

IN THE HIGH COURT OF SINDH, KARACHI
C. P. No. D-3764 of 2022

Date

Order with signature of Judge

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Adnan-ul-Karim Memon

Petitioner: Dr. Muhammad Tariq Khan,
Through Mr. Ahmed Ali Ghumro,
Advocate.

Respondents
No. 1 to 3: Federation of Pakistan & Others,
Through Mr. Kashif Nazeer,
Assistant Attorney General.
Mr. S. Muzammil Hussain,
Entomologist, National Food
Security.

Respondent
No. 4: Allah Ditta Abid,
Through Mr. Sarmad Hani,
Advocate.

Date of hearing: 13.03.2024.

Date of Order: 09.04.2024.

ORDER

Muhammad Junaid Ghaffar, J: Through this Petition, the Petitioner has impugned Notification dated 08.06.2022 whereby, Respondent No. 4 has been posted as Director General (BS-20), Department of Plant Protection, under Section 10 of the Civil Servants Act, 1973, ("**1973 Act**") for a period of three (03) years or till appointment / promotion of a regular incumbent against the post, whichever is earlier.

2. Learned Counsel for the Petitioner has contended that Respondent No. 4 is at serial No. 3 of the Provisional Seniority List dated 16.10.2020, whereas, he is admittedly a BS-19 officer and cannot be assigned / posted as a BS-20 Officer for a period of three years under the garb of Section 10 of the 1973 Act. According to him, sine the post is vacant for a number of

reasons including non-convening of meeting of the Central Selection Board (“**CSB**”), therefore, the senior most officer was to be assigned the said post in terms of Rule 8B(1) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, (“**1973 Rules**”) whereas, earlier the Petitioner as well as Respondent No. 4 were assigned the look after charge or current charge of the said post; however, despite clarifications issued by the Establishment Division from time to time that there is no provision under the law for any appointment or posting under look after charge in the 1973 Act and the 1973 Rules; but instead of resorting to Rule 8B(1) *ibid*, the impugned Notification was issued. According to him, after assuming such charge the Respondent No. 4 has repeatedly defied the orders of the Ministry and Establishment Division by not referring the names for promotion for CSB’s meeting inasmuch as Respondent No. 4 being Junior was enjoying a BS-20 post; hence, he could not act against his own interest. Per learned Counsel, an attempt was also made by way of Advertisement dated 27.12.2020 to appoint a suitable person but that effort also failed; hence, till such time the CSB is convened and any of the available officer is promoted to BS-20 on seniority-cum-fitness basis, the impugned Notification is liable to be set aside, whereas, the Respondents be directed to strictly adhere to and appoint a person in terms of Rule 8B(1) of the 1973 Rules.

3. On the other hand, learned Counsel for Respondent No. 4 has raised an objection as to maintainability of this Petition on the ground that the remedy, if any, lies before the Service Tribunal as it is a matter of terms and condition of service. Secondly, he has contended that Respondents have exercised powers under Section 10 of the 1973 Act which also provides that any civil servant can be posted on a higher post and therefore, no exception can be taken to such an appointment. Per learned Counsel since no suitable person was available,

therefore, the then Minister In-charge, after scrutinizing the available data of all the Officers including conducting interviews decided to appoint Respondent No. 4 in terms of Section 10 of the 1973 Act for a period of three years as he was found competent and more suitable for such posting. Similarly, learned Assistant Attorney General has also supported the impugned Notification on the ground that Section 10 provides for such an appointment, whereas, till such time the CSB is convened, the impugned Notification was the best solution. He has further argued that the seniority list was provisional, whereas, during pendency of this Petition one of the Officers has been successful in respect of adverse remarks in his Annual Confidential Reports (“**ACR**”) and therefore, a final seniority list has now been prepared and thereafter, the matter can be placed before **CSB** in the next meeting.

4. Heard all the learned Counsel as well as learned Assistant Attorney General and perused the record. Insofar as the objection regarding maintainability of this Petition is concerned, that would be dealt with later on in this opinion as determination of that requires scrutiny of the facts as well as the law applicable in this matter. It would be advantageous to refer to the the Impugned Notification and the provisional seniority list which reads as under:-

F.No.22/04/2020-E-1
GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
ESTABLISHMENT DIVISION

Islamabad, the 08th June, 2022

NOTIFICATION

Mr. Allah Ditta Abid, Director Technical (BS-19), Department of Plant Protection, Karachi, is posted as Director General (BS-20), Department of Plant Protection (DPP), under Section 10 of the Civil Servants Act, 1973, with immediate effect, for a period of three (03) years or till appointment / promotion of a regular incumbent against the post, whichever is earlier.

