

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

W.P.No.4627 of 2016  
Mahfooz Khan and others

**Versus**

Secretary, Aviation Division and others

**Date of Hearing:** 21.06.2017

**Petitioners by:** Mr. Muhammad Ramzan Khan, Advocate

**Respondents by:** Mr. Ahsan Mehmood Satti, learned Deputy Attorney-General with Mr. S. Iftikhar Ahmed Naqvi, Assistant Director, A.S.F.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant writ petition, the petitioners, who are all retired employees of the Airport Security Force ("A.S.F."), seek consideration for up-gradation of posts with effect from 12.03.2015 (i.e. the date when the Finance Division, Government of Pakistan, conveyed its conditional concurrence to the up-gradation of posts in A.S.F. from BS-16 to BS-17, BS-17 to BS-18 and BS-18 to BS-19).

2. The record shows that vide office memorandum dated 20.02.2015, the Establishment Division conveyed to the Aviation Division its agreement to the up-gradation/re-designation of certain posts in A.S.F., subject to the concurrence of the Finance Division and amendment in the recruitment rules of A.S.F. As per the said office memorandum, the existing post of Deputy Assistant Director (BS-16) was to be up-graded to Assistant Director (BS-17); the post of Assistant Director (BS-17) was to be up-graded to Deputy Director (BS-18); and the post of Deputy Director (BS-18) was to be up-graded to Additional Director (BS-19). Vide office memorandum dated 12.03.2015, the Finance Division conveyed to the Aviation Division its concurrence to the up-gradation of the posts referred to above. This concurrence was subject to (i) the up-gradation of the post of Director (BS-19) to (BS-20) to be completed first, (ii) amendment in the recruitment rules, and (iii) appointment to the up-graded posts to be made in the manner prescribed in the Establishment Division's letter dated 31.12.2008. The amendment in A.S.F.'s

recruitment rules was notified on 05.08.2016. In October, 2016, the Departmental Selection Committee of A.S.F. promoted officers in A.S.F. against the up-graded posts. The petitioners assert that they should not be made to suffer on account of the substantial delay occasioned in notifying the amendments in A.S.F.'s recruitment rules. They further assert that had the respondents not delayed the amendment in the recruitment rules, the petitioner would have been timely considered for promotion against the up-graded posts. Therefore, the petitioners, in their writ petition have prayed for the following relief:-

*“Under the above said circumstances, it is most humbly prayed that the instant writ petition may please be accepted, the inaction/delay at the part of the respondents may kindly be declared illegal, unlawful and without lawful authority, as a consequence thereof the respondents may kindly be directed to remove the anomaly and discrimination/disparity and consider the petitioners for upgradation w.e.f 12.03.2015 the date when it was approved against the post of BPS-16 to 17, BPS-17 to 18 and BS-18 to 19 keeping in view OMs at (Annex-C,D&E), alongwith consequential/back benefits.”*

3. Learned counsel for the petitioners submitted that in the year 2013, the Senate Standing Committee in its meeting decided that in order to boost the morale of officers in A.S.F., and in order to bring their pay-scales at par with officers in other law enforcing agencies, the Ministry of Defence, in consultation with the Ministry of Finance and the Establishment Division would finalize a proposal for up-gradation of posts in A.S.F. He further submitted that even after the approval of the Establishment Division and Finance Division on 20.02.2015 and 12.03.2015, respectively, the Aviation Division unduly delayed the up-gradation of posts of Deputy Assistant Director to Assistant Director, and Assistant Director to Deputy Director; that on various dates between April, 2015, to November, 2016, all the petitioners retired; that the petitioners had been deprived of up-gradation with effect from 12.03.2015, when the Finance Division, concurred with the up-gradation of posts in the A.S.F.; that the petitioners were deprived of up-gradation for reasons beyond their control, therefore, they were entitled to be given

the benefit of proforma up-gradation under the proviso to FR-17(1) with effect from 12.03.2015; that the denial by the respondents to up-grade the petitioners with effect from the said date is a violation of the petitioners' fundamental rights. Learned counsel for the petitioners prayed for the writ petition to be allowed and for a declaration to be made that the petitioners' up-gradation should be considered to be with effect from 12.03.2015.

4. Learned counsel for the petitioners drew the attention of the Court to the notification dated 27.08.2011, issued by the Controller General of Accounts, and the office memorandum dated 14.05.2014, issued by the Finance Division, and submitted that these were examples of back-dated up-gradations of posts in different organizations. Learned counsel for the petitioners also made reference to the proviso to FR-17(1) in support of his submission that the proforma promotion or up-gradation can be antedated.

