

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Mian Saqib Nisar

Mr. Justice Mushir Alam

Civil petition No.1424 of 2016

Against the Judgment dated 08.2.2016 passed
by Federal Service Tribunal, Islamabad in
Appeal No. 194(R)CS/2013.

Federal Public Service Commission thr. Its Secy.

Petitioner(s)

VERSUS

Anwar-ul-Haq (Private Secretary) Islamabad & others

Respondent(s)

For the Petitioner(s):

Mr. Abdul Rashid Awan, DAG

Mr. Muhammad Ashraf, Director, FPSC

For Respondent No.1:

Mr. Ghulam Fareed, ASC

Date of Hearing:

30.9.2016

JUDGMENT

Mushir Alam, J.-. Petitioner, Federal Public Service Commission (FPSC), has challenged the decision dated 8.2.2016 passed by the Federal Service Tribunal (FST) Islamabad, whereby setting aside the order dated 8.01.2013, passed by the competent authority, declining representation of the respondent seeking grant of BPS-19. The petitioner was directed to grant BPS-19 and re-designate respondent No.1 as Senior Private Secretary from the date he completed 12 years of service in BPS-17.

2. Facts in brief appear to be that the respondent No.1 was originally appointed on 2.12.1978 in Finance Division, as LDC, he was then promoted as Stenotypist on 19.02.1980. He was then appointed in the office of *Wafaqi Mohtasib* as Stenographer in (BPS-15) on 19.02.1980, in which post he was confirmed on 08.12.1985. Later he was appointed in FPSC, in selection grade BPS-16 on 21.5.1998 with effect from 6.2.1997. However, his substantive post remained as that of Stenographer (BPS-15.). He earned promotion as Private Secretary (BPS-17) on 12.8.2011.

Pursuant to Office Memorandum (OM) dated 23.12.2011 (@ page 35) with the concurrence of competent authority post of Private Secretary was upgraded, to BPS 18.

3. On 05.6.2012 respondent No.1, made a request (@ page 26) for the grant of BPS-19 on the ground *inter-alia* that pursuant to OM dated 2nd June, 1983 his total length of service comes to 12 years, 03 months and 26 days, thus entitled him for the grant of BPS-19, which request was declined vide order dated January 8th 2013 on the ground that he does "*not hold the required length of 12 years service in BS-17 and above as per clarification from Establishment Division vide their U.O No.4/1/98-R-6 (Pt-II) dated 30.11.2012,*" which order of the competent authority was successfully challenged before the *FST*, and vide its impugned decision dated 08.2.2016 the petitioner was directed to grant *BPS-19* to the respondent and re-designate him as Private Secretary from the date of his completing 12 years of service in BPS-17 on the strength of formula laid down in Establishment Division O.M dated 02.6.1983, with back benefit.

4. Mr. Abdul Rasheed Awan learned DAG, with vehemence urged that the respondent did not possess 12 years qualifying length of service in substantive post of BPS-17 and above. According to learned DAG, respondent was holding substantive post of Stenographer in BPS-15, when he was appointed in Federal Public Service Commission (in BPS-16 selection grade) he was promoted to BPS-17 on 12.8.2011, pursuant to OM dated 23.12.2011 his post was upgraded to BPS-18 (@ page 35), it was urged that upgradation of post of Private Secretary from BPS-17 to 18 is not a promotion in terms of Section 9 (1) of the Civil Servants Act, 1973. It was urged that the learned *FST* misdirected itself while treating respondent on substantive post, which is factually not correct. It was urged that OM dated 2nd June, 1983; was not correctly appreciated in proper perspective resulting into flawed judgment, which cannot be sustained and is liable to be set aside. He prayed accordingly.

