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JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 20192/2021

Muhammad Ayub

Vs.

Secretary Primary & Secondary Healthcare Department etc.

JUDGMENT

Date of hearing:	19.1.2023
For the Petitioner:	Mr Abu Bakar Zia, Advocate.
For Respondent No.1:	Mr Mukhtar Ahmad Ranjha, Additional Advocate General.
For Respondent No.2:	Mr Muhammad Abrar Khan, Law Officer.
For Respondent No.4:	Mr Saeed Anwar, Litigation Officer.

Tariq Saleem Sheikh, J. – The Petitioner joined the service of the Province of the Punjab, Health Department, as Hakeem in BS-15, on 24.5.1993. He retired on 13.1.2021 after serving for about 28 years. In 2016, the Governor of the Punjab upgraded all technical/non-technical personnel holding posts in BS-5 to BS-16, who were isolated/stagnant (i.e. had no promotion prospects) to the next pay scale w.e.f. 1.1.2016 subject to the following conditions: (i) they had 10 years' service to their credit, (ii) their (further) promotion to the next pay scale would be after earning every 10 years of service, and (iii) they would not be entitled to premature increment either on upgradation (i.e. on 1.1.2016) or time scale promotion after every 10 years. The Finance Department, Government of the Punjab, notified the Governor's order vide Notification No.FD.PC.39-14/77(Pt.IV) (APCA/2008) (Provi.) dated 4.1.2016. In pursuance thereof, Respondent No.4 granted the Petitioner time scale upgradation in BS-16 by Office Order dated 7.4.2016. He assumed charge of the upgraded post (BS-16) and was paid salary accordingly from 1.1.2016 till his retirement.

2. In 2018, the Director General Health Services Punjab (Respondent No.2) held that the Finance Department's notification dated 4.1.2016 did not apply to Hakeems. Therefore, vide order dated 20.11.2018, he declared their upgradation to Senior Tabeeb/Hakeem (BS-16) illegal. Consequently, on 11.12.2018, Respondent No.4 withdrew the Petitioner's upgradation.

3. The Petitioner first applied for review before Respondent No.4 and then filed an appeal with Respondent No.3 against the order dated 11.12.2018, but they did not decide them. On 11.1.2021, i.e. two days before his superannuation, the Petitioner applied to Respondent No.4 for issuance of his retirement order and pensionary benefits. In response, Respondent No.4 instructed Respondent No.5 to compute the money (illegally) paid to the Petitioner. Respondent No.5 wrote to the Petitioner on 26.2.2021 and stated that he had been drawing the salary of BS-16 from 1.1.2016 until the day of superannuation, i.e. 13.1.2021, and received money beyond his entitlement. He told him to deposit his service book so that the overpaid amount could be calculated and deposited in the Government Treasury. He warned that his pension papers would not be processed without it.

4. By this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"), the Petitioner impugns the order of Respondent No.5 dated 26.2.2021. Consequently, orders dated 20.11.2018 and 11.12.2018 issued by Respondents No.2 and 4 also come under challenge.

5. The Petitioner's counsel, Mr Abu Bakar Zia, Advocate, contends that the Finance Department's notification dated 4.1.2016 fully applies to him and that Respondent No.4 rightly upgraded him on 7.4.2016. He maintains that Respondent No.2 has erred in holding differently and that his order dated 20.11.2018 is perverse. As a result, the subsequent orders issued by Respondents No.4 and 5 (dated 11.12.2018 and 26.2.2021 respectively), which are based on it, are also not sustainable. Mr Zia further contends that the Petitioner's upgradation is protected under the doctrine of *locus poenitentiae*, which is entrenched in our jurisprudence. Lastly, he states that in a similar case, "*Hakeem Abid Rauf, DHQ Hospital Hafizabad v. Chief Executive Officer, DHA, Hafizabad*", the Deputy

Commissioner/Chairman District Health Authority granted relief to one of the Hakeems and restored his original upgradation order. The counsel argues that the Petitioner has a right to be treated in accordance with the law and that discriminating treatment is not permitted.

6. The Additional Advocate General has objected to the maintainability of this petition. He contends that the Petitioner is a civil servant, so it is barred under Article 212 of the Constitution. On merits, he states that the Government notified the service structure of Hakeems vide notification dated 12.8.2015. As such, the Petitioner's case does not fall within the ambit of the Finance Department's notification dated 4.1.2016. In the circumstances, no exception could be taken to the impugned orders, and he is liable to refund the excess money he has received.