Sd/-
(Atif R. Khattak)
Section Officer to the
Government of Pakistan”

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**“PROVISIONAL SENIORITY LIST OF DIRECTOR (TECHNICAL) (BPS-19)
IN THE DEPARTMENT OF PLANT PROTECTION**

S N.	Name & Designation	Domicile	Promotee / Direct	Date of Birth	Date of Appointment in Govt. Service	Date of Regular appointment in Basic Pay Scale 18	Date of Regular appointment in present pay scale 19	Present posting
1	2	3	4	5	6	7	8	9
1	Mr. Muhammad Tariq Khan	Balochistan	Promoted	21.03.1978	27.09.2011	27.09.2011	02.01.2020	HQ
2	Mr. Muhammad Sohail Shahzad	Punjab	Promoted	10.11.1972	21.09.2011	21.09.2011	07.08.2020	HQ
3	Mr. Allah Ditta Abid	Punjab	Promoted	01.04.1978	06.03.2012	06.03.2012	07.08.2020	MNFS&R Islamabad
4	Mr. Shahid Abdullah	AJK	Promoted	16.12.1964	01.10.1991	31.10.2017	07.08.2020	DPP Islamabad

Signature: _____ Sd/-
 Designation: Assistant Director (Admin)
 Government of Pakistan
 Department of Plant Protection
 Date: 16.10.2020”

5. From perusal of the above provisional seniority list it reflects that Respondent No. 4 is admittedly at serial No. 3 of the said seniority list and to that effect there is no dispute. All the officers as mentioned in the seniority list are working as Director Technical BS-19 in the Department of Plant Protection, whereas, the Post in question is of BS-20. The Petitioner has been appointed in BS-18 on regular basis on 27.09.2011, and Respondent No. 4 was appointed in the same category on 06.03.2012, whereas, the Petitioner was appointed in the present pay-scale i.e. BS-19 on 02.01.2020 and Respondent No. 4 was appointed in the same pay-scale on 07.08.2020. As per the impugned Notification, Respondent No. 4 Director General BS-19 has been posted as Director General BS-20 in terms of Section 10 of the 1973 Act for a period of three years or till appointment / promotion of a regular incumbent against the said post whichever is earlier. It would be advantageous to refer to Section 10 of the 1973 Act which reads as under: -

“10. **Posting and transfer.** - Every civil servant shall be liable to serve anywhere within or outside Pakistan, in any 2[equivalent or higher] post under the Federal Government or any Provincial Government or local authority, or a corporation or body set up or established by any such Government:

Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:

Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which he would have been entitled if he had not been so required to serve.”

6. Perusal of the aforesaid Section reflects that every civil servant shall be liable to serve anywhere within or outside Pakistan, in any equivalent or higher post under the Federal Government or any Provincial Government or local authority, or a corporation or body set up or established by any such Government. Though the impugned Notification has been supported and defended by Respondents seeking protection under the above provision of law; however, in our considered view, the said provision has no nexus with the dispute in hand, notwithstanding the fact that the impugned Notification has been issued under Section 10 *ibid*. The Respondents have made an attempt to take refuge by placing reliance on the words [equivalent or *higher*] by contending that such posting can also be made on a higher post; hence, the impugned action is unexceptionable; however, with respect, we do not agree. In fact, the intention and purpose of Section 10 *ibid* is that no civil servant can deny any posting within or outside Pakistan on any basis under the Federal Government or the Provincial Government. It is not meant primarily for granting a higher post to a junior officer so as to protect such posting or transfer. In fact, it is a provision which a civil servant cannot violate or refuse to abide by, and if it is so, he can be proceeded with under the Disciplinary Rules. It is a penal provision insofar as a Civil Servant is concerned. If the interpretation of the learned Counsel for Respondent No. 4 is accepted, then it will not only violate various other provisions of the Act in question; but at the

same time, will become a tool to post junior officers on higher post continuously for a very longer duration of time and this in our considered view cannot be the intention of the legislature. This will also defy and deviate the law settled by the courts including the Supreme Court in various cases whereby, any posting on deputation or acting charge basis or look after charge post has been deprecated. Moreover, it will also provide a benefit for up-gradation whereas, all these modes of promoting or favoring junior officers has been deprecated in the celebrated case of **Ali Azhar Baloch**¹. Here, it has been used as a tool for an out of turn promotion under a so called stop-gap arrangement lasting for 3 years. This cannot, in any manner be justified. Hence, insofar as Section 10 and its applicability to protect the impugned Notification is concerned, in our considered view the same is ill-founded and misconceived.

