

Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 1711 of 2016

Syed Muhammad Zahid.

Vs

The Secretary, M/O Communication, etc.

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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05. 09.03.2017. Raja Khalid Ismail Abbasi, advocate for the
petitioner.
Khawaja Muhammad Imtiaz, AAG.

Through this single order I shall
dispose of the instant petition and the
connected petitions bearing W.P. Nos.
1713/2016, 1692/2016, 1696/2016,
1701/2016, 1702/2016, 1703/2016,
1704/2016, 1705/2016, 1706/2016, 1710/2016
and 1712/2016.

2. The petitioners have invoked the
jurisdiction of this Court under Article 199 of
the Constitution of the Islamic Republic of
Pakistan, 1973, seeking upgradation of their
respective posts.

3. The learned counsel for the
petitioners has brought to the notice of this

Court the documents attached with C.M. No. 1115 of 2017 and has requested that in case the matter is remanded to the respondents then the latter may be directed to consider the same. A Division Bench of this Court vide judgment rendered in ICA No. 510 of 2014, titled "Chairman FBR versus Atta Muhammad Mahsud, etc" ~~and~~ has enunciated the principles and law relating to up-gradation. The relevant portion of the said judgment is as follows:-

It is an admitted position that upgrading a post is not envisaged or provided for in any statute, nor is it one of the terms and conditions of service. Moreover, it is not denied that a policy has been formulated for upgrading a post, and details of the terms thereof are contained in the Establishment Division's Office Memorandum dated 20-01-2001 (hereinafter referred to as the "Policy").

The said Office Memorandum

is reproduced as follows.-

Sl. No.25-B

Policy for Upgradation/Redesignation of Posts

On a summary submitted recently to the Chief Executive, he has been pleased to approve the policy for upgradation/re-designation of posts as indicated in the proceeding paragraphs.

2. Henceforth, the upgradation of posts shall be considered in the following cases only:

- (a) 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
- (b) Where the duties and responsibilities attached to a post have considerably increased.
- (c) Where pay scale of a post is considered grossly incommensurate with the qualifications and experience prescribed for appointment to that post.
- (d) Up-gradation of a post on personal basis may not be allowed except if any officer, already holding on regular basis a higher grade post, is posted against a post, carrying lower grade, due to exigencies of service.

3. Subject to the observance of the parameters referred to in sub-paras (a) – (d) above, the future proposals for the up-gradation/re-designation of posts shall be processed as under:-

- (i) The cases for up-gradation/re-designation of the posts in BPS 1 to 19 will be decided by the Finance Division in consultation with the Establishment Division. However, the decision about the proposed up-gradation/re-designation of posts in BPS 1 to 19 will be taken at the level of Secretary, Finance Division and the Secretary Establishment Division.
- (ii) Cases of up-gradation/re-designation of posts in BPS 20 and above will be submitted to the Chief Executive for approval but after seeking the concurrence of Finance Division and the Establishment Division.

4. *[When the competent authority approves the up-gradation of a post in the situations mentioned in sub-paras (a), (b) and (c) of para 2, appointed to the up-graded post should be made in

accordance with the provisions of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973**, and the specific rules which regulate appointment to the post.]

5. The above instructions may please be noted by the Ministries/Divisions for strict compliance.

6. **[]

[Authority:-Establishment Div.'s O.M. No.F.8/36/2000-R.I., dated 20.01.2001].