7. According to the report and para-wise comments submitted by the Respondents, the Petitioner was appointed as Hakeem (BS-15) in the Health Department, Gujranwala, vide Letter No. 6356-59/E dated 23.5.1993 issued by the Director Health Services, Gujranwala Division. He was upgraded from BS-15 to BS-16 by the then Executive District Officer Health, Gujranwala, vide Order No. 6565-70/Est dated 07.5.2016 in pursuance of the Finance Department's notification dated 04.1.2016. The Director General Health Services (Respondent No.2) sent Letter No. 442-71/Tib dated 20.11.2018 to all the Chief Executive Officers/District Health Authorities stating that the upgradation of Hakeems was unlawful because the Government had issued a 4-tier structure for Hakeems vide SO(G-II)22-45/2012 dated 12.8.2015. Therefore, he directed them to revoke the same. In compliance with the directive, Respondent No.4 withdrew the Petitioner's upgradation from BS-15 to BS-16 vide Order No. 11078-84/E&A dated 11.12.2018. However, the Senior Medical Officer, IRHC Alipur Chatha (DDO of the Petitioner), did not implement the Director General's aforesaid order dated 20.11.2018. Resultantly, the Petitioner managed to get his salary in BS-16 even after the withdrawal of the upgradation order. When this came to the notice of Respondent No.4, he directed Respondent No.5 to recover the overpayment vide Letter No. 784/Est dated 20.2.2021. The Petitioner's pension papers are being

processed. He was asked to provide particular documentation, which he still hasn't done.

Opinion

8. I take up the objection regarding the maintainability of this petition first.

9. "Upgradation" is distinct from promotion. In ***Regional Commissioner Income Tax and another v. Syed Munawar Ali and others*** (2016 SCMR 859), the Supreme Court of Pakistan held that "upgradation" is not defined in the Civil Servants Act or the Rules framed thereunder. It applies to the posts and not the person occupying them. In ***Federal Public Service Commission v. Anwar-ul-Haq and others*** (2017 SCMR 890), the apex Court held that upgradation is carried out without necessarily creating posts in the relevant pay scales. It is done under a policy and a specific scheme. It is exclusively used for incumbents of isolated positions with no other advancement options, and its purpose is to overcome the issue of their stagnation and frustration.

10. In ***Fida Muhammad v. Government of Khyber Pakhtunkhwa and others*** (2021 SCMR 1895), the Supreme Court explained:

"There is a meticulous differentiation between upgradation and promotion. The promotion involves advancement in rank, grade or a footstep en route to a higher position. In contrast, the facility or benefit of upgradation confers some monetary benefits by granting a higher pay scale to ventilate stagnation. In an upgradation, the candidate continues to hold the same post without any change in his duties, but he is accorded a higher pay scale. It is also a well-settled exposition of law that the benefit of upgradation is normally granted to the persons stuck-up in one pay scale for a considerable period of their length of service, either having no venue for promotion or progression. In order to minimize the anguish or suffering being stuck up in a particular pay scale for a sizeable period, the mechanism of upgradation as a policy decision comes in the field for redress and rescue."

11. The Service Tribunal has exclusive jurisdiction under Article 212 of the Constitution in issues relating to the terms and conditions of persons who are or have been civil servants, including disciplinary matters. It is, however, well settled that upgradation does not form a part of the terms and conditions of service. In ***Regional Commissioner Income Tax and another v. Syed Munawar Ali and others*** (2016 SCMR 859), a 5-member Bench of the Supreme Court held:

"The aforesaid definition of the expression 'upgradation' clearly manifests that it cannot be construed as promotion but can be granted through a policy. In fact, this Court in the judgment titled as *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) and an unreported judgment of this Court passed in the case of *Chief Commissioner Inland Revenue and another v. Muhammad Afzal Khan* (Civil Appeal No.992 of 2014) has held that the issue relating to upgradation of civil servants can be decided by a High Court in the exercise of its constitutional jurisdiction and bar contained under Article 212(3) of the Constitution would not be attracted. The policy of upgradation, notified by the Government, in no way amends the terms and conditions of service of the civil servant or the Civil Servants Act or the Rules framed thereunder. The Service Tribunals have no jurisdiction to entertain any appeal involving the issue of upgradation, as it does not form part of the terms and conditions of service of the civil servants."

12. No doubt, a Hakeem in BS-15 or BS-16 in the Health Department is a civil servant and thus amenable to the jurisdiction of the Punjab Service Tribunal in matters relating to the terms and conditions of his service. The case law cited above shows that upgradation does not form a part of those terms. Hence, this petition is competent. The Law Officer's objection is overruled.