5. On the other hand, the learned Deputy Attorney-General along with Mr. S. Iftikhar Naqvi, Deputy Director (Legal), A.S.F., submitted that as per the existing policy, decisions regarding up-gradation/re-designation of posts in BS-01 to BS-19 are to be taken by the Finance Division in consultation with the Establishment Division; that as per Establishment Division's office memorandum dated 03.02.2001, when the competent authority approves the up-gradation of a post, appointment against the up-graded post is to be made in accordance with the provisions of the Civil Servants (Appointments, Promotion, and Transfer) Rules, 1973; that as per Establishment Division's letter dated 31.12.2008, up-gradation of a post does not mean up-gradation of its incumbent; that the Establishment Division, vide office memorandum dated 20.02.2015, agreed to the up-gradation of posts in A.S.F. subject to the concurrence of the Finance Division, amendment in the recruitment rules, etc; that the up-graded posts were to be filled by the concerned Ministry/Division after completion of the process of up-gradation;

that since the up-gradation in question was subject to certain conditions, therefore, the Departmental Promotion Committee could not promote officers to the up-graded posts until the conditions were fulfilled; that the amendment in the recruitment rules were notified on 05.08.2016; that the Departmental Promotion Committee on 31.10.2016, promoted the officers to the up-graded posts with effect from 31.10.2016. Learned Deputy Attorney-General prayed for the writ petition to be dismissed.

6. I have heard the contentions of the learned counsel for the petitioners as well as the learned Deputy Attorney-General, and have perused the record with their able assistance.

7. Under the provisions of the Airport Security Force Act, 1975, the A.S.F. is mandated to ensure security of all civil airports in Pakistan. The Senate Standing Committee for Defence in its meetings dated 12.11.2012, and 04.03.2013, recommended the up-gradation of posts in officers' cadre in A.S.F. It was felt that there was a need for the command structure of A.S.F. to be elevated to make it compatible with other law enforcement agencies. The Aviation Division in its summary dated 11.02.2014 to the Prime Minister of Pakistan made the following recommendations regarding up-gradation/re-designation of posts in A.S.F.:-

- (a) *The post of Director General (BS-20) may be upgraded from BPS-20 to BS-21 (Major General).*
- (b) *Deputy Director General (Coord) in BPS-19 be upgraded to BS-20 (Brigadier).*
- (c) *05 Posts of Director in BS-19 (out of authorized strength of 09) may be upgraded in BS-20.*
- (d) *Existing rank of Deputy Director (BS-18) may be re-designated as Additional Director in BS-19. 04 Posts of existing Directors (BS-19) shall also be re-named as Additional Director (BS-19).*
- (e) *Existing rank of Assistant Director (BS-17) be re-designated as Deputy Director in BS-18.*
- (f) *Existing rank and pay scale of Deputy Assistant Director (BS-16) be re-designated as Assistant Director in BS-17.*

8. The Establishment Division vide letter dated 25.02.2014 supported the proposed up-gradation/re-designation of posts of the officers of A.S.F., subject to (i) the concurrence of the

Finance Division, (ii) amendment in the recruitment rules, and (iii) filling up the up-graded posts in the manner prescribed in the Establishment Division's letter dated 31.12.2008. However, the Finance Division in its letter dated 28.04.2014 did not support the proposed up-gradation of posts in A.S.F. On 24.05.2014, the Prime Minister of Pakistan approved the proposals contained in paragraphs 4(a) and (b) of the above mentioned summary submitted by the Aviation Division. The proposal contained in paragraphs 4(a) and (b) in the said summary are only with regard to the up-gradation of the post of Director General from BS-20 to BS-21, and the post of Deputy Director General (Coordination) from BS-19 to BS-20.