4. The above is a self contained comprehensive policy in respect of upgrading a post. Clauses (a) to (d) of paragraph 2 specify the eventualities in which a post may be upgraded. A plain reading of the clauses clearly shows that the Ministry, Division or a Department, as the case may be, has to be satisfied that the circumstances described therein exist to justify initiating a proposal for upgrading a post. The eventualities do not envisage any other ground, such as posts with the same nomenclature having been up graded in other organizations. Paragraph 3 provides the mechanism and specifies the authorities competent to grant approval in order to upgrade a post. Paragraph 4 of the Policy relates to how an appointment against an upgraded post is to be made. Reading paragraphs 2, 3 and 4 of the

Policy together, it unambiguously shows that whether or not to initiate the process regarding upgrading a post is exclusively within the domain of the relevant Ministry, Division or Department, as the case may be. The decision in this regard can only be made on the basis of the criteria or eventualities explicitly mentioned in clauses (a) to (d). If, in the opinion of the Ministry, Division or a Department, as the case may be, upgradation of a post in BPS 1 to 19 is justified within the prescribed parameters, then the latter is required to initiate and send a proposal in this regard to the Finance Division for approval. The approval by the latter is subject to consultations with the Establishment Division. The approval of the Finance Division cannot be given unless the Establishment Division has given its sanction. The Policy specifically mandates that the respective Secretaries of the Finance and Establishment Divisions are empowered to take the decisions relating to the proposal regarding upgradation of a

(6)

post, and no other officer lower in rank has been authorized in this regard. In the case of a proposal relating to a post in BPS 20 and above, the same is sent to the Chief Executive who, after consultation with the Finance and Establishment Divisions, is competent to give approval. It is pertinent to note that after approval by the competent authority and the subsequent upgradation of a post, the grade, salary, perks and privileges remain unaffected, because up gradation is restricted to the post and has no nexus with the person holding it. The person holding the post does not automatically get the higher grade to which the post has been upgraded. It may be illustrated by giving an example of a post which has been upgraded from BPS 18 to 19. If the person holding the post before its upgradation is in BPS 18, then he would not get the higher grade merely because the post has been upgraded nor will he become entitled to the benefits thereof. The appointment to such a post is made in accordance with the provisions of the

Civil Servants (Appointment, Promotion, and Transfer) Rules, 1973 (*hereinafter referred to as the "Rules of 1973"*) or the specific rules which regulate appointment to such a post.

5. It is, therefore, obvious that upgradation of a post and appointment against such a post are distinct and independent of each other. Upgradation has no nexus with the grade of the incumbent person nor would he or she benefit in this regard. Likewise, a Ministry, Division or a Department, as the case may be, cannot be compelled to initiate a proposal. Whether or not a proposal is to be initiated is within the exclusive domain of the said entities and no vested right exists in favour of a person holding a post to claim its upgradation, except on the basis of the situation described in clause (d) of the Policy.

6. In a nutshell, an employee is entitled to claim upgradation of a post on a personal basis if he is able to show

that the conditions mentioned in clause (d) of paragraph 2 of the Policy are fulfilled. In such an eventuality a constitutional petition seeking a writ of mandamus would only be competent if the pre requisites have been complied with, as enunciated by the august Supreme Court in the case of "*District Magistrate, Lahore and another vs. Syed Raza Kazim*" [PLD 1961 Supreme Court 178], wherein it has been held as follows:-

"Now, having regard to the limited scope of the powers vested in the High Courts and this Court by the Laws (continuance in Force) Order to issue writs only of habeas corpus mandamus, prohibition, quo warranto and certiorari, we have to point out that the foundation for an application for a writ of mandamus (which alone is applicable in the present case as the function of the licensing authority is purely administrative) is that there must exist a legal right in the person seeking the writ to insist upon a clear duty being performed by some public officer or authority in respect of that right.

There are other good reasons, too, upon which this application for a writ of mandamus must fail. The accepted conditions for the grant of a writ of this nature

are that it must be preceded by a demand of justice and the refusal thereof and that there should be no other equally expeditious, in expensive and efficacious remedy available to the person seeking this extraordinary remedy."

7. In the light of the above, it is essential for a person who invokes the jurisdiction under Article 199 of the Constitution, seeking a writ in the nature of mandamus, to explicitly show that there exists a legal right vested in such a person to insist upon a clear duty being performed by some public officer in respect of that right. Moreover, that a demand for performance of such duty ought to have been made and the same had been met with refusal by the public officer or authority in relation to the right being asserted. A person seeking a writ of mandamus is further required to satisfy the Court that no other equally expeditious, in expensive and efficacious remedy is available to him or her.

