

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE MUNIB AKHTAR

AFR
CIVIL PETITION NOS.1092 & 1093 OF 2018

Against the judgment dated 8.3.2018
passed by Islamabad High Court, Islamabad
in ICA No.859 of 2013

Khushdil Khan Malik (in both cases)

...Petitioner(s)

VERSUS

The Secretary, Establishment Div. Cabinet Block
Islamabad & others

(in CP 1092/2018)

Federation of Pakistan thr. Secretary Establishment,
Cabinet Block, Islamabad

(in CP 1093/2018)
Respondent(s)

For the Petitioner(s): In-person

For the Respondent(s): N.R

Date of Hearing: 12.9.2018

JUDGMENT

MUSHIR ALAM, J.- The instant Civil Petitions No.1092 of 2018 and 1093 of 2018 arise out of the impugned consolidated judgment dated 08.03.2018 passed in I.C.A No.859 of 2013 allowed by the learned Bench of the Islamabad High Court against the judgments dated 13.05.2013 passed in Writ Petition No.828 of 2011 and dated 10.03.2017 passed in Writ Petition No. 4118 of 2016.

2. Succinctly stated facts are that the Petitioner was originally appointed as Headmaster (BPS-18) on 24.2.1996 in the Federal Government Educational Institutions (Cantts/Garrison) [hereinafter referred to as the parent department]; which falls under the administrative control of the Ministry of Defence. The petitioner

was posted as Deputy Secretary in the Federal Government on deputation basis w.e.f. 13.09.2004. The period of deputation was extended from time to time under section 10 of the Civil Servants Act, 1973 (hereinafter referred to as the "Act of 1973"). The petitioner, while being serving as Deputy Secretary, States and Frontier Regions Division, was repatriated to his parent department w.e.f. 03.02.2010 vide Notification dated 20.01.2010 on alleged misconduct. The petitioner challenged his repatriation orders before the Islamabad High Court through Writ Petition No.828 of 2011. He was promoted from BS-19 to BS-20 as Headmaster vide Notification dated 22.04.2011 and posted to FG Tech. High School Tariqabad Rawalpindi. The date of promotion to BS-20 was revised later on Four Tier Service Structure Formula, in pursuance of Notification and the petitioner was granted financial benefits of BPS-20 w.e.f. 25.10.2004 while transferring his services to NACTA, Interior Division, and Government of Pakistan. Vide Office Memorandum dated 20.10.2011, the Establishment Division was requested to notify the transfer of services of the petitioner against the post of Director General (BS-20) in NACTA under Section 10 of the Act 1973 and the Notification dated 20.10.2011 was issued by the Cabinet Secretariat Establishment Division accordingly. The petitioner was given an additional charge of the Joint Secretary (Law) vide letter dated 17.11.2011. The Government of Pakistan vide Office Memorandum dated 30.05.2012 circulated the policy for induction of Civil Servants (BS-20) as well as persons in BS-20/ equivalent in service of Federal/ Provincial Autonomous Bodies/ Semi-Autonomous Bodies/ Corporations etc. as Joint Secretary (BS-20) in Secretariat Group and invited nominations from all the concerned Ministries/Divisions. When the petitioner's request for induction in the

Secretariat group was not considered, he filed amended petition in Writ Petition No.828 of 2011, which was allowed accordingly on 13.05.13 and the respondents in that case were directed to *process petitioner's case for induction/absorption in the Federal Government (Secretariat Group) as per rules and regulations applicable*. The said judgment was assailed by the Federal Government through I.C.A. No. 859 of 2013. The Prime Minister of Pakistan had issued a directive whereby the financial benefits under the 'Time Scale Formula' were granted to the Teaching Staff of the Federal Directorate of Education, Islamabad and, pursuant thereto, the Capital Administration and Development Division issued the Office Memorandum dated 15.09.2011. The Ministry of Defence forwarded a summary to the competent authority for extending the 'Time Scale Formula' to the Teaching Staff in BPS-16 and above employed and working in the parent Department. The said summary was endorsed by the Secretary Finance vide note dated 14.02.2014 and the approval, accorded by the Prime Minister, was duly communicated to the Defence Secretary on 16.10.2015. A summary had already been forwarded by the parent department to the Ministry of Defence for granting promotion to the petitioner on the basis of meritorious service. The Ministry of Defence, vide office Memorandum dated 24.06.2015, sought the advice of the Establishment Division to this effect. The latter regretted that the petitioner was transferred vide Notification dated 29.07.2013 without seeking its concurrence or that of the parent department. Moreover, it was further observed that the petitioner had barely served in BPS-19 and BPS-20 in his parent department. The Establishment Division, vide Office Memorandum dated 17.12.2015, observed that petitioner could not be promoted on the basis of meritorious service. It transpires

