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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No. 63900/2021

Tanveer Sarwar

Vs.

Government of Punjab and others

JUDGMENT

Dates of hearing:	20.09.2022, 13.01.2023, 09.02.2023, 17.02.2023, 24.02.2023, 03.03.2023, 09.03.2023 & 02.05.2023
For the Petitioners:	Mr Shahbaz Akmal Jandran, Advocate, assisted by Mr Nadeem Sarwar, Advocate.
For Respondents No.1 & 2:	Mr Muhammad Shan Gul, Advocate General Punjab and Mr Sittar Sahil, Assistant Advocate General.
Amicus curiae:	Mr Muhammad Shahzad Shaukat, Advocate.

“If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difference lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.”

– James Madison¹

Tariq Saleem Sheikh, J.

The Petitioner, a professional lawyer, has challenged the appointments of 22 officers (Respondents No.3 to 24) made in their own pay and scale (“OPS”) in the Punjab against various posts made through four notifications. He contends that the concept of OPS is alien to the law. Neither Punjab Civil Servants Act 1974 (“PCS Act”) nor Punjab Civil Servants (Appointments and Conditions of Service) Rules 1974 (“PCS Rules”) allows such appointments. He argues that it is an artifice to favour blue-eyed officers and breeds a culture of nepotism and favouritism.

¹ Library of Congress, Research Guides Federalist No. 51, <https://guides.loc.gov/federalist-papers>

2. OPS connotes appointing a civil servant against a post higher in scale than his basic pay scale. For example, appointing a BS-19 officer against a BS-20 or a higher position.

3. This Court admitted this petition to a regular hearing by order dated 20.09.2022 and directed the Respondents to file written statements. Since this petition involved important questions requiring interpretation of the Constitution and statutory law, notice was also issued to the Advocate General Punjab under Order XXVII-A CPC.

4. The Government submitted its written statement strongly opposing this petition. It contends that the Petitioner lacks *locus standi* to file it because he is not an aggrieved person within the meaning of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”). Furthermore, it is *mala fide* and based on ulterior motives. According to the Government, there is a severe scarcity of officers in BS-19 and above. It has repeatedly requested the Establishment Division, Government of Pakistan, Islamabad, to post officers of the Pakistan Administrative Service as per its share in the provincial sub-cadre. However, the Federal Government is also short on officers, so the Establishment Division could not post the requisite number of officers in the Punjab. In these circumstances, the Punjab Government is occasionally constrained to post “suitable/competent officers” on an OPS basis in the public interest to manage public affairs and ensure that the administration runs smoothly. Such appointments are permitted under the Service and General Administration Department’s Notification No.SOR.I(S&GAD)-16-70/77 dated 17.05.1982, and the Finance Department’s Office Memorandum No.F.8(4)R-2/97-1204/ 2009 dated 24.02.2009 and Policy Letter dated 16.12.2009. The Government has further stated that seniority, service record, integrity, experience/ achievements, qualifications and recommendations, if any, from any department/organization are all taken into account when making OPS appointments.

5. The Government has defended the OPS postings of Respondents Nos. 3 to 24, claiming that the Competent Authority appointed them in conformity with law and policy and that they are in the public interest.

6. Although notices were issued to all the respondent officers, only Respondents No.12, 15, and 24 have submitted their written statements. According to them, section 9 of the PCS Act mandates that every civil servant shall be liable to serve anywhere within or outside the province and in any post under the Government of the Punjab, the Federal Government, any Provincial Government or a local authority or a corporation or a body set up or established by any such Government. They state that they have assumed charge of their current posts in compliance with the orders issued by the Competent Authority, which are in accordance with the law, rules and policy.

7. On 13.01.2023, this Court directed the Chief Secretary of the Punjab to furnish a list of all the officers posted on the OPS basis in the province. His report revealed that currently there are 183 such officers, including Respondents No.3 to 24. On 09.02.2023, this Court directed the office to issue them notices to be served through the Chief Secretary. It further directed that the officers in question file a reply/written statement to this petition, if so advised. On 17.02.2023, Ahmed Hassan Shahzad, Deputy Secretary, Service and General Administration Department (S&GAD), submitted a report confirming that the Chief Secretary has issued notices to the aforesaid officers. None of them has joined these proceedings except three whom the Petitioner had arrayed as Respondents No. 12, 15 and 24.

8. On 24.02.2023, this Court appointed Mr Muhammad Shahzad Shaukat, Advocate, as *amicus curiae*.

Advocate General's submissions

9. Mr Muhammad Shan Gul, Advocate General Punjab, has submitted a written note in response to the notice under Order XXVII-A CPC and addressed the Court on 09.03.2023. According to him, the PCS Act and the PCS Rules did not originally include any provision for appointing junior officers to higher-level positions. However, due to the necessity and unavailability of officers of proper scale, the Government was sometimes compelled to nominate officers of lower level to higher offices. This stop-gap arrangement did not grant them the right to receive pay/salary of the higher scale or seniority, so such appointments were termed “own pay and

scale” appointments. On 17.05.1982, S&GAD issued Notification No.SOR.I(S&GAD)-16-70/77 to streamline the procedure for such appointments. Subsequently, the Government determined that the said notification was insufficient to provide the proper legal mandate for OPS appointments, so it inserted Rule 10-A in PCS Rules vide Notification No. SOR-III-1-14/75 dated 26.02.1983. Rule 10-A caters to two situations: (a) when the post is to be filled by departmental promotion, and (ii) when the post is to be filled through initial recruitment. In both cases, it provides that the most senior officer eligible for promotion should be appointed. Mr Gul submits that the Government always strives to ensure that the officers of the right grade are posted against vacant seats, but where the unavailability of suitable officers poses a hurdle, the senior-most officer of the lower scale might be posted. Through Notification No. SOR.I(S&GAD)16-70/77-1 dated 01.05.2000, S&GAD called for strict adherence to the procedure laid down in Rule 10-A. Mr Gul points out that Rule 10-A is not the only provision that allows for a deviation from the normal and preferred method of appointment of suitable officers. Rule 10-B of the PCS Rules (inserted on 04.09.1994) authorizes appointment on a current charge basis of the most senior available civil servant (eligible for promotion) if the post (should be filled) is expected to remain vacant for less than a year. Rule 13 also permits that if a post becomes vacant due to deputation, posting outside cadre, leave, suspension or appointment on acting charge basis of the incumbent, the most senior civil servant can be appointed by promotion on officiating basis.