5. Mr. Ghulam Fareed, learned ASC for the respondent No.1 supports the impugned decision of the *FST*. He has placed heavy reliance upon Finance Division O.M dated 23.12.2011 to claim upgradation to BPS-19 on the strength of his length of service in

lower grade, in accordance with O.M dated 02.06.1983, referred to in first mention O.M. He emphasized his service in lower grade is to be computed in accordance with formula given by the Establishment Division as per O.M. dated 02.06.1983. For the purpose of computing length of service in different grade to earn eligibility for BPS-19 he has placed heavy reliance on part (iii) to the O.M dated 2nd June, 1983, to urge that the impugned decision of FST is based on correct appreciation of facts and law does not call for interference.

6. Exercising right of rebuttal learned DAG has drawn our attention to proviso (ii) and (iii) of O.M dated 2nd June, 1983 to urge that upgradation to BPS-19 or otherwise cannot be claimed as a matter of right. It was urged that the minimum length of service in a particular substantive grade is considered for consideration of promotion in next higher substantive grade and not for the purposes of merely upgradation of the post. It was stated that the post of the respondent was being upgraded from time to time. He cannot claim upgradation as a matter of right.

7. We have heard the arguments and perused the record. In order to appreciate the contentions of both the learned counsels it would be beneficial to glance through Office Memorandum dated 23.12.2011 and 02.06.1983 respectively, relied upon by both the learned counsels in support of their respective contentions subject O.M dated 23.12.2011 reads as follow: -

"Government of Pakistan
Finance Division
(Regulation Wing)

OFFICE MEMORANDUM

F.No.19(55)Legal-II/2010-1055 Islamabad, the 23rd December, 2011

Subject: - UPGRADATION OF THE POSTS OF STENOTYPIST,
STENOGRAPHER AND PRIVATE SECRETARY

The undersigned is directed to say that consequent upon approval of the Prime Minister of Pakistan, the posts of Private Secretaries, Stenographers and Stenotypist have been upgraded with immediate effect subject to fulfillment of the conditions mentioned against each: -

Sr. #	Name of the Post	Existing BS	Upgraded BS	Conditions
1	Private Secretary	17	-	Will continue to remain in BS-17 and will be granted BS-18 after putting in 5 years satisfactory service instead of 7 years. The Private Secretaries in BS-18 will further be granted BS-19 after putting in 12 years service in BS-17 and above taking benefit of Establishment Division's O.M. No.1/9/80-R-II, dated 2.6.1983. However, on grant of BS-19 nomenclature of the post will be Senior Private Secretary <u>The existing Private Secretaries in BS-17 will be granted BS-18 on one time basis irrespective of their length of service in BS-17.</u>
2	Stenographer	15	16	With enhancement of qualification for initial appointment from Intermediate to Graduation.
3.	Stenotypist	12	14	With enhancement of qualification for initial appointment from Matriculation to Intermediate

The incumbents of the upgraded posts will also stand upgraded and their pay will be fixed at the stage next above their basic pay in their lower pay scales.

2. The Establishment Division will amend the recruitment rules of the above said posts, accordingly.

All Ministries/Divisions/Departments

Sd/xxx
(Muhammad Azam Awan)
Section Officer (R-I)"

8. It is admitted position that the respondent No.1 was serving in *BPS-16 in Selection Grade* (his substantive grade remained BS-15) before he was promoted to *BPS-17* on 12.8.2012. Post of Private Secretary (BPS-17) was upgraded to BPS-18 subject to five years qualifying length of service instead of seven years. In terms of *O.M* dated 23.12.2011 which *inter-alia* provided that all the Private Secretaries “will continue to remain in BS-17 and will be granted BS-18 after putting in 5 years satisfactory service instead of 7 years”. However one time exception was created in subject *O.M* as reproduced above, which provided that “existing Private Secretaries in BS-17 will be granted BS-18 on one time basis, irrespective of their length of service in BS-17”.