7. In contrast the situation in hand appears to be covered aptly under sub-rule 8B(1) of the 1973 Rules which reads as under:-

“8B. - (1) 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.”

8. The above rule 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. This provides a stop-gap arrangement and whosoever fulfills the above criteria, can in exceptional circumstances, be appointed to that post

¹ 2015 SCMR 456

until a suitable person is available by way of promotion or fresh induction as the case may be. Record reflects that time and again (though on temporary basis) the Petitioner as well as Respondent No. 4 were being appointed in BS-20 on current charge basis or look after charge basis; however, the said Notification were never issued by exercising powers under Rule 8B(1) of the 1973 Rules to give protection to the said temporary charge which otherwise is to be done in exceptional circumstances. Per settled law to stretch or continue acting charge or ad hoc arrangement on own pay scale (OPS) for an extensive period rather than making timely appointments or filling the post by promotion according to the ratio or quota, as the case may be, creates misgivings and suspicions and such a tendency is highly destructive and deteriorative to the civil service structure. Moreover, where appointments on current or acting charge basis are necessary in the public interest, such appointments should not continue indefinitely and every effort should be made to fill posts through regular appointments in shortest possible time².

9. Record further reflects that time and again the concerned Ministry has been requesting the Plant Protection Department to arrange relevant documents and performance evaluation reports of the relevant personnel to consider their case for promotion or appointment of senior most Director on acting charge basis; however, none of these directions were complied with by the department and instead Respondent No. 4 has been permitted to hold his position in BS-20 since June 2022. Such conduct on the part of the Respondent department as well as the concerned Ministry cannot be appreciated as in our considered view the concerned Ministry cannot be held hostage by any In-charge of a concerned Department and if no compliance was being made then the Ministry ought to have

² Province of Sindh Vs Ghulam Shabbir (2023 SCMR 686)

taken action for failure on the part of the concerned department including the responsible person, be it Respondent No.4. It is also worth mentioning that due to continuity of this illegal arrangement, a situation has arisen, whereby, a junior officer will be asked for to write ACR's of his seniors which not only will be an illegality, but may seriously prejudice the case of such senior officers.

10. On perusal of the comments of Respondent No.3(ministry of National Food Security and Research) it transpires that the appointment of Respondent No.4 has been justified on a number of grounds, including that the concerned Minister had made the appointment recommendation after scrutiny and interview of all available candidates. We have not been assisted in any manner as to how and under what provision of law, the Minister became relevant in evaluating the available candidates and even interviewing them. It has been further stated by the Ministry that it was the Establishment Division which gave an alternate option that since no office in the feeding cadre is eligible (due to lack of length of service-which now is not an issue) for regular promotion, an officer of BS-19 may be appointed under Section 10 of the 1973 Act. We are at a loss to understand as to how the Establishment Division, instead of resorting to Rule 8B(1) of the 1973 Rules and failing in its duty to convene meeting of CSB on priority, could take refuge under Section 10 ibid, and allow the Minister to conduct interview and appoint a junior officer on BS-20 for a period of 3 years, out of which around 1 year and 9 months have already lapsed, whereas, admittedly, no effort has been made to convene CSB and carry out the requisite promotion which is now due. Such an act of the Establishment Division and the concerned Ministry cannot be appreciated as it is against law settled by the Courts as well as Section 10 of the 1973 Act, as

discussed hereinabove. In the case of **Sardar Muhammad**³ while interpreting Section 10 *ibid*, a learned Judge⁴ of the Lahore High Court has held “that Section 10 only casts an obligation on a civil servant that he can be transferred to any post, it does not entitle the Federal Government or the civil servant to appoint or to be appointed, as the case may be, to any post through transfer without qualifying the requirements of the said post under the law”. He has further held “that this is also evident from the reading of Rules 7 and 8 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973. These Rules provide that promotions and transfers to posts in BS-2 to 18 and BS-19 to 21 and equivalent shall be made on the recommendations of the appropriate Departmental Promotion Committee or Selection Boards, respectively. Hence, section 10 is subject to the requirement of the post in question”. We are fully in agreement with the said finding of the learned Lahore High Court as already discussed hereinabove.