10. The Advocate General contends that the instructions issued by the Government and notified in the Esta Code are considered statutory and have the force of law. Hence, the appointments of officers in their own pay and scale, which are made in accordance with the instructions contained in notifications dated 17.05.1982 and 01.05.2000, are unexceptionable. He has relied upon *Khan Faizullah Khan v. Government of Pakistan through the Establishment Secretary, Cabinet Secretariat, and another* (PLD 1974 SC 291), *Muhammad Afzal and another v. Government of Balochistan through Secretary, Services and General Administration Department, Quetta and others* [1995 PLC (C.S.) 567], and *Fazali*

Rehmani v. Chief Minister, N.W.F.P. and others (PLD 2008 SC 769) in support of his argument regarding the legal status of the aforesaid instructions.

11. The Advocate General concludes that the term “own pay and scale” is only used to assert that there is no right to claim either the higher post’s salary or seniority from the date of appointment to the higher scale. This expression is only used to make the appointee aware of the conditions mentioned in Rule 10-A(5), which states:

(5) No appointment on acting charge basis shall be made without the recommendations of the Departmental Promotion Committee or the Provincial Selection Board as the case may be, but such appointment shall not be deemed to have been made on a regular basis for any purpose nor shall confer any right for regular appointment.

Submissions of the amicus curiae

12. Mr Muhammad Shahzad Shaukat, Advocate, submits that the PCS Rules provide a comprehensive mechanism that should be adopted when a post is required to be filled and no suitable officer is available for appointment. The concept of OPS has no legal backing. He has pointed out that in paragraph-3 of the notification dated 01.05.2000, S&GAD declared that “appointment to a higher post in own pay and grade has no meaning in law, therefore, this practice should be discontinued.” In these circumstances, all OPS appointments are illegal and without lawful authority, and the Government should be permanently restrained from making such appointments. He agrees with the Petitioner’s counsel that it spawns nepotism and favouritism, eventually leading to bad governance.

Opinion of the Court

13. The Government has objected to the maintainability of this petition. I must address this issue first.

14. The present petition is in the nature of Public Interest Litigation (“PIL”). *Halsbury’s Laws of India* states that “lexically, the expression ‘public interest litigation’ means a legal action initiated in a court of law for the enforcement of public or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal

rights or liability are affected.”² Dr Faqir Hussain states that “the *raison d'être* of public interest litigation is to break through the existing legal, technical, and procedural constraints and provide justice, particularly social justice, to a particular individual, class, or community who, on account of any personal deficiency or economic or social deprivation or State oppression are prevented from bringing a claim before the court of law.”³ The courts consider PIL a “part of the process of participative justice”⁴ and an extremely important jurisdiction.⁵

15. In law, “*locus standi* means the right to bring an action, to be heard in court, or to address the court on a matter before it. *Locus standi* is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party’s participation in the case.”⁶ In ***S.P. Gupta vs President of India and others*** [1981 Supp. SCC 87 : AIR 1982 SC 149)], the Supreme Court of India held that the traditional rule regarding *locus standi* is that judicial redress is available only to a person who has suffered a legal injury to property, body, mind or reputation as a result of any violation, actual or threatened, of the legal right or legally protected interest. This principle is, however, relaxed where an act or omission of the State or a public authority in violation of the Constitution or the law causes a public wrong or public injury. In such instances, any member of the public acting in good faith, who is not merely a busybody or a meddling interloper, but has sufficient interest in the proceeding, may file an action. The threat of legal action will compel public officials to act with greater responsibility and care, thereby improving the administration of justice. The Supreme Court also cited the following observations of Lord Diplock from ***Rex v. Inland Revenue Commrs.*** (1981) 2 WLR 722 (at p.740):

² Halsbury’s Laws of India, First Edn., Vol.22, para 245.001, p.580

³ Faqir Hussain, *Public Interest Litigation in Pakistan*, Working Paper Series-5 (1993). <https://sdpi.org/sdpiweb/publications/files/W5-Public%20Interest%20Litigation.pdf>

⁴ ***Fertilizer Corporation Kamagar Union (Regd), Sindri, and others v. Union of India and others*** (AIR 1981 SC 344).

⁵ ***State of Uttaranchal v. Balwant Singh Chaufal & others*** (AIR 2010 SC 2550).

⁶ <https://definitions.uslegal.com/l/locus-standi/>

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped ... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the court is the only judge.”