from the record that the petitioner's repatriation orders to his parent department were issued again through Notifications dated 18.10.2012 and 05.05.2016 but the same orders were never complied with. Nonetheless, the petitioner continued to serve outside his parent department for many years. The petitioner filed W.P. No.4118 of 2016, seeking the grant of 'Time Scale Promotion' in BPS-21 w.e.f. 01.01.2011 and thereafter forwarding his case for the grant of BPS-22 on the basis of meritorious service'. The said Writ Petition was allowed by the learned Single Judge in Chambers of the Islamabad High Court vide judgment dated 10.03.2017. The respondents in the said petition were directed to issue a notification in favour of the petitioner for the grant of 'Time Scale Promotion' in BPS-21 w.e.f. 01.01.2011 and then to forward his case for promotion to BPS-22 on the basis of meritorious service. The Secretary Establishment Division challenged the judgment dated 10.03.2017, through I.C.A. No.123 of 2017, while the same had also been assailed by the parent department through the Ministry of Defence by filing I.C.A. No.117 of 2017. The petitioner was transferred vide Notification, dated 12.01.2017, to the National Security Division and later directed to report to the Establishment Division. The said transfer order was also challenged by the petitioner by filing Crl. Org. Petition No.11 of 2017 in C.P. No.23 of 2012 and the same was dismissed by the Islamabad High Court vide order dated 30.01.2017. The petitioner filed W.P. No.427 of 2017 before the Islamabad High Court, which was disposed of vide order dated 06.02.2017. Another Writ Petition No.1230 of 2017, filed by the petitioner, was also disposed of by the Islamabad High Court vide order dated 10.04.2017. Pursuant to the aforesaid orders, dated 06.02.2017 and 10.04.2017, the Secretary Establishment Division

passed order, dated 26.04.2017, and the relevant portion thereof is as follows:

"NOW, THEREFORE, the undersigned, in compliance with the orders of the honourable Islamabad High Court, has heard the petitioner and is of the view that an appropriate placement, that too in consultation with his parent department or repatriation of the officer to is parent department, would be decided in pursuance to any final order of the honourable Islamabad High Court (I.C.A. No. 859/2013) for which an application for early hearing has already been filed. A seat of OSD for the officer will be created in the Establishment Division meanwhile, for pay purposes."

3. The respondent filed three Intra Court Appeals No.117 of 2017, titled *"Federation of Pakistan through Secretary, Ministry of Defence, Secretariat No.2, Rawalpindi & another v. Khush Dil Khan Malik & others"* and I.C.A. No.123 of 2017, titled *"The Secretary Establishment Division, Islamabad v. Khushdil Khan Malik and others"* before the Islamabad High Court. The learned bench of the Islamabad High Court decided I.C.A. No.859 of 2013 in W.P. No.828 of 2011 along with the aforementioned Intra Court Appeals through impugned consolidated judgment dated 08.03.2018 and allowed all the three appeals filed by the respondents while setting aside judgments, dated 13.05.2013 passed in W.P. No.828 of 2011 and dated 10.03.2017, passed in W.P. No.4118 of 2016. The learned bench of the Islamabad High Court observed that:

"It will be open to the Federal Government to proceed with the placement of the respondent in the light of paragraph 8 of the order, dated 26-04-2017, passed by the Secretary, Establishment Division."

4. The instant Civil Petition No.1092 of 2018 before this Court arises out of the judgment dated 10.03.2017, passed in W.P. No.4118 of 2016 and the Civil Petition No.1093 of 2018 arises out of the judgment dated 13.05.2013 passed in W.P. No.828 of 2011, which were set aside through the impugned consolidated judgment dated 08.03.2018 in I.C.A. No.859 of 2013.