9. Vide office memorandum dated 20.02.2015, the Establishment Division conveyed to the Aviation Division its agreement to the up-gradation of the following posts in A.S.F.:-

<b><i>Sr.No.</i></b>	<b><i>Existing Post and BPS</i></b>	<b><i>Approved upgradation/ re-designation</i></b>
<b><i>1</i></b>	<b><i>Deputy Director (BS-18)</i></b>	<b><i>Additional Director (BS-19)</i></b>
<b><i>2</i></b>	<b><i>Assistant Director (BS-17)</i></b>	<b><i>Deputy Director (BS-18)</i></b>
<b><i>3</i></b>	<b><i>Deputy Assistant Director (BS-16)</i></b>	<b><i>Assistant Director (BS-17)</i></b>

10. Establishment Division's said agreement to the up-gradation of the said posts of A.S.F. was subject to (i) the concurrence of the Finance Division, (ii) amendment in the recruitment rules, and (iii) filling up the up-graded posts in the manner prescribed in the Establishment Division's letter dated 31.12.2008. Vide office memorandum dated 12.03.2015, the Finance Division conveyed to the Aviation Division its concurrence to the up-gradation of the above mentioned posts in A.S.F. subject to the following conditions:-

- i. To avoid anomaly in the administrative setup of ASF, up-gradation of the post of Director (BS-19) to (BS-20) will be completed first.*
- ii. Amendment in the Recruitment Rules.*
- iii. Appointment to the upgraded post may be made in the prescribed manner in light of Establishment Division's d.o letter No.8/36/2000/R-I dated 31.12.2008.*

11. Under the Establishment Division's office memorandum dated 20.01.2001, the cases of up-gradation/re-designation of

posts in BS-01 to BS-19 are to be decided by the Finance Division in consultation with the Establishment Division. The Finance Division's concurrence regarding the up-gradation of the above mentioned posts was clearly conditional in nature. Therefore, the up-gradation of the said posts could not have taken place unless the said conditions were fulfilled. It is pertinent to mention that none of the petitioners or the Aviation Division or the A.S.F. challenged the conditions imposed by the Finance Division to the up-gradation of the said posts.

12. Vide letter dated 09.04.2015, the Aviation Division informed the Accountant General Pakistan (Revenues) about the sanction of the President of Pakistan regarding the up-gradation of the said posts in A.S.F. The said sanction was also subject to the same conditions as the concurrence of the Finance Division to the up-gradation of the said posts in A.S.F.

13. The first condition regarding the up-gradation of the posts with which the petitioners are concerned appears to have been fulfilled on 02.06.2016, when the Finance Division vide office memorandum dated 02.06.2016, informed the Aviation Division about the approval of the Prime Minister to the up-gradation of nine posts of Directors in A.S.F. from BS-19 to BS-20. On 07.06.2016, the Aviation Division informed the Accountant General (Pakistan Revenues) about the up-gradation of the said posts in A.S.F.

14. As regards the second condition regarding the up-gradation in question (i.e. the amendment in the recruitment rules), the Establishment Division on 27.08.2015, approved the draft amendment in the recruitment rules of A.S.F. The draft amendment in the recruitment rules were to be notified after obtaining the concurrence of the Federal Public Service Commission. Vide notification dated 05.08.2016 (which was published in the official gazette on 09.08.2016), amendments were made in the method, qualification and other conditions in the recruitment rules of A.S.F. Therefore, on 05.08.2016, the

second condition for the up-gradation of the posts in question, was satisfied.

15. The third condition for the up-gradation of the posts in question was that appointments against the up-graded posts were required to be made in the manner prescribed in the Establishment Division's letter dated 31.12.2008, which provides that appointment against the up-graded posts is to be made in accordance with the applicable rules which regulate appointments to such a post. Respondents No.1 and 4, in their written comments, have pleaded that the Departmental Promotion Committee of A.S.F. promoted officers against the up-graded posts on 31.10.2016. Apparently, none of the petitioners were appointed against the up-graded posts prior to their retirement. In paragraph No.13 of the writ petition, it is pleaded that the petitioners retired from service in the period between April, 2015, to November, 2016. As per the documents annexed at page-29 to 38 of this petition, petitioner No.1 retired on 01.05.2016; petitioner No.2 on 13.05.2016; petitioner No.4 on 27.03.2015; petitioner No.5 on 15.08.2016; petitioner No.7 on 11.08.2015; petitioner No.8 on 14.03.2016; petitioner No.9 on 01.12.2015; petitioner No.10 on 28.09.2016; petitioner No.11 on 14.03.2016; and petitioner No.14 on 15.03.2016. All these petitioners had retired prior to the meeting of the Departmental Promotion Committee, which as per the written comments of respondents No.1 and 4, was held on 31.10.2016.

16. The petitioners' case essentially is that since the Finance Division, being the competent authority, had on 12.03.2015 concurred to the up-gradation of the posts in question, and that since there had been an inordinate delay occasioned at the hands of the respondents in fulfilling the conditions for the up-gradation of the posts in question, the petitioners should be considered for up-gradation with effect from the said date i.e. 12.03.2015.