16. Nonetheless, the courts have always emphasized that they should not allow their process to be abused through PILs. In *S.P. Gupta*, the Supreme Court of India stated that the court must ensure it is *bonafide* and not for personal gain, private profit, political motivation, or any other oblique consideration.⁷ In *Javed Ibrahim Paracha v. Federation of Pakistan and others* (PLD 2004 SC 482), the Supreme Court of Pakistan held that a person could invoke the constitutional jurisdiction of the superior courts as *pro bono publico*, but he must first demonstrate that he is prosecuting in the public interest and for the public good, or the welfare of the general public.⁸ In *Muhammad Shafique Khan Sawati v. Federation of Pakistan* (2015 SCMR 851), the apex Court emphasized that in a PIL action, a citizen must demonstrate that it is *bonafide* and that he is pursuing it to promote public welfare, not private or vested interest. In *Premier Battery Industries Private Limited v. Karachi Water & Sewerage Board and others* (2018 SCMR 365), the Supreme Court held that PIL had received judicial recognition enabling the courts to enlarge the scope of the meaning of “aggrieved person” under Article 199 of the Constitution of 1973 to include a public-spirited person who brings to the court’s notice a matter of public importance requiring enforcement of fundamental rights. However, the superior courts should exercise constitutional jurisdiction with care, prudence, and circumspection. They should not take on any speculative, hypothetical, or malicious litigation that would obstruct the Government from performing its executive functions.

⁷ The Supreme Court of India reiterated this view in *Janata Dal v. H.S. Chowdhary and others* [AIR 1993 SC 892 : 1992 (4) 4 SCC 305], and *Dr. B. Singh vs Union Of India and others* [(2004) 3 SCC 363].

⁸ This case was cited with approval in *Moulvi Iqbal Haider v. Capital Development Authority and others* (PLD 2006 SC 394).

17. The Petitioner seeks a writ of *quo warranto* through this petition. In such cases, as we shall see in the next few paragraphs, the principle of *locus standi* is further relaxed. *Halsbury's Laws of India* explains *quo warranto* as follows:⁹

“*Quo warranto* proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of *quo warranto* gives the judiciary a weapon to control the executive from making appointments to public office against the law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the executive or by reason of its apathy.”¹⁰

18. The Constitution of Pakistan (1973) empowers the High Court under Article 199(1)(ii)(b) to issue an order “requiring a person within the territorial jurisdiction of the Court holding a public office to show under what authority of law he claims to hold that office.” The Constitution expressly states that the individual applying for an order under the said Article need not be an “aggrieved person”. In ***Malik Asad Ali and others v. Federation of Pakistan and others*** (PLD 1998 SC 161), the Supreme Court ruled that *quo warranto* proceedings confer jurisdiction and authority on superior courts to control executive action in making appointments to public offices against the relevant statutory provisions. These proceedings are a bulwark against usurpers of public offices, who may be allowed to occupy positions in connivance or with the help of the executive authority in some cases. In ***Jawad Ahmad Mir v. Prof. Dr. Imtiaz Ali Khan, Vice Chancellor, University of Swabi, and others*** (2023 SCMR 162), the Supreme Court held that there is no legal necessity that the person applying for a writ of *quo warranto* should be an “aggrieved person” in the literal sense. Further, he is not required to demonstrate that he has a special interest in the matter or to explain which of his legal rights has been infringed. It is enough that the relator is a member of the public and acts *bonafide*. This writ is more akin to public interest litigation, in which an individual seeks to remedy a wrong or vindicate a right for himself, for the good of society, or

⁹ Halsbury's Laws of India, Vol.35, p.145

¹⁰ The Supreme Court of Pakistan approvingly cited this excerpt in *Jawad Ahmad Mir v. Prof. Dr. Imtiaz Ali Khan, Vice Chancellor, University of Swabi, and others* (2023 SCMR 162).

as a matter of principle. In ***Barrister Sardar Muhammad v. Federation of Pakistan and others*** (PLD 2013 Lahore 343), a learned Judge of this Court stated:

“The object of this constitutional remedy is to protect the sanctity of the ‘public office’ by safeguarding against unlawful appointments. The constitutional objective appears to be more institutional. Acting as gatekeepers, the constitutional courts protect the sanctity of a ‘public office’ and, as a result, shield public institutions from usurpers. The constitutional obligation is to ensure that persons selected to man public institutions are appointed in accordance with the law without the slightest taint of impropriety. It is also a constitutional platform for the ‘whistle-blowers’ to come forward in public interest and raise their concern about wrongdoing within organizations.¹¹ The result is that institutions/organizations are more open and accountable to their employees, shareholders and the greater public in their activities.”

19. I may now refer to a few cases which outline the nature and scope of *quo warranto* proceeding. In ***Salahuddin and others v. Frontier Sugar Mills & Distillery Ltd. and others*** (PLD 1975 SC 244), the Supreme Court of Pakistan held that in a petition for issuance of a writ of *quo warranto* the High Court can only grant a declaration as to the person’s authority to hold the questioned post but cannot issue a mandamus to restore or reinstate the applicant to office. In ***Pakistan Tobacco Board and another v. Tahir Raza and others*** (2007 SCMR 97), the Supreme Court stated that *quo warranto* proceedings are inquisitorial rather than adversarial, not only because a relator does not have to be a person aggrieved but also because a person who holds public office without a legal warrant is burdening the public exchequer and causing harm to others who may be entitled to the said office. The High Court can conduct such inquiry as it deems necessary in the facts and circumstances of a particular case, including an examination of the entire relevant record. This exercise can be done *suo motu* even if the parties concerned do not draw its attention to it. In ***Capt. (Retd) Muhammad Naseem Hijazi v. Province of Punjab and others*** (2000 SCMR 1720), the Supreme Court held that on any such plea, the court must not only determine whether the respondent is holding the office under the order of competent authority, but also whether he is legally qualified for it or to continue to hold it, and whether any statutory provision has been violated in making the appointment. In ***Muhammad Hanif Abbasi v. Jahangir Khan Tareen and***