5. The petitioner contended that the respondent has inducted/absorbed similarly placed officers in the Secretariat Group despite the fact that they were not members of any Occupational Group/Service. He further contended that he has a vested right to be considered for promotion on the basis of 'Time Scale Formula' and that the learned Single Judge in Chambers of the Islamabad High Court after considering all the achievements of the petitioner correctly directed the respondent process the case of the petitioner for induction/ absorption in the Secretariat Group vide judgment dated 13.03.2013 in W.P No.828 of 2011. He contended that the repatriation orders issued vide Memorandum dated 20.01.2010 were in response to his request to the then Prime Minister of Pakistan seeking his induction/absorption in the Secretariat Group on the analogy of some blue eyed officers. That no misconduct has ever been proved against him throughout his career and he possesses unblemished service record; and for the same reason the parent department had recommended the grant of the higher pay scale on a meritorious basis however the same was arbitrarily regretted by the Establishment Division. The petitioner argued that the impugned consolidated judgment dated 08.03.2018 suffers from legal infirmities and has failed to correctly appreciate the facts and circumstances of the case.

6. The arguments advanced by the petitioner in-person and the record perused with his able assistance.

7. The petitioner invoked the constitutional jurisdiction time and again under Article 199 of the Constitution, seeking direction for his absorption/induction in the 'Secretariat Group, benefits of BPS-21 under the Time Scale Formula and thereafter, his further promotion to BPS-22 under the policy relating to the grant of the higher pay scale on a meritorious basis. The constitutional petitions were allowed which were later on set aside through impugned consolidated judgment. In order to appreciate the nature of controversy, it is necessary to examine the respective laws and policies forming the background of the dispute. The matter of creation of Civil Service on All-Pakistan basis was considered for the first time after independence on 8.11.1950 in a meeting of the representatives of the Government a Resolution which was passed to set up a Centralized Civil Service on All-Pakistan basis. This resolution was given effect to by promulgating Civil Service of Pakistan (Composition and Cadre) Rules, 1954 by the Governor-General in exercise of powers under section 241 of the Government of India Act, 1935. In order to improve the efficacy of civil services the Government of Pakistan carried out administrative reforms in the year 1971 and as a first measure the Pakistan Services (Change in Nomenclature) Rules, 1971 were promulgated which provided that the names of the Civil Service of Pakistan and the Police Service of Pakistan shall stand changed to All-Pakistan Unified Grades and all persons who were members of Civil Service of Pakistan or Police Service of Pakistan shall stand appointed in their existing posts in All-Pakistan Unified Grades. Different occupational groups were created from time to time to become part of All Pakistan Service. The

Secretariat Group was set up by the Establishment Division in continuation of Memorandum No.2/2/75-ARC dated 17.01.1975 through O.M. No.2/2/75-ARC dated 12.04.1976.¹ This Group composed of officers of the former CSP, DMG who opted for this Group; officers of OMG on promotion to the posts of Deputy Secretary and officers of other services/groups who opted for or were inducted in Secretariat Group.² The Secretariat Group has been placed under the administrative control of the Establishment Division and Clauses 3, 4, 5 and 6 of the Office Memorandum, dated 12.04.1976 prescribe the modes for appointment as well as induction in the Secretariat Group. Clauses 3 and 4 of the said O.M provide that:

"3. Deputy Secretary.- Appointment to the post of Deputy Secretary will be made in accordance with the following methods:

- i. By promotion of Grade 18 officers of the Office Management Group and the Secretariat Group on the recommendations of the Central Selection Board.*
- ii. By horizontal movement from other Occupational Groups of Grade 19 Officers who have been recommended by the Ministries/Divisions/Departments or Provincial Governments and have been found fit by the Central Selection Board.*
- iii. By direct appointment on the recommendations of Federal Public Service Commission of persons possessing such qualifications and experience etc., as may be prescribed.*

4. Joint Secretary. -- Appointment to the post of Joint Secretary will be made as under:

¹ MANUAL ON APPOINTMENT, PROMOTION AND TRANSFER (Edition -2013), Appendix A, Page No 280.