17. In the case of Mukhtar Ahmed Siddiqui Vs. Secretary to the Government of Pakistan, Ministry of Finance (2001 SCMR 923),

the up-gradation of the post in question was notified by the competent authority after the retirement of the employee/petitioner who was seeking the benefit of up-gradation to be given to him. In that case, the Auditor General of Pakistan had recommended the case of the petitioner with his colleagues to the Ministry of Finance for up-gradation of the post of Divisional Accountant, but it remained pending for years and ultimately the Finance Division on 10-8-1994 up-graded the said post. Since the employee/petitioner had retired prior to the notification qua the up-gradation of the post, it was held that he had no *locus standi* to seek the benefit of up-gradation.

18. Now, when a decision of a competent authority to up-grade a particular post or posts is subject to the fulfillment of certain conditions, the conditions have to be fulfilled before the decision regarding up-gradation of a post can take effect. In the case at hand, the essential condition for the up-gradation of the posts in question took place on 05.08.2016, when the amendment and the recruitment rules of A.S.F. were notified. It is only thereafter that the employees of A.S.F. could have been considered for promotion against the up-graded posts. Indeed, respondents No.1 and 4, in their Report filed before this Court, have taken the position that on 31.10.2016, a formal Departmental Promotion Committee considered officers for promotion from BS-16 to BS-17, and BS-17 to BS-18 and up-graded them with effect from the said date.

19. As per the policy for up-gradation reflected in Establishment Division's office memorandum dated 20.01.2001, up-gradation of posts is considered (i) when it is considered necessary to up-grade certain posts in order to rationalize the administrative structure of a Ministry/Division or a Department to make it more effective or to bring about uniformity of pay scales of similar posts in different organizations, (ii) where the duties and responsibilities attached to a post have considerably increased, and (iii) where pay scale of a post is considered grossly incommensurate with the qualifications and experience



prescribed for appointment to that post. It is by now well settled that when the competent authority approves the up-gradation of a post, appointment to the up-graded post is to be made in accordance with the specific rules which regulate appointment to such a post. It is also not disputed that up-gradation of a post does not mean automatic up-gradation of its incumbent. Appointment to the up-graded post will have to be made in the manner prescribed for appointment to such a post. If a post is up-graded with immediate effect, the incumbent would be left without any post (in his grade) until he is approved for appointment to a higher grade. Appointment against the up-graded post is to be made in accordance with the specific rules, which regulate appointment to such a post. Therefore, appointments of the incumbents against up-graded posts without going through the prescribed selection process or approval of the competent authority are irregular. All this is explicitly stated in the policy of the Federal Government set out in Establishment Division's office memoranda dated 20.01.2001, 02.02.2001 and 31.12.2008. At this juncture, it is apposite to make reference to the following case law:-

- (i) As per the law laid down by the Hon'ble Supreme Court in the case of Federal Public Service Commission Vs. Anwar-ul-Haq (Private Secretary) Islamabad (2017 SCMR 890), up-gradation is not a promotion, as generally misunderstood; up-gradation is carried out without necessarily to create posts in the relevant scales of pay; it is carried out under a policy and specified scheme; it is resorted only for the incumbents of isolated posts, which have no avenues or channel of promotion at all; up-gradation 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; up-gradation 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; up-gradation by no standards could be treated and or considered as promotion to higher grade; and incumbents occupying upgraded posts retain their substantive grades.

- (ii) In the case of Regional Commissioner Income Tax, Northern Region Vs. Munawar Ali (2016 SCMR 859), it has been held as follows:-

*"6. ...The expression "upgradation" is distinct, from the expression "promotion", which is not defined either in the Civil Servants Act or the Rules framed thereunder, and is restricted to the post (office) and not with the person occupying it. The upgradation cannot be made to benefit a particular individual in term of promoting him to a higher post and further providing him with the avenues of lateral appointment or transfer or posting. In order to justify the upgradation, the Government is required to establish that the department needs re-structuring, reform or to meet the exigency of service in the public interest. In the absence of these pre-conditions, upgradation is not permissible.*

*7. The aforesaid definition of the expression "upgradation" clearly manifests that it cannot be construed as promotion, but can be granted through a policy. ..."*

- (iii) In the case of Mrs. Saima Iqbal Vs. Government of Punjab (2010 PLC (C.S.) 1444), it has been held by the Hon'ble Lahore High Court that the question of up-gradation of a post is a matter of policy, which cannot be interfered with by the High Court in exercise of its constitutional jurisdiction. Furthermore, it was held that an up-gradation cannot be claimed by an employee as a matter of right.