11. In somewhat similar terms a petition was earlier filed by another employee of the Plant Protection Department against one Waseem-ul-Hasan, who was appointed to this very post on acting charge basis by way of Notification dated 19.3.2018. In that case it was averred on behalf of the Petitioner that Respondent Waseem-ul-Hasan was firstly an officer of BS-19, whereas, he was absorbed in Ministry of National Food, Security and Research from Department of Agriculture & Cooperative Department, Government of Baluchistan unlawfully, whereas, instead of making an appointment in terms of Rule 8B(1) of the 1973, Rules, acting charge basis appointment had been made. While responding, this Court vide its order dated 30.5.2018 in CP No.D-3232 of 2018 (**Muzaffar Iqbal Khan v Federation of Pakistan**), speaking through one

³ [Sardar Muhammad v Federation of Pakistan (PLD 2013 Lahore343-378)]

⁴ [Mansoor Ali Shah, J, as he then was]

of us *Adnan-ul-Karim Memon, J*, was pleased to observe as under;

16. To address the plea taken by the learned AAG and learned Counsel for the Respondent No. 3 that Respondent No.3 is competent to hold the look after charge for the post of Director General, Department of Plant Protection Karachi till the availability of the regular incumbent. We think it would be appropriate to have a glance on the term look after /Acting/current /additional charge of the post. Looking at the Rule 8-B of Civil Servants (Appointment, promotion & Transfers) Rules, 1973 empowers the Competent Authority to appoint a civil servant on acting charge and current charge basis, it further provides that if a post is required to be filled through promotion and the most senior civil servant eligible for promotion does not possess the specific length of service/appointment of eligible officer may be made on acting charge basis after obtaining approval of the appropriate Departmental Promotion Committee/Selection Board. Sub Rule 4 of the afore referred Rule 8 further provides that appointment on acting charge basis shall be made for vacancies lasting for more than six months and for vacancies likely to last for six months. This acting charge appointment can neither be construed to be an appointment by way of promotion on regular basis for any purpose including seniority, nor it confers any vested right for regular appointment. In other words, appointment on current charge basis is purely temporary in nature or a stop-gap arrangement, which remains operative for a short duration until regular appointment is made against the post. Looking at the scheme of Civil Servants Act 1973 and the Rules framed thereunder, it is crystal clear that there is no scope of appointment of a civil servant to a higher grade post, except resorting to the provisions of Rule 8-B, which provides that in exigencies, appointment on current charge basis can be made, subject to conditions contained in the Rules.

17. Since the very appointment of the Respondent No. 3 is under challenge in the present proceedings, we deem it appropriate that the assignment of look after charge of the post of Director General, Department of Plant Protection, Karachi be given to a person, who qualifies for the said post as per law as discussed in the preceding paragraph.

12. Very recently in the case of *Aijaz Ali*⁵ this Bench has dealt with an identical provision in the Sind Civil Service (Appointment, Promotion & Transfer) Rules, 1973 i.e. Rule 8-A. In that case in somewhat similar situation, the available officers lacked the requisite length of service for promotion to the Post of IG Prisons (BS-21), and the Government had initially appointed a junior officer as IG Prisons on acting charge or look after charge basis and subsequently did so on permanent basis until further orders. This Bench again speaking through one of us *Adnan-ul-Karim Memon, J*, held as under;

11. We have before us the seniority list wherein the name of respondent No.5 is placed at Sr. No.4. It has also been informed that respondent No.5 lacks twenty-

⁵ SHC Citation [2024-SHC-KHI-212412] judgment dated 19.2.2024 CP D-5270-2023

two years of service in BPS-17 and above with successful completion of mandatory training viz. National Management Course (NMC) at the National Institute of Management (NIM) as prescribed under the rules. If this is the position of the case, the grant of higher appointments to junior officers against senior posts amounts to accelerated promotion, as has been done in the present case, as respondent No.5 without the recommendation of PSB, has been directly posted as IG Prison (BPS-21), which is a promotion post.

12. In view of the above facts and circumstances of the case, we hold that the respondent department is required to appoint a qualified person to the post of IG Prison BPS-21 as per Recruitment Rules and not otherwise.

13. On the issue of OPS, the Supreme Court in the case of the Province of Sindh and others Vs. Ghulam Fareed and others (2014 SCMR 1189) while dealing with OPS posting not only discouraged such practice but also noted that only in exigencies the Government makes such appointments as a stop-gap arrangement whereas in the present case, recruitment rules are already in the field but the respondent-department deemed it fit to post the respondent No.5 as IG Prison Sindh on OPS which act on the part of respondents is against the law and dicta laid down by the Supreme Court in the case of "Khan Muhammad Vs. Chief Secretary, Government of Balochistan Quetta and Others" (2018 SCMR 1411).

14. For what has been discussed above, the impugned notifications dated 13.10.2023 and 01.11.2023 are struck down; the petition asked for is accordingly allowed with the direction to the competent authority to fill the post of Inspector General of Prison of Sindh (BPS-21) under Recruitment Rules within one month from the receipt of this judgment. In the intervening period, the respondent department shall strictly follow Rule 8-A of the Sindh Civil Servant (Appointment, Promotion and Transfer) Rules 1974, while making the appointment of the senior most officer of the same cadre, as stop-gap arrangement, on the subject post.