² MANUAL ON APPOINTMENT, PROMOTION AND TRANSFER (Edition -2013), Appendix A, Page No. 244.

- i. *By promotion of officers in the Grade of Deputy Secretary on the recommendations of the Central Selection Board.*
- ii. *By horizontal movement of such Grade 20 Officers of the various occupational groups as are recommended by the Ministries/ Divisions, Departments Provincial Governments etc. and are found fit by the Central Selection Board.*
- iii. *By direct appointment on the recommendations of the Federal Public Service Commission of persons possessing such qualifications and experience etc. as may be prescribed."*

It is apparent from the language employed in clauses 3 and 4 reproduced above that three modes can be adopted for the appointments against the posts of Deputy Secretary or Joint Secretary, as the case may be. Firstly, it can be made through the promotion of grade 18 officers of the Office Management Group and the Secretariat Group. Secondly such appointments can be made by the horizontal movement of officers in BPS-18 from other Occupational Groups. Thirdly direct appointments can be against the posts of Deputy Secretary or Joint Secretary, on the recommendation of the Federal Public Service Commission. It is pertinent to mention here that appointment through horizontal movement of officers in BPS 18 again has to meet three conditions; the first prerequisite is that the officer considered for appointment must belong to one of the Occupational Groups. Secondly, such an officer is required to be recommended by the concerned Ministry, Division, Department or Provincial Governments, as the case may be; and lastly such an officer shall be found fit by the Central Selection Board. These three conditions must necessarily be fulfilled by every officer who aspires to be inducted in

the Secretariat Group as Deputy Secretary or Joint Secretary. Admittedly the petitioner was inducted into service against the post of Headmaster (BPS-18) on 24.12.1996 in the Federal Government Educational Institutions (Cantts/Garrison). In the year 2004 he was transferred to the Federal Government on deputation basis and he was repatriated to the parent department vide Office Memorandum dated 20.10.2010; he had hardly served in his parent department as member of the Teaching Staff when he was again transferred in the year 2011 to the Federal Secretariat under section 10 of the Act of 1973. The petitioner is neither an officer of Management Group nor of Secretariat Group as provided in clause 3 supra. Moreover he doesn't belong to any of the 'Occupational Groups' in terms of clause (viii) of Rule 2 of the Occupational Groups and Services (Probation, Training and Seniority) Rules, 1990; therefore he cannot be considered for appointment through horizontal movement. Moreover there is nothing on record to show that he was ever recommended by the controlling Ministry of the parent department to be considered for such appointment. Therefore the petitioner has no vested right to be considered for induction/absorption in the Secretariat Group as per prescribed eligibility criteria and conditions laid down in the relevant laws and policies, despite his best service record and the learned bench of the Islamabad High Court has fully appreciated this aspect of the matter in paragraph '7' of the impugned consolidated judgment and we see no reason to set aside the same.

8. Now adverting to another contention of the petitioner that benefits under Time Scale Formula may be granted to him, it is essential to consider the terms and conditions of service of the petitioner under the Act of 1973 read with the Civil Servants

(Appointment, Promotion and Transfer) Rules, 1973 hereinafter referred to as Rules 1973. The petitioner being a civil servant was appointed under the Act of 1973 and transferred and promoted under the procedure and conditions prescribed under the same Act and Rules 1973. The Act of 1973 doesn't define the term 'Time Scale Promotion'; therefore it cannot be considered as a term and condition of service. Promotion on the basis of Time Scale is not a regular promotion but a matter of policy granted to specific categories of professions by the relevant competent authority with the concurrence of the Finance Division. Such a policy is meant to grant benefits of higher pay scales to those cadres of civil servants which do not ordinarily get promotions to higher grades under the Rules 1973 on a regular basis. The monetary benefits under the Time Scale Formula cannot be extended generally to all civil servants but to class of civil servants as mentioned in the approved policy. The Establishment Division, expressly mentioned in Office Memorandum dated 19.09.2011, that *Time Scale Formula is simply the grant of financial benefits of a higher pay scale without change in designation of the post and does not tantamount to up-gradation of the said post nor requires amendment in the recruitment rules*. It was further clarified by the Finance Division, vide letter dated 10.09.2013, that *even after the grant of higher time scale the incumbent continues to hold the same post without there being any change in its status*. The explicit conditions of the Time Scale Formula as mentioned in the relevant policy make it crystal clear that it does not tantamount to regular promotion under the Rules 1973. The monetary benefits under the Time Scale Formula were initially granted to the Teaching Staff of the Federal Directorate of Education, Islamabad and later, at the request of the Ministry of