20. True there had been a substantial delay of almost one year in the approval of the amendment in the recruitment rules. The Establishment Division had, on 27.08.2015, conveyed to the Aviation Division its approval to the draft amendment in the recruitment rules. However, the amendments in the recruitment rules were to be notified after obtaining the concurrence of the Federal Public Service Commission. As mentioned above, the amendment to the recruitment rules were notified on 05.08.2016. It is my view that the delay in the notification of the amendment in the recruitment rules would not give the petitioners the right for the posts in question to have been considered as up-graded on

12.03.2015, (when the Finance Division gave its conditional concurrence to the up-gradation of the posts in question). Furthermore, such a delay would also not give the petitioners a right to be considered as having been promoted against the up-graded posts with effect from 12.03.2015. This is because prior to 05.08.2016, there were no up-graded posts against which the petitioners could have been promoted. When there was no higher/up-graded posts prior to 05.08.2016, the question of the petitioners from being wrongfully prevented from rendering service in the higher post did not arise.

21. The petitioners cannot claim to have a vested right to be promoted against the up-graded posts. Additionally, the petitioners have not been through a process of selection for appointment against the up-graded posts. Their comparative suitability, fitness, eligibility and entitlement for promotion has not been assessed by the competent authority. Therefore, all the 18 petitioners cannot claim that upon the antedation of the up-graded posts, all of them should *en masse* be promoted automatically. In the case of Abid Hussain Sherazi Vs. Secretary M/O Industries and Production Government of Pakistan, Islamabad (2005 SCMR 1742), it has been held that wherever there is a change of grade or post for the better, there is an element of selection involved. Promotion is not earned automatically, but under an order of the competent authority to be passed after the consideration of the comparative suitability and entitlement of the candidates.

22. Since all the petitioners are said to have retired from service, the learned counsel for the petitioners submitted that the petitioner should be considered for proforma up-gradation under the proviso to FR-17(1), which is reproduced herein below in its entirety:-

*“FR-17(1) subject to any exceptions specifically made in these rules and to the provisions to sub-rule(2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post and shall cease to draw them as soon as he ceases to discharge those duties.”*

*Provided that the appointing authority may, if satisfied, that a civil servant who was entitled to be promoted from a particular date was, for no fault of his own, wrongfully prevented from rendering service to the Federation in the higher post, direct that such civil servants shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation on arising from the ante-dated fixation his seniority."*

23. Assuming that the antedation of the up-graded posts takes place, in order for the petitioners to gain the benefit of proforma promotion under the proviso to FR-17(1), they would have to satisfy the appointing authority that they were entitled to be promoted from a particular date, and that they were wrongfully prevented from rendering service in the higher posts. Under the revised guidelines for the FR-17(1) Committees, issued by the Establishment Division, the FR-17(1) Committees could consider cases of retired civil servants who could not be considered for promotion for no fault of their own and retired on attaining the age of superannuation. The FR-17(1) Committees cannot consider the cases beyond the scope of FR-17(1). The delay in the notification of the amendment in the recruitment rules would not *ipso facto* make out a case for proforma promotion. This is because promotion can take place only against an available and an existing post. The promotions made by the competent authority in A.S.F. against the up-graded posts would take effect from the date when such promotions were made, and not earlier. In the case of The Prime Minister Vs. Major (Retd.) Muhammad Habib Khan (2016 PLC (C.S.) 621), the Division Bench of this Court has held as follows:-

*"Proforma promotion essentially involves a change of benefits relating to a grade or post, and thus an element of selection; therefore, as settled law, it cannot be earned automatically, rather it is within the exclusive jurisdiction of the appointing authority whether or not to direct through an order, after consideration of the relevant matters placed before him/her in the manner prescribed in the guidelines issued in this regard."*

24. Be that as it may, even if the petitioners felt that they had a case for proforma promotion or up-gradation, they should have approached the competent authority to consider them for granting the benefit of proforma promotion or up-gradation in

accordance with the law. None of the petitioners have at any stage filed applications under the proviso to FR-17(1). At least no such application is on the record. The petitioners could not have (without filing applications under the proviso to FR-17(1)) invoked the jurisdiction of this Court to seek the benefit of antedated up-gradation/promotion.

25. In view of the above, I do not find any merit in this petition, which is accordingly dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2017**

**(JUDGE)**

**APPROVED FOR REPORTING**

*\*Ahtesham\**

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