¹¹ See: UK Committee on Standards in Public Life quoted in “*The Status of Whistleblowing in South Africa*”-Taking Stock- Patricia Martin.

others (PLD 2018 SC 114), the Supreme Court ruled that the writ of *quo warranto* is discretionary, and the High Court is competent to inquire into the motives and conduct of the person challenging public office appointments. The relevant excerpt is reproduced below:

“There can be no cavil with the principle that to grant the relief in the nature of *quo warranto* is within the discretionary power of the superior Courts, it should not be allowed as a matter of course, rather the conduct and the *bona fides* of the relator, the cause and the object of filing such petition is of considerable importance and should be examined; it should be ascertained if the petition has been filed with some *mala fide* intent or ulterior motive and to serve the purpose of someone else. We are of the considered view that *quo warranto* remedy should not be allowed to be a tool in the hands of the relators, who approach the court with *mala fide* intentions and either have their own personal grudges and scores to settle with the holder of the public office or are a proxy for someone else who has a similar object or motive.”¹²

20. The Petitioner is a practising advocate and citizen of Pakistan. In *Malik Asad Ali and others v. Federation of Pakistan and others* (PLD 1998 SC 161), the Supreme Court held that such a person has the essential *locus standi* to file the petition. The Respondents have alleged that this petition is *mala fide*, but have not brought any material on record to substantiate that allegation. The expression “*mala fide*” has a definite significance in legal phraseology. The same cannot possibly emanate out of fanciful imagination or even apprehensions. There must exist indisputable evidence of an oblique motive. It is a settled law that *mala fides* must be pleaded with particularity.¹³ Vague and general allegations are not acceptable.¹⁴ The court cannot conduct a roving inquiry to “fish out” a case.¹⁵

¹² Also see: *Dr. Kamal Hussain and others v. Muhammad Sirajul Islam and others* (PLD 1969 SC 42).

¹³ *Mian Iftikhar-ud-Din and another v. Muhammad Sarfraz and another* (PLD 1961 SC 585), *Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri* (PLD 1969 SC 14), *The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan Rawalpindi v. Saeed Ahmad Khan and others* (PLD 1974 SC 151), *Capt. Dr. Nabi Ahmad v. The Ministry of Defence, Military Land and Cantonment Department, Rawalpindi, and others* (1985 SCMR 1649), *Qazi Hussain Ahmad, Ameer Jamaat-e-Islami Pakistan and others v. General Pervez Musharraf, Chief Executive and others* (PLD 2002 SC 853), *Hazara (Hill Tract) Improvement Trust through Chairman and others v. Mst. Qaisra Elahi and others* (2005 SCMR 678), and *Said Zaman Khan and others v. Federation of Pakistan through Secretary Ministry of Defence and others* (2017 SCMR 1249).

¹⁴ *The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan Rawalpindi v. Saeed Ahmad Khan and others* (PLD 1974 SC 151), *Qazi Hussain Ahmad, Ameer Jamaat-e-Islami Pakistan and others v. General Pervez Musharraf, Chief Executive and others* (PLD 2002 SC 853), and *Dr. Muneebul-Rehman Haroon and others v. Government of Jammu and Kashmir State and others* (AIR 1984 SC 1585).

¹⁵ *Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri* (PLD 1969 SC 14), *The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan Rawalpindi v. Saeed Ahmad Khan and others* (PLD 1974 SC 151), *Said Zaman Khan and others v. Federation of Pakistan through Secretary Ministry of Defence and others* (2017 SCMR 1249), and *Major G. S. Sodhi v. Union of India* (AIR 1991 SC 1617).

21. In light of the above discussion, I hold this petition maintainable.

22. Let's now turn to the merits of the case. Section 4 of the PCS Act ordains that appointments to the civil service of the province or a civil post in connection with the affairs of the province shall be made in the prescribed manner by the Governor or by a person authorized by him on that behalf. Part-II of the PCS Rules defines the procedure for appointments to posts in the civil service of Punjab by promotion. Part-III and Part-IV deal with initial and ad-hoc appointments, respectively, and Part-V with relaxations. Rule 9 ordains that promotions or transfers to posts in various grades shall be made on the recommendation of the appropriate Committee or Board. Rule 10 states that the Selection Authority shall consider only officers with the prescribed qualifications and meet the conditions stipulated for this purpose. The crux of these provisions is that only the right officer can be posted to a particular position. A BS-19 officer shall be posted only against a BS-19 position and not to a higher one.

23. Rules 10-A, 10-B, and 13 provide for appointments on acting charge, current charge, and officiating basis to deal with various contingencies when a post becomes vacant. These Rules are reproduced in Appendix-I for ready reference. It is important to note that the seniority principle is followed in every case, subject to the conditions/criteria outlined in these provisions. The PCS Rules, including Rules 10-A, 10-B and 13, do not allow for appointments on an OPS basis.

24. The Government maintains that OPS is a stop-gap arrangement and draws on S&GAD's notifications dated 17.05.1982, 17.08.1988 and 01.05.2000 (Appendix-II) and the Finance Department's Memorandum dated 24.2.2009 and Policy Letter dated 16.12.2009 (Appendix-III) to claim a legal mandate for it. I am afraid, they are of little help to it because S&GAD's notifications talk of **"Officiating arrangements against posts pending regular appointment"** and specifically declare that "appointment to higher post in own pay and grade has no meaning in law" and that "such arrangements are not envisaged in law."

