., in the relevant subject OR equivalent qualification recognized by PMDC 3. Five years' service in BS-17 & above in the relevant specialty. First preference will be given to teaching experience Second preference to practical experience after postgraduate qualification Third preference before postgraduate qualification 4. Credit should be given to the original published research work in the standard Medical Journal
2	Associate Professor (BS-19)	<ol style="list-style-type: none"> i. Assistant Professor (BS-18) in the relevant subject. ii. Senior Registrar (BS-18) in the relevant subject. 	<ol style="list-style-type: none"> i) MBBS or equivalent Medical Qualification recognized by the Pakistan Medical and Dental Council (PMDC) or M.Sc. of a recognized University in case of Basic Science subjects in the relevant subject (for non Medical graduates). ii) Postgraduate higher diploma such as D.Sc. Ph.D. FCPS, MD, MS, M.Phil, etc., in the relevant subject OR equivalent qualification recognized by PMDC iii) 12 years' service in BS-17 & above (relaxable to seven years in case of direct recruits in BS-18) including five years of teaching experience as Assistant Professor OR 10 years as Senior Registrar in the relevant subject Postgraduate Medical Institution <p style="text-align: center;">OR</p>

			<p>12 years' service in BS-17 & above (relaxable to seven years' service in case of direct recruits in BS-18) including eight years of teaching experience as Assistant Professor OR 16 years as Senior Registrar in the relevant subject in Medical the undergraduate Institution in the relevant subject</p> <p>iv) Must have produced at least three research papers or must have produced at least five research papers if teaching experience is in the under-graduate institution.</p>
--	--	--	--

14. As per the promotion policy, the minimum length of service for promotion in BPS-18 is 5 years of service in BPS-17. For posts in BPS-19, 12 years' service in BPS-17, and 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.

15. 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 guilty of misconduct 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 a promotion committee takes the penalties imposed upon the employee into consideration and denies him / her promotion, such denial would not be illegal or unjustified under the service jurisprudence.

16. There is no denial of the fact that the petitioner has acquired the FCPS qualification in diagnostic radiology and has teaching experience in the department of Radiology at JPMC with effect from 10.12.2012 to 10.01.2013 and she also worked as the Assistant Professor (BPS-18) on current charge basis in the department of Radiology at JPMC with effect from 18.4.2013 to 10.04.2018 and as per petitioner, in her credit, there are five research publications in PM&DC approved journals with full credits, which factum is disclosed in the letter issued by Pakistan Medical and Dental Council Islamabad.

17. Adverting the deferment of the case of the petitioner for promotion by PSB-II based on the non-availability of her ACRS in her present grade, it is essential to note that the prime object of maintaining ACR/PER is to assess whether the officer under consideration is entitled to promotion or not, and such assessment, in addition to his / her performance and eligibility, would also include whether or not he/she has been awarded any major or minor penalty. The DPC/PSB, which is held to finalize the decision about promotion based on the

above assessment, is required to make an overall assessment of the performance of the civil servant based on a working paper prepared by the department concerned. Therefore, the preparation and presentation of ACRs is the duty of the department concerned and not of the civil / Government servant for the simple reason that ACRs are confidential documents to which the officer concerned cannot have any access. The law only requires that if any adverse remarks are made in ACRs, the officer concerned should be informed so that he/she may be able to improve his / her performance to make up for the deficiency. It is a settled proposition of law that subject to its powers and authority, the PSB/ DPC has to assess every proposal for promotion on case to case basis under the law.

18. In principle, before convening the meeting of PSB and/or DPC for considering the cases for promotion of civil / Government servants, the department concerned shall provide the complete set of ACRs / PERs of the concerned officer to PSB / DPC well in advance so that the cases for promotion should be decided without any delay. In the present case, the petitioner claims her promotion in BPS-18 with effect from 2013 and in this regard, the competent authority of respondents is directed to consider her case afresh on the subject issue in terms of the dicta laid down by the Hon'ble Supreme Court of Pakistan in the cases of Government of N.W.F.P. and others v. Buner Khan and others (1985 SCMR 1158), Khalid Mehmood v. Chief Secretary, Government of Punjab and others, 2013 SCMR 544 and Executive District Officer (Revenue) Bahawalpur and others v. Muhammad Attique and another, 2017 SCMR 399.

19. So far as her case for promotion in BPS-19 is concerned, we deem it appropriate to refer the matter to Provincial Selection Board-II to reconsider the recommendations of the petitioner for promotion to the post of Associate Professor BPS-19 without waiting for ACRs in her present grade BPS-18. The aforesaid exercise shall be undertaken within one month. Let a copy of this order be communicated to the respondents for compliance.

JUDGE

JUDGE