9. Upgradation is not a promotion, as generally misunderstood. Upgradation is carried out without necessarily to create posts in the relevant scales of pay it is carried out under a policy and specified scheme as done in the instant case through subject *O.M dated 23.12.2011*. It is resorted only for the incumbents of isolated posts, which have no avenues or channel of promotion at all. Upgradation under the scheme is personal to the incumbents of the isolated posts, to address stagnation and frustration of incumbent on a particular post for sufficient length of service on particular post without any progression or avenue of

promotion. Post of Stenographers/Private Secretaries is one of such kind of post, which has no avenues or channel of promotion to higher grades as may be available to other incumbents in civil service. Upgradation is carried out under a scheme and or a policy to incentivize and to encourage and to give financial benefits without creating additional vacancies of higher grade, upgradation by no standards could be treated and or considered as promotion to higher grade. Incumbent occupying ungraded post retain their substantive grade.

10. Now examining the case of the respondent No.1 he was serving as Private Secretary in substantive grade BPS-17 when, *O.M dated 23rd December, 2011* was issued, which *inter-alia* provided that all those serving in BPS-17 having put in 5 years would be entitled to be upgraded to BPS-18 on satisfactory service in BPS-17 for a period of 5 years instead of 7 ½ years as earlier required per *O.M dated 2.6.1983*. However, in view of one time exception, all the Private Secretaries including the respondent No.1 working in BPS-17 on the date of issuance of *O.M dated 23rd December, 2011* was upgraded to PBS-18, irrespective of length of service in BPS-17, respondent No.1 falling in such exception was accordingly promoted with merely little over 4 months service in BPS 17, as noted above, it is merely a financial benefit attached to upgradation, as and when such upgraded incumbent leaves or transfers or vacancy occurs for any reasons than the vacancy is of substantive post and not that of upgraded post and is accordingly filled up either by transfer, promotion or direct appointment as the case may be.

11. Claim of the respondent that he has put in 12 years of service in BPS-17 as per formula made applicable in terms of *O.M dated 2.6.1983*. To appreciate such contention it would be beneficial to examine such said Office Memorandum which reads as follows: -

“GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
ESTABLISHMENT DIVISION

No.1/9/80-R.2

Rawalpindi, the 2nd June 1983

OFFICE MEMORANDUM

Subject: MINIMUM LENGTH OF SERVICE FOR ELIGIBILITY IN PROMOTION OF OFFICERS

In pursuance of rule 8-A of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 and in supersession of the instructions laid down in the Establishment Division's Office Memorandum No.1/9/80-R.II (A), dated the 12th January, 1981, *the President is pleased to decide that the minimum length of service for promotion to various grades shall be as follows:-*

For Grade-18	5 years in grade 17
For Grade-19	12 years in grade 17 and above
For Grade-20	17 years in grade 17 and above
For Grade-21	22 years in grade 17 and above

Proved that: -

- i) Where initial appointment of a person not being a person in government service takes place in a post in grade 18, 19 or 20, the length of service specified in this office memorandum shall be reduced by the following periods:

<u>First appointment in</u>	<u>Reduced by</u>
Grade-18	5 years
Grade-19	12 years
Grade-20	17 years

- ii) Where initial appointment of a person already in government service takes place, on recommendations of the Federal Public Service Commission in a post in grade 18, 19 or 20 the length of service specified in this office memorandum shall be reduced by the periods specified in proviso (i),
- iii) Where first appointment of a person other than a person covered by proviso (ii) was made to government service in grade 16 or below, one-half of the service in grade 16 and one fourth in grade 15 and below may be counted as service in grade 17 for computing length of service for the purpose of promotion only.