25. S&GAD's notification dated 17.05.1982 states that appointments to higher posts, even as a stop-gap measure, should be made with the Appointing Authority's approval. If appointment to higher posts is not possible for any reason, the senior-most eligible officer should be assigned additional charge of the higher post. S&GAD's notification dated 01.05.2000 directs that the practice of making appointments on an OPS basis should be discontinued. A position should be filled up according to the prescribed procedure as soon as it becomes available. If that is not possible for any reason, stop-gap appointments should be made only per Rules 10-A, 10-B and 13 of the PCS Rules. These instructions have statutory force in terms of the law laid down by the Supreme Court in ***Khan Faizullah Khan v. Government of Pakistan through the Establishment Secretary, Cabinet Secretariat and another*** (PLD 1974 SC 291). The relevant excerpt is reproduced below:

“This Court has stated on several occasions that even instructions contained in Memoranda issued by the appropriate Government could be regarded as being in the nature of statutory rules provided they are expressed with precision and yet possess generality so as to be capable on application to a large number of cases – See: *Pakistan v. Abdul Hamid* (PLD 1961 SC 105), *Province of West Pakistan v. Din Muhammad* (PLD 1964 SC 21), *Government of West Pakistan v. A. A. Aziz* (PLD 1966 SC 188) and *Habibur Rehman v. West Pakistan Public Service Commission* (PLD 1973 SC 144).”

26. The phrase “in own pay and scale” *prima facie* implies that the lower-grade officer appointed to a higher-grade post receives no additional salary benefits. Surprisingly, the Finance Department's Memorandum dated 24.2.2009 grants them to such officers, in addition to the perks and privileges that come with the higher position. As a result, the very concept of OPS is negated. According to the Memorandum, the salary of the higher post will be fixed presumptively w.e.f. the date the officer assumes charge of the higher post, and it will include the increments of the higher post's pay scale during the period of the higher post appointment. Premature increment is not admissible in such cases, but the officer is entitled to the arrears of pay and allowances from the date he assumes the charge of the higher post. The salary of the higher position is not taken into account while calculating emoluments towards the pension.

27. The courts have considered the issue of OPS in several cases. In

Province of Sindh and others v. Ghulam Fareed and others (2014 SCMR 1189), while dealing with a case under the Sindh Civil Servants Act 1973, which is analogous to the PCS Act, the Supreme Court stated:

“We have inquired from the learned Additional Advocate General to show us any provision of law and or rule under which a civil servant can be appointed on higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies, the Government makes such appointments as a stop-gap arrangement. We have examined the provisions of Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appoint any officer on a higher grade on “Own Pay And Scale Basis.” Appointment of the nature that, too, of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the civil servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature, if allowed to be vested in the Competent Authority, will offend valuable rights of the meritorious civil servants besides blocking promotions of the deserving officers.”

The Supreme Court went on to say:

“At times, officers possessing the requisite experience to qualify for a regular appointment may not be available in a department. However, all such exigencies are taken care of and regulated by statutory rules ... Looking at the scheme of the Sindh Civil Servants Act and Rules framed thereunder, it is crystal clear that there is no scope for appointment of a civil servant to a higher grade on OPS basis except resorting to the provisions of Rule 8-A,¹⁶ which provides that in exigencies, appointment on acting charge basis can be made, subject to conditions contained in the Rules.”

The above judgment was cited approvingly in ***Khan Muhammad v. Chief Secretary, Government of Balochistan and others*** (2018 SCMR 1411), which reaffirmed that posting and transferring civil servants on an OPS basis is legally not permissible.

28. In ***Mian Zia-ud-Din v. Secretary Local Government*** [2005 PLC (CS) 908], this Court observed that public employment is no longer a bounty of the State or its functionaries. The rule of law is a cherished goal of any civilized society, and it will remain an illusion if abuse of administrative authority continues unchecked. Rules 10-A, 10-B and 13 of the PCS Rules and S&GAD’s notifications offer a detailed framework for

¹⁶ Rule 8-A of the Sindh Civil Servants (Appointment, Promotion & Transfer) Rules 1974 is analogous to Rule 10-A of the Punjab Civil Servants (Appointments and Conditions of Service) Rules 1974.

stop-gap solutions that must always be adhered to. In ***Bashir Ahmed Badini, D&SJ, Dera Allah Yar and others v. Hon'ble Chairman and Members of Administration Committee and Promotion Committee of Hon'ble High Court of Balochistan and others*** (2022 SCMR 448), the Supreme Court emphasized:

“In the case of *Tariq Aziz-ud-Din and others* (In re: Human Rights Case Nos. 8340,9504-G, 13936-G, 13635-P and 14306-G to 143309-G of 2009) (2010 SCMR 1301), this Court held that in case where the appointing authority is satisfied that no suitable officer is available to fill the post and it is expedient to fill the same, it may appoint to that post on acting charge basis the most senior officer otherwise eligible for promotion in the cadre or service as the case may be. It is the duty and obligation of the competent authority to consider the merit of all the eligible candidates while putting them in juxtaposition to isolate the meritorious amongst them. Expression ‘merit’ includes limitations prescribed under the law. Discretion is to be exercised according to rational reasons, which means that (a) there be a finding of primary facts based on good evidence, and (b) decisions about facts be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner. Actions which do not meet these threshold requirements are considered arbitrary and misuse of power.”

29. Appointments on a current or acting charge basis should not continue indefinitely, and every effort should be made to fill posts through regular appointments in the shortest possible time. In ***Province of Sindh through Chief Secretary and others v. Ghulam Shabbir and others*** (2023 SCMR 686), the Supreme Court held that allowing the assignment of duties on an acting charge basis to continue indefinitely amounts to deflecting and frustrating the spirit of the Rules. The competent authority is obligated to decide the fate of an acting charge holder by the deadline specified in the Rules. Stretching or continuing acting charge or ad-hoc arrangement on OPS basis for an extended period raises misgivings and is highly disruptive and detrimental to the structure of civil service.