Defence, these were extended to the Teaching Staff of the parent department pursuant to approval given by the Prime Minister which was duly communicated on 16.10.2015. The petitioner admittedly belongs to the cadre of the Teaching Staff of the parent department; however, he is serving on ex-cadre posts since 2011 and has hardly served as an officer of Teaching Staff in the parent Department. He could not be extended the benefits of Time Scale Formula, particularly when at the same time he was also seeking his induction in the Secretariat Group. Therefore, the request of the petitioner for consideration of his promotion on Time Scale basis at this stage is not feasible. However, it is open to the relevant competent authority to consider his case on Time Scale basis after his repatriation to the parent department.

9. The last contention of the petitioner is that he may be promoted on the basis of meritorious service. Finance Division's Office Memorandum, dated 18-08-1983 envisages the policy regarding grant of Basic Pay Scales 21 and 22 to Technical and Professional Officers on meritorious basis in paragraph 7(a) (c). The criteria and modalities of the same policy were notified vide Office Memorandum, dated 07.04.1987 by a Committee constituted for the very purpose. The same policy was revised and accordingly notified vide Office Memorandums dated 25.11.2008 and dated 04.10.2012. The revised policy 2008 encapsulates the revised criteria on the following terms:

- "a. Officers be considered for grant of BPS-21 and BPS-22 on the basis of meritorious service in order of seniority.*
- b. P.E.Rs. should be quantified in present and previous scales as per existing promotion policy and assigned a weightage of 70%.*
- c. Training from NIPA, Staff College and National Institutes of Management may be given 15% weightage. In case*

the training information/ requirement is not relevant, overall professional competence be judged and notional marks be assigned on the basis of his previous record.

d. Minimum of 3 years' active service in BPS-20 for BPS-21 and 5 years active service in BPS-20 and above including 3 years in BPS-21 for BPS-22 will be required excluding the period of long leave (4 months or more).

e. The Special Selection Committee shall scrutinize significant contribution of the Technical and Professional Officers in their relevant fields of specialization, consulting Secretary concerned and Head of Offices/Organizations about the background, level of competence and general reputation and allocate marks out of 15 to the officers being considered for grant of BPS-21 and BPS-22 on the basis of meritorious services.

f. Minimum threshold in this way shall be 75% marks."

The terms of aforementioned revised policy make it clear that the Special Selection Committee shall scrutinize significant contribution of the Technical and Professional Officers in their relevant fields of specialization, consulting Secretary concerned and Head of Offices/Organizations about the background, level of competence and general reputation and allocate marks accordingly to the officers for being considered for grant of BPS-21 and BPS-22 on the basis of meritorious services. It is exclusively the prerogative of the Special Selection Committee to consider the competence of the officer for the grant of promotion to BPS-21 and BPS-22 to Technical and Professional officers, and not a vested right of a civil servant. It is actually a reward for such technical and professional officer who has distinguished himself by rendering meritorious services as an acknowledgment for exceptional contributions in his specialized field. The role of Special Selection Committee cannot be assumed by any other authority by any stretch of interpretation of the revised policy,

not even by the Court. As the petitioner has been serving outside the parent department since 2011 and he is not holding any technical or professional office in his parent department, therefore the Ministry of Defence sought clarification from the Establishment Division and the latter regretted the recommendations made by the parent department for being in violation of violation of the conditions and procedure, inter alia, prescribed in Office Memorandum, dated 25.11.2008. The petitioner no doubt served on higher grades for many years and might have rendered service to the best of his ability; however we are afraid the same aspects could be considered by the Special Selection Committee and not by us. Therefore, both the instant Civil Petitions No.1092 of 2018 and 1093 of 2018 are hereby dismissed and the impugned consolidated judgment dated 08.03.2018 is upheld.

Judge

Judge

Judge

ISLAMABAD
12th Sep., 2018

"Approved for Reporting"