Sd/xxx

(Mashkoo Ahmad Khan)
Joint Secretary
To the Government of
Pakistan"

All Ministries/Divisions

12. From bare perusal of above criteria, it could be seen that same is applicable "for the purposes of promotion only". Admittedly, case of the respondent No.1 is of upgradation and not that of promotion. As noted above upgradation is often misconstrued as promotion, what respondent No.1 requested through his application is promotion to grade BPS-19, for which a selection process, in terms of Section 9(1) of the Civil Servants Act, 1973, read with Civil Servant (Appointment, promotion and Transfer Rules), 1973 is to be followed, which cannot be bypassed under any circumstance. Civil servants are appointed and or promoted to the post and not to the grades. This Court in the case of Ali Azhar Khan Baloch and others versus Province of Sindh and others (2015 SCMR 456) in paragraph 138 @ page 514, has dealt with implication and purport of upgradation, as retreated in the case of Regional Commissioner Income Tax, Northern Region, Islamabad and another versus Syed Munawar Ali and others (2016 SCMR 859), held in para No.7 @ page

862 it was further held that “issue relating to upgradation of civil servants can be decided by a High Court in 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 civil the servant or the Civil Servants Act and or the rules framed there under. 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.”

13. In order to appreciate contentions of respondent his tenure of his service in grade below PBS-16 given in paragraph 6 of his appeal before FST; is reproduced as follows: -

“That the appellant fulfills/meet the requisite length of service as enunciated in O.M dated 23.12.2011. The detail of the same is reproduced below for kind perusal of this Learned Tribunal: -

Sr.No.	Post	Period	Length of service	To be counted in the light of OM 23.12.11 & 02.06.83
1.	LDC	2.12.1978 to 18.2.1980	1 year, 2 months, 16 days	3 months, 19 days
2.	Stenotypist	19.2.1980 to 07.12.1985	5 years, 9 months, 19 days	1 year, 05 months, 07 days
3.	Stenographer (BPS-15)	08.12.1985 to 05.2.1997	11 years, 1 month, 25 days	2 years, 9 months, 06 days
4.	Stenographer Selection Grade (BPS-16)	06.2.1997 to 11.8.2011	14 years, 6 months, 5 days	7 years, 3 months, 2 days
5.	Private Secretary (BPS-17)	12.8.2011 to 22.12.2011	4 months, 10 days	04 month, 10 days
6.	Private Secretary (BPS-18)	23.12.2011 to 31.01.2013	1 year, 01 month, 8 days	1 year, 1 month, 8 days
7.	Total			13 years, 02 months 02 days”

14. Even if request of the respondent No.1 is considered for upgradation to BPS-19, then also he has no case. Respondent No.1 was promoted in BPS-17 on 12.8.2011, merely after 4 months and 10 days pursuant to O.M dated 23.12.2011, his post of Private Secretary was upgraded to BPS-18. To claim benefit to O.M dated 2.6.1983, as reproduced above he counted 1/2 of his earlier 14 years service in BPS-16 (Selection Grade) from 6.2.1997 to 11.8.2011 as 7 years. From the calculation made by the respondent No.1, it is manifest that he made error in counting his service in BPS-16 (Selection Grade) as that of BPS-16 in substantive grade. As noted in the narrative above; he was serving in his substantive grade BPS-15

when his was appointed in Federal Public Service Commission in BPS-16 (selection grade), merely serving in BPS-16 in selection grade, could not be counted as service in substantive grade BPS-16 but in BPS-15, therefore, such tenure of service could not be calculated $\frac{1}{2}$ of 14 years but in fact $\frac{1}{4}$ of total service being below substantive grade BPS-16, (i.e. from 2.12.1978 to 11.8.2011 which comes to approximately 22 years calculating $\frac{1}{4}^{\text{th}}$ of said period it comes to **5.5 years** adding 4 months 10 day in BS-17 and 1 year 01 month and 8 days in BS-18 comes 6 years 6 months approximately in terms of formula (per proviso (iii) to O.M dated 2.6.1983) even if rounded up to 8 years that it does not meet the criteria of 12 years of length of service in BPS-17 and above required to be upgraded to BPS-19. In view of the discussion made above, impugned decision of the *FST*, cannot be sustained both on merits as well as for lack of jurisdiction, which is accordingly, set aside, instant leave petition is converted into appeal and is allowed accordingly.

Judge

Judge

ISLAMABAD, THE
30th September, 2016
arshed

Approved for Reporting