30. According to the report submitted by the Chief Secretary in terms of order dated 13.01.2023, the Government has currently posted 183 officers, including Respondents No.3 to 24, on the OPS basis in the Punjab. A review of the list he has furnished reflects that several BS-18 officers have been posted against BS-20 and at least three BS-19 officers against BS-21 posts. The Chief Secretary has not placed on record any evidence that all these officers were senior-most and otherwise eligible for promotion in the cadre or service, as the case may be, and thus entitled to the posts they hold.

Prima facie, the law has been flouted with impunity. Respondents No.12, 15 & 24 have submitted copies of their posting orders, which do not even mention that the appointment is temporary. Presumably, the posting orders of the other officers appearing in the aforementioned list would be in the same language.

31. “Good governance is essential to development, prosperity and peace.”¹⁷ It gives every citizen, young or old, man or woman, a real and lasting stake in the future of their societies – politically, economically, and socially. With that stake in their minds and hearts, there are no limits to what the people of a country can achieve.¹⁸ The Supreme Court observed in *Tariq Aziz-ud-Din* that good governance largely depends on an upright, honest, strong bureaucracy. The purity of administration is greatly influenced by the purity of the services, which is only possible if promotions [postings and transfers] are made on merit in conformity with the Constitution and the law and without favouritism or nepotism. Institutions are destroyed when appointments and promotions are made contravening the law. The Supreme Court further stated that when we talk about public interest and the welfare of the State, we have the principles of the rule of law and access to justice for all in our minds, which are enshrined in our Constitution. In *Syed Mahmood Akhtar Naqvi and others v. Federation of Pakistan and others* (PLD 2013 SC 195), the Supreme Court determined that tenure, appointment, promotion and posting/transfer are crucial in the civil service. If rules and instructions are violated, and merit is discouraged by favouritism, *sifarish* or other motives, the civil service will lose its independence. In *Province of Sindh through Chief Secretary and others v. Ghulam Shabbir and others* (2023 SCMR 686), the Supreme Court held the term “civil service” refers to a branch of government that consists of career bureaucrats recruited on merit. The improper selection of blue-eyed boys based on nepotism, favouritism, or other extraneous considerations creates dissatisfaction and resentment among civil servants, with long-term serious consequences. Merit should be

¹⁷ UN Secretary-General Kofi Annan, Press Release SG/SM/6291 DEV/2166, <https://press.un.org/en/1997/19970728.sgsm6291.html#:~:text=Good%20governance%20is%20also%20a,%20path%20for%20consolidating%20peace>.

¹⁸ *ibid.*

the decisive factor in the selection process because it is integral to good governance.

Declarations and directives

32. This petition is **disposed of** with the following declarations and directives:

- (i) It is declared that the concept of OPS appointments is alien to law. It violates Articles 4 and 25, the PCS Act and the PCS Rules. S&GAD's notifications dated 17.05.1982 and 01.05.2000 also declare that it has no legal basis.
- (ii) As soon as a post becomes available, it should be filled up in accordance with the procedure prescribed under the relevant service/recruitment rules. If that is not possible for any reason, stop-gap appointments should be made only following the procedure laid down for the respective categories of the vacancy under Rules 10-A, 10-B and 13 of the PCS Rules (read with S&GAD's notifications dated 17.05.1982 and 01.05.2000).
- (iii) There is no scope for appointment of a civil servant to a higher grade on an OPS basis except resorting to the provisions of Rule 10-A, which provides that in exigencies, an appointment on an acting charge basis can be made, subject to the conditions contained in the PCS Rules.
- (iv) The Chief Secretary Punjab shall review the appointments of the 183 officers named in the list which he furnished to this Court in terms of the order dated 13.01.2023 and shall, within 30 days of the announcement of this judgment, take appropriate steps to bring them into compliance with the law, if any deviation exists.

(Tariq Saleem Sheikh)
Judge

Appendix I to III

Announced in open Court on _____

Judge

Naeem

Approved for reporting

Judge

APPENDIX-I**Rules 10-A, 10-B and 13 of Punjab Civil Service
(Appointments and Conditions of Service) Rules, 1974**

10-A. Appointment on acting charge basis.— (1) Appointments on acting charge basis may be made in the manner hereinafter prescribed.

(2) 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.

(3) Where the appointing authority is satisfied on report of the selecting authority that no suitable officer is available to fill a post Grade 17 and above reserved under the rules to be filled by initial recruitment and it is expedient not to allow that post to remain unfilled, it may appoint to that post on acting charge basis the most senior officer eligible for promotion to that post.

(4) No appointment on acting charge basis shall be made against a post which is likely to remain vacant for a period of less than six months.

(5) No appointment on acting charge basis shall be made without the recommendations of the Departmental Promotion Committee or the Provincial Selection Board, as the case may be, but such appointment shall not be deemed to have been made on regular basis for any purpose nor shall confer any right for regular appointment.

10-B. Appointment on current charge basis.— (1) Where a post is likely to remain vacant for a period of less than one year and the appointing authority does not consider it expedient to make an appointment on ad hoc basis, it may appoint any civil servant to that post on current charge basis.

(2) An appointment made on current charge basis shall come to an end on appointment of a person on regular basis or on the expiry of one years whichever is earlier.

13. Appointment by promotion on officiating basis.— (i) Where a post falls vacant as a result of deputation, posting outside cadre, leave, suspension on appointment or acting-charge basis of the incumbent or is reserved under the rules to be filled by transfer, if none is available for transfer, the appointing authority may make appointment by promotion against such post on officiating basis.