13. Let's now turn to the merits of the case. The Government of the Punjab issued Notification No.SO(G-II)22-45/2012 dated 12.8.2015 to the effect that the Governor had approved a 4-tier structure to the post of Hakeem/Tabib (BS-15) with the following nomenclatures:

BS	Total Post	No. of seats in respective pay scale	Percentage of total posts	Re-designated under 4-tier structure
BS-15	192	96	50%	Tabeeb
BS-16		65	34%	Senior Tabeeb
BS-17		29	15%	Tibb Officer/Lecturer
BS-18		02	1%	Senior Tibb Officer/Principal

14. Although notification dated 12.8.2015 stated that the Governor had granted the aforesaid approval with "immediate effect", paragraph (2) thereof expressly said that the service structure in question shall be subject to the following conditions:

- i) Implementation of service structure will be made after framing of service rules incorporating therein newly-upgraded posts.
- ii) All the upgraded posts of BS-16, BS-17 and BS-18 will be filled in accordance with the service rules to be amended through the Service Rules Committee of the S&GA Department on the recommendation of DPC on a seniority cum fitness basis.

15. Respondent No.2 issued a letter dated 20.11.2018 declaring the upgradation of Hakeems/Tabibs (BS-15) illegal on the ground that a 4-tier promotional channel was available to them under notification dated 12.8.2015. Only those employees could avail of the benefit of notification dated 4.1.2016 who were isolated/stagnant and had no promotion prospects. Admittedly, the rules contemplated by paragraph (2) of the notification dated 12.8.2015 – The Punjab Health Department (Tibb) Service Rules, 2018 – were published in the Gazette on 20.6.2019. They cannot be applied retrospectively to the employees who are already upgraded. In ***Commissioner of Sales Tax (West), Karachi v. Messrs Kruddsons Ltd.*** (PLD 1974 SC 180), the Supreme Court held that rules could not operate retrospectively to impair existing rights or nullify the effect of final judgment. Similarly, ***Kohinoor Textile Mills Ltd. v. Commissioner of Income-Tax, Lahore*** (PLD 1974 SC 284) held that they could not have a retrospective effect.

16. Respondent No.4 granted the Petitioner upgradation in BS-16 by Office Order dated 7.4.2016, which was duly implemented. The 4-tier service structure contemplated by the notification dated 12.8.2015 came into force when the Government framed the requisite service rules on 20.6.2019. The said notification cannot be invoked to deprive the Petitioner of the right he had already acquired.

17. I agree with Mr Zia that the doctrine of *locus poenitentiae* is also applicable to the present case. Black's Law Dictionary, Ninth Edition, (Year 2009), p. 1025 defines this term as: "(1) A point at which it is not too late for one to change one's legal position; the possibility of withdrawing from a contemplated course of action, esp. a wrong, before being committed to it and (2) the opportunity to withdraw from a negotiation before finally concluding the contract." The doctrine of *locus poenitentiae* is recognized by section 21 of the General Clauses Act 1897. In ***Government of the Punjab v. Muhammad Imran and others*** (2019 SCMR 643), the Supreme Court held:

"Keeping in view the above deliberation, it is noted that there is a judicial consensus on the issues in hand in terms that –

- i) The Authority which can pass an order is entitled to vary, amend, add to or rescind the same under section 21 of the General Clauses Act, 1897.

- ii) The jurisdiction to recall an earlier order is based on the principle of *locus poenitentiae*.
- iii) There is an exception to the principle of *locus poenitentiae* vesting power in an authority to recall its earlier order: if in pursuance of the order passed by the authority, an aggrieved person takes decisive steps and changes his position.
- iv) None can retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority is illegal, void or without lawful authority. In such circumstances, it would not matter, even if decisive steps have been taken by the person in pursuance of the illegal order passed by the authority. However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority cannot be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.”

18. The Respondents have not brought anything on the record which may suggest any lapse, misrepresentation or foul play on the part of the Petitioner in getting the upgradation. He acquired the right and enjoyed it with the approval of the competent authority. It cannot be taken back from him.

19. The Petitioner has submitted a copy of the order dated 20.11.2019 passed by the Deputy Commissioner/Chairman, District Health Authority, Hafizabad, by which he set aside the Chief Executive Officer's order revoking the upgradation of a similarly-placed Hakeem, Abid Rauf. The Respondents have not challenged that decision. The Petitioner cannot be discriminated against.

20. In view of the above, this petition is **accepted**, and the impugned orders dated 11.12.2018 and 26.2.2021 are set aside. The order of Respondent No.2 dated 20.11.2018 is also declared to be without lawful authority and quashed. The Respondents shall process the Petitioner's pension papers within 60 days without fail.

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____

Judge

Naeem

Approved for reporting

Judge