8. The expression "upgradation" has been examined by the august Supreme Court in the case titled

'Regional Commissioner Income Tax, Northern Region, Islamabad and another v. Syed Munawar Ali and others' [2016 SCMR 859] wherein it has been observed and held as follows.-

"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."

9. The august Supreme Court in the case of '*Lt. Col. (R.) Abdul Wajid Malik v. Government of the Punjab and another*' [2007 PLC (C.S.) 617] has observed that upgradation of a post simpliciter does not confer a right to the person holding such an upgraded post to claim the benefits as well. No right can be claimed for the benefits, such as higher pay, allowances, perks and privileges and pensionary benefits due to up gradation of the post, since the same can only be conferred on an employee pursuant to promotion. The august Supreme Court in the case of '*Government of Pakistan M/o Railways, through Secretary and others v. Jamshed Hussain Cheema and others*' [2016 SCMR 442] has observed and held that discrimination cannot be raised as a valid plea in case of up gradation of a post nor up gradation of a post was a vested right. Reference is also made to the cases of '*Chief Commissioner, Inland Revenue and another v. Muhammad Afzal Khan and others*' [2014 PLC (C.S.) 829], and '*Ali Azhar Khan Baloch and*

others v. Province of Sindh and others'
[2015 SCMR 456].

10. The principles and law enunciated by the august Supreme Court and the Policy determines the scope, conditions, mechanism, locus standi of a person holding a post and appointment against a post in the context of upgradation of a post. The principles are, therefore, summarized as follows.-

“(i) A post can be upgraded pursuant to a policy formulated by the Government since it is not contemplated under the Civil Servants Act 1973 and the rules made there under or under any other law.

(ii) The details of the existing policy are contained in the Office Memorandum dated 20-01-2001.

(iii) It falls within the exclusive domain of a Ministry, Division or Department to initiate a proposal, having regard to the conditions mentioned in the Policy.

(iv) The proposal initiated for upgrading a post essentially has to be processed and approved in accordance with and in the manner prescribed in the Policy.

(v) Upgradation is distinct from promotion and, therefore, no right accrues in favour of the holder of the post except when it is sought on a personal basis under clause (d) of paragraph 2 of the Policy.

(vi) Upgradation can only be proposed on the basis of

circumstances mentioned in clauses (a) to (d) of paragraph 2 of the Policy.

(vii) Up gradation of a post is not a right vested in the person appointed against it.

(viii) Even if a post is upgraded the person holding such a post is not entitled to claim higher pay, allowances, perks, privileges or pensionary benefits of the grade to which the post has been up graded.

(ix) After the competent authority grants approval and pursuant thereto a post has been upgraded, appointment against such a post cannot be made except in accordance with the Rules of 1973 or the rules which regulate appointment to such post.

(x) Discrimination i.e violation of Article 25 of the Constitution cannot be pleaded as a ground for upgradation of a post.

(xi) If up gradation is claimed on a personal basis under clause (d) of paragraph 2 of the Policy, a constitutional petition seeking a writ of mandamus will not be competent unless the principles enunciated by the august Supreme Court in the case of *District Magistrate, Lahore versus Syed Reza Kazim* supra have been complied with.

(xii) Since a post can only be upgraded pursuant to a policy, therefore, restraint will be exercised by a High Court while exercising

powers under Article 199 of
the Constitution”.

11. The petitions are converted into representations deemed to be pending before the respondent no.2. The petitioners shall be at liberty to raise additional grounds before the competent authority, inter alia, including the documents attached with C.M. No. 1115 of 2017. The competent authority is expected to decide the representations of the petitioners in the light of the principles and law highlighted above.

12. The writ petitions are, therefore, disposed of in the above terms.

(ATHAR MINALLAH)
JUDGE