(ii) No person shall be promoted on officiating basis unless he possessed the qualifications and experience prescribed for the post and his promotion as such is approved by the Chairman of the appropriate selection authority.

APPENDIX-II**No. SOR.I(S&GAD)-16-70/77****Dated the 17th May 1982**

Subject: **OFFICIATING ARRANGEMENTS AGAINST POSTS PENDING
REGULAR APPOINTMENT**

I am directed to refer to this Department's circular letter of even number dated 23.07.1979 on the subject noted above and to state that it has been observed that stop-gap arrangements are still being made by posting members of next below cadres against higher posts in their own pay and scale. Once such postings are made the concerned officials represent for grant of pay of the post and such requests are passed on by the Administrative Departments to the Finance Department for concurrence. Since such arrangements are not envisaged by law, the Administrative Departments and appointing authorities under their administration should keep the following instructions in mind before any stop-gap arrangements is made. The appointing authorities shall be held personally responsible for posting of any person against a higher post in disregard to these instructions:

- i) appointment to higher post in own pay and grade has no meaning in law;
- ii) appointment to higher posts even as a stop-gap arrangement should be made with the approval of the Appointing Authority i.e. Administrative Secretary for posts in grade 17 and Chief Secretary for posts in grade 18 and Governor for posts in grade 19 and above;
- iii) in case where appointment to higher posts is not possible for one reason or the other the senior-most eligible officer should be given additional charge of the higher post instead of appointing him to the said higher post.

No. SOR.IV (S&GAD)1-14/75**Dated the 28th April 1985**

Subject: **APPOINTMENT BY PROMOTION ON OFFICIATING BASIS**

I am to refer to S&GAD Notification No. SOR.IV(S&GAD) 1-14/75 dated 12th March, 1985 amending Rule 13 of the Punjab Civil Servants (Appointment & Conditions of Service) Rules, 1974, copy of which has been sent to all departments under endorsement of even number dated 14th March, 1985. According to the amended Rule 13(ii) *ibid*, no person shall be promoted on officiating basis unless he possesses the qualifications and experience prescribed for the post and his promotion as such is approved by the chairman of appropriate selection authority. Under rule 9(1) of the Punjab Civil Servants (Appointment & Conditions of Service) Rules, 1974, appointments by promotions or transfer to posts in various grades shall be made on the recommendations of the appropriate committee or board. Officiating promotion has all the attributes of regular promotion, except that it is for a specified period and is temporary in nature. It is, therefore, clarified that all promotions on officiating basis should be made on the recommendations of the appropriate selection authority.

PCS(A&CS) Rules, 1974
No. SORI(S&GAD)16-70/77
Dated the 17th August 1988

Subject: **OFFICIATING ARRANGEMENTS AGAINST POSTS PENDING
REGULAR APPOINTMENT**

I am directed to refer to this department's circular letter No. SORI(S&GAD)16-70/77, dated 17.05.1982 on the subject noted above and to say that it has been pointed out that Junior Officers are being posted against higher posts in their own pay and grade and this is followed by requests from the respective administrative departments to Finance Department for allowing pay of the post.

2. Appointment to higher posts in own pay and grade has no meaning in law. Detailed instructions on the subject have already been issued vide this department's letter referred to above. It has, however, been observed that some appointing authorities are not adhering to these instructions. Since this course of action is violative of law and rules, it is requested that the instructions on the subject may be brought to the notice of all concerned for strict compliance. Violation of the instructions should be taken seriously and appropriate steps should be taken to arrest the tendency of deviations from law, rules and instructions.

No. SORI(S&GAD)16-70/77-1
Dated the 1st May 2000

Subject: **OFFICIATING ARRANGEMENTS AGAINST POSTS PENDING
REGULAR APPOINTMENT**

I am directed to refer to this department's letter of even number dated 17.05.1982, wherein the following instructions were issued:

- i) appointment to higher post in own pay and grade has no meaning in law;
- ii) appointment to higher posts even as a stop-gap arrangement should be made with the approval of the Appointing Authority i.e. Administrative Secretary for posts in grade 17 and Chief Secretary for posts in grade 18 and Governor for posts in grade 19 and above;
- iii) in case where appointment to higher posts is not possible for one reason or the other the senior-most eligible officer should be given additional charge of the higher post instead of appointing him to the said higher post.

2. The Accountant-General Punjab has intimated that instances have come to the notice that Administrative Secretaries/Appointing Authorities are making appointments against the higher posts in own pay and grade and are not adhering to the instructions circulated vide this department's circular letter referred to above. This course of action is violative of the provisions of Section 16 of the Punjab Civil Servant Act, 1974 and the instructions referred to above.

3. In view of the above, I am directed to draw your attention to the said instructions on the subject wherein it has been clearly stated that appointment to a higher post in own pay and grade has no meaning in law, therefore, this practice should be discontinued. A post, as soon as it becomes available, should be filled up in accordance with the method prescribed under the relevant service/recruitment rules. In case it may not be possible to do so for one reason or other, stop-gap appointments should be made only in accordance with the procedure laid down for the respective category of the vacancy under the relevant provisions of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, i.e. Rules 10-A, 10-B and 13 of the Rules *ibid*.

4. The instructions may kindly be brought to the notice of all concerned for strict compliance.

APPENDIX-III**Government of Pakistan
Finance Division
(Regulations Wing)**

No. F.8(4)R-2/97-1204/09

Islamabad, the 24th February, 2009.