13. Lastly, as to maintainability of this Petition pursuant to Section 4 of the Service Tribunal Act, 1973, and the argument that in essence the impugned notification is a posting order of Respondent No.4; hence, the jurisdiction of this Court is barred under Article 212 of the Constitution, in our considered view such argument is misconceived and not tenable in law. For the present purposes the Petitioner only seeks a declaration that the Notification issued under Section 10 of the 1973 Act is illegal and without lawful authority, whereas, it has no nexus of the Petitioner vis-à-vis. Respondent No. 4 and or for that matter any terms and conditions of the service of the Petitioner. Alternatively, the Petitioner seeks his appointment, or for that matter any other eligible person, in terms of Rule 8B(1) of the 1973 Rules to the post in question, which appointment cannot be ordered by the Service Tribunal. In somewhat similar terms

in the case of *Waseem-ul-Hasan* (Supra) while responding to the very maintainability of the petition, this Court vide its judgment dated 30.5.2018 in CP No.D-3232 of 2018, speaking through one of us *Adnan-ul-Karim Memon, J*, was pleased to observe as under;

6. The issue of maintainability of the captioned Constitutional petition has been raised, as such we would confine our self to that issue of look after charge of the post of Director General Department of Plant Protection to the Respondent No.3 vide Notification dated 19.3.2018 issued by Respondent No.2 only and refrain ourselves to dilate upon the merits of the case on other issues, if we find the petition is maintainable.

7. We are cognizant of the fact that the post of Director General BS-20, Department of Plant Protection is a public office, which, falls within the purview of sub clause-1(b)(ii) of the Article 199 of the Constitution, which permits the High Court to issue a writ of quo warranto requiring a person within its territorial jurisdiction of this Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office. It is also cleared that while acting under clauses(b)(ii) of Article 199 of the Constitution the High Court could declare that the holder of a public office is not entitled, if the office in question of that post, it comes to the conclusion that incumbent has no authority to hold the same and the person invoking the jurisdiction under Article 199 of the Constitution of Pakistan is not required to fulfill the stringent condition required for bringing himself within the meaning of an aggrieved person. Any person can move to a Court and challenge the usurpation or unauthorized occupation of a public office by an incumbent of that office and he is not required to undergo the stringent criteria to establish his locus standi. In the light of the aforesaid legal position, the objection on the maintainability of the captioned Constitution Petition is not sustainable in law and is accordingly rejected.

14. Moreover, the case in hand is not a case of a routine transfer or ordinary posting or deputation of a civil servant from his parent department to another department, which normally is a case under Section 10 *ibid*. It is also not a case of induction or absorption. Further an order or notification issued in flagrant violation of Section 10 of the 1973 Act, to post an officer of BS-19 to a post of BS-20, and that too for a period of 3 years, is nothing but an eyewash not to resort to and follow Rule 8B(1) of the 1973 Rules, and depriving an eligible person from holding such post (though temporarily), will definitely not fall within the jurisdiction of the Service Tribunal. It may also be of relevance to observe that the Petitioner itself has not challenged any order relating to his terms and conditions of service; nor is he asking for enforcement of it. At best the impugned order issued

under Section 10 of the 1973 Act, could be an order relating to the terms and conditions of service of Respondent No.4. For the petitioner, it is an order, whereby, an illegal jurisdiction has been assumed in terms of Section 10 *ibid*, to favor Respondent No.4, who otherwise is not qualified to hold the post of BS-20 in question. In view of such position as well as the discussion made hereinabove and the chequered history of this post being vacant for a considerable period of time, and the in-action as well as illegal actions of the Respondents including the concerned Ministry, in our considered view the Petition is very much maintainable and objection to this effect is hereby repelled.

15. In view of hereinabove and circumstances of the case and the discussion as above, the impugned Notification dated 08.06.2022 appears to have been issued without lawful authority and jurisdiction as such an appointment cannot be made under Section 10 of the 1973 Act, hence it is hereby set aside, whereas, the Respondent Ministry is directed to immediately issue a Notification / posting order in terms of Rule 8B(1) of the 1973 Rules by appointing the senior most person as Director General (BS-20) on acting charge basis till such time the regular appointment / promotion is made by the concerned **CSB**. The matter may also be expeditiously taken up for promotion of all eligible persons to BS-20 in the next **CSB** meeting without fail. Petition stands ***allowed*** in the above terms.

Dated: 09.04.2024

J U D G E

J U D G E

Arshad/