OFFICE MEMORANDUM**Subject: Appointment of an Officer of Lower Grade to a Post of Higher Grade and Grant of Pay of the Higher Post**

In partial modification of Finance Division's Office Memorandum No.8(4)R-2/97 dated 19th September, 2003 on the above subject, the undersigned is directed to say that the courts have held from time to time that where a civil servant is called upon to discharge duties and responsibilities of a higher post, he is entitled to pay of that higher post. The Law, Justice and Human Rights Division in their Office Memorandum No. F.3(9)/81 Sol. II dated 18 March, 1986 issued necessary guidelines in that regard. To further clarify the matter, it has been decided that pay of the higher post will be admissible to civil servants during the period of appointment on higher post subject to the following conditions:

- (i) The officer has been appointed on the higher post by the authority competent to make appointment on that post.
- (ii) The officer is fully qualified in every respect to be appointed to that higher post.
- (iii) The officer discharges all the duties and responsibilities of the higher post independently and severed all connections with his lower post.
- (iv) The pay of the higher post will be fixed presumptively w.e.f. the date the officer assumes charge of the higher post and it will include the increments of the pay scale of the higher post for the period of higher post appointment on that post. In such cases premature increment shall not be admissible. However, the officer will be entitled to the arrears of pay and allowances from the date he assumes the charge of the higher post.
- (v) On relinquishment of charge of the higher post or on transfer or on regular promotion to that higher post, the pay will be re-fixed with reference to original scale of pay of the post, held by the officer and increments carried (if any) on higher post will count for increments in his original scale as per provisions of FR-26.
- (vi) The pay of the higher post shall not be accounted for the calculation of emoluments towards the pension.
- (vii) The pay of the higher post will be given only with the concurrence of Finance Division.

2. All Ministries/Divisions/Departments are advised that only those cases may be referred to Finance Division which are covered under sub-paras (i) to (iii) of para-1 above and pay of the concerned officers may be fixed/re-fixed in terms of sub-para (iv) to (vi) of para-1 above after obtaining prior concurrence of Finance Division.

(Adnan Majid)
Secion Officer (R-2)
Ph.9263179

All Ministries/Divisions/Departments

NO.FD.PC.44-9/2009
GOVERNMENT OF THE PUNJAB
FINANCE DEPARTMENT

Dated Lahore the 16th December 2009

From:

Tariq Mahmood Pasha,
Finance Secretary.

To

1. All Administrative Secretaries to Government of the Punjab.
2. The Principal Secretary to Governor, Punjab, Lahore.
3. The Principal Secretary to Chief Minister, Punjab, Lahore.
4. The Military Secretary to Governor, Punjab, Lahore.
5. All Commissioners in the Punjab.
6. All District Coordination Officers in the Punjab.
7. All Heads of Attached Departments, Government of the Punjab.
8. The Registrar, Lahore High Court, Lahore.
9. All District and Session Judges in the Punjab.
10. The Secretary, Punjab Public Service Commission, Lahore.
11. The Secretary, Punjab Provincial Assembly, Lahore.
12. The Director General, Audit & Accounts (Works), Lahore.
13. The Provincial Director, Local Fund Audit, Punjab, Lahore.
14. The Chief Pilot, VIP Flights. Lahore.
15. The Incharge, Public Policy & Change Management Wing, S&GAD.

Subject:

APPOINTMENT OF AN OFFICER OF LOWER GRADE TO A POST OF HIGHER GRADE AND GRANT OF PAY OF THE HIGHER POST.

In pursuance of Finance Division's Office Memorandum No.F.8(4)R-2/97-1204/09, dated 24.02.2009, Government of the Punjab has decided that pay of the higher post will be admissible to civil servants during the period of appointment on higher post subject to the following conditions:

- i. The officer has been appointed on the higher post by the authority competent to make appointment on that post.
- ii. The officer is fully qualified in every respect to be appointed to that higher post.
- iii. The officer discharges all the duties and responsibilities of the higher post independently and severed all connections with his lower post.
- iv. The pay of the higher post will be fixed presumptively w.e.f. the date the officer assumes charge of the higher post and it will include the increments of the pay scale of the higher post for the period of higher post appointment on that post. In such cases premature increment shall not be admissible. However, the officer will be entitled to the arrears of pay and allowances from the date he assumes the charge of the higher post.
- v. On relinquishment of charge of the higher post or on transfer or on regular promotion to that higher post, the pay will be re-fixed with reference to original scale of pay of the post, held by the officer and increments carried (if any) on higher post will count for increments in his original scale as per provisions of Rule 4.4(a)(i) of CSR Punjab Vol-1, Pt-1.

- vi. The pay of the higher post shall not be accounted for the calculation of emoluments towards the pension.
- vii. The pay of the higher post will be given only with the concurrence of Finance Department.

2. All Administrative Departments are advised that only those cases may be referred to Finance Department which are covered under sub-paras (i) to (iii) of para-1 above and pay of the concerned officers may be fixed/re-fixed in terms of sub-para (iv) to (vi) of para-1 above after obtaining prior concurrence of the Finance Department.

(Tariq Muhammad Mirza)
Deputy Secretary (PC)

NO.& DATE EVEN:

A copy is forwarded for information and necessary to:

1. The Accountant General Punjab, Lahore.
2. All District Accounts Officers in the Punjab.

(Inayat Ullah Khan Niazi)
Section Officer (PC)

NO.& DATE EVEN:

A copy is forwarded for information to:-

1. Finance Secretary, Government of Sindh, Karachi.
2. Finance Secretary, Government of NWFP, Peshawar.
3. Finance Secretary, Government of Balochistan, Quetta.
4. Finance Secretary, Azad Government of the State of Jammu & Kashmir, Muzaffarabad.

(Tariq Muhammad Mirza)
Deputy Secretary (PC)