

2023

AZIZULLAH KHAN V. MEMBER (ADMN) FEDERAL Tr.C. 143

BOARD OF REVENUE, ISLAMABAD

[Federal Service Tribunal, Islamabad (Karachi Bench)]

and (3)(a) of the Power Act and observations/guidelines noted supra.

17. The parties and their counsel will appear before the registrar NEPRA on March 20, 2023 for further proceedings by the authority.

(A.)

Appeal accepted.

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[Federal Service Tribunal, Islamabad (Karachi Bench)]

Present: TAUQEER AHMED KHAN AND SHAHID AHMAD, MEMBERS

AZIZULLAH KHAN--Appellant

versus

MEMBER (ADMN), FEDERAL BOARD OF REVENUE,
ISLAMABAD and 2 others--Respondents

Appeal No. 132(K)CS of 2016, decided on 31.1.2023.

Civil Servant Act, 1973 (LXXI of 1973)--

S. 22(2)--General Clauses Act, (X of 1897), S. 24-A--Appellant was working as inspector--Representations for inclusion of name for promotion as Deputy Superintendent--Seniority list of inspectors--Junior to appellant was promoted as D.S.--continuing cause of action--Discriminatory treatment--Representations of appellant was not finalized--Direction to--It has been settled by Supreme Court that seniority of a civil servant was to be reckoned from .date of initial appointment and not from date of confirmation or regularization--No lawful justification was forwarded for assigning seniority to private respondent in terms of Civil Servants (Seniority) Rules, 1993 leading us to conclude that Board letter is not based on settled principles of law on subject and thus are inclined to declare it as a void order--The respondent failed to explain as to why representation of appellant was not finalized as per provisions of Civil Servants (Seniority) Rules, 1993--Resultantly, appellant was not considered for promotion by said DPC--Appellant was discriminated as representation filed by appellant as well as private respondent forwarded to competent authority was decided only in respect of private respondent while that of appellant was kept pending which had implications in terms of promotion and consequent financial benefits--Appeal allowed.

[Pp. 149 & 150] A, C & D



Civil Servant Act, 1973 (LXXI of 1973)--

---S. 22(2)--General Clauses Act, 1987, S. 24-A--Departmental appeal--
Duty of authority--When a departmental appeal/representation is
filed by a civil servant in terms of Section 22 (2) of Civil Servant
Act, 1973, departmental authority concerned is duty bound to
consider same objectively and if manked to reject same to record
reasons for doing so and to pass a speaking order in 24A of General
Clauses Act, 1987 and inform person concerned so that he may seek
remedy is so desired in accordance with law.

Syed Attaullah, Advocate for Appellant.

Mr. Zafar Imam, Advocate for Respondents

Date of hearing: 12.1.2023.

JUDGMENT

Shahid Ahmad, Member.--The appellant has filed this
appeal under Section-4 of the Service Tribunal Act, 1973, having been
aggrieved by the order dated 15.11.2010, through which private
respondent Pir Ali Shah was promoted to the post of Deputy
Superintendent (BS-15). The appellant preferred various
representations including departmental appeal dated 16.05.2016
requesting for consideration of his case for promotion as Deputy
Superintendent with effect from the date vacancy was available in
2010/2011 with consequential back benefits, which remained un-
replied, hence, the instant appeal.

2. Concisely, the facts of the case are that the appellant was
working as Inspector (BS-14) in the defunct Sales Tax and Federal
Excise department and was due for promotion as Deputy
Superintendent (BS-15) however, the competent authority sought
ACRs of 73 Inspectors *vide* letter dated 16.12.2008 for consideration of
their cases by the DPC which did not include the name of the appellant
Representation filed by the appellant was forwarded by the
Collectorate of Sales Tax and Federal Excise, Karachi *vide* letter dated
11.02.2009 to the competent authority which also included the name of
private respondent, but failed to invoke any response. Subsequently,
upon integration of Sales Tax with Income Tax department *vide*
Establishment Division O.M. dated 12.09.2009 all employees of BS-1 to
BS-15 were placed under the administrative control of Regional Tax
Office however, his seniority remained intact with his batch mates as
evident from the seniority list circulated by FBR *vide* letter dated
28.04.2014. FBR on 15.11.2010 notified promotion of Inspectors/
Intelligence Officer and Ministerial Staff to the post of Deputy



Superintendent (BS-15) including the private respondent who was junior but did not include the name of the appellant. It was contended that sufficient vacancies of Deputy Superintendent were available at the time as fifty-five vacancies were caused due to the promotion of Deputy Superintendents/Senior Intelligence Officers (BS-15) to the post of Superintendent (BS-16) notified on 04.08.2011. It was prayed that under the provisions of Section 9 of Civil Servants Act, 1973 the appellant was entitled for promotion to next higher post from the date in 2010 when vacancy was available.

3. The learned counsel for the appellant averred that the respondent did not respond to representations filed from time to time and thus only option available to the appellant was to prefer appeal before the Tribunal for redressal of grievance. It was pointed out that seniority list dated 20.09.1993 was the basis for determination of seniority and promotion and name of the private respondent was not mentioned in the said list which was not challenged by the private respondent. However, FBR *vide* letter dated 10.04.2009 assigned seniority to the private respondent at S.No. 1650-A of the list which was placed before the DPC held on 27.04.2009 but was not considered and recommended for promotion, whereas DPC held on 15.11.2010 wrongly recommended him for promotion by deviating from clause C of General Principles of Seniority (ESTA CODE 2002 EDITION) as his date of initial appointment was 18.06.1988 whereas the appellant was promoted on 29.11.1988 and the seniority of appellant was over and above the seniority of private respondent. The learned counsel cited apex Court judgement dated 26.09.2022 in Civil Petitions No. 3157 to 3165 of 2022 and drew attention to para 6 whereby it was stated that:

“if a person is not considered due to any administrative slip-up error or delay when the right to be considered for promotion is matured and without such consideration, he reaches to the age of superannuation before the promotion, then obviously the avenue or pathway of proforma promotion comes into filed of his rescue. If he lost his promotion on account of any administrative oversight or delay in the meeting of DPC or Selection Board despite having fitness, eligibility and seniority, then in all fairness, he has a legitimate expectation for proforma promotion with consequential benefits. The provision for proforma promotion is not alien or unfamiliar to the civil servant service structure but it is already embedded in Fundamental Rule 17, wherein it is lucidly enumerated 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 servant shall be paid the arrears of pay and allowances of such higher post through proforma promotion or upgradation arising from the antedated fixation of his seniority”.

Further contested the plea of the department that the post of Deputy Superintendent is a dying cadre by placing budget document 2022-2023 of RTO Karachi which confirms availability of one vacant post of Deputy Superintendent, even in financial year 2022/2023. It was also averred that the respondent departmental authority has impliedly condoned the delay by making no reply to any of the representations filed by the appellant. Reliance is made to 1970 SCMR 170. More so since the matter for promotion ultimately being related to pay and allowances as well as pension, the appellant has continuing cause of action for which, it had time and again held by the various Courts including the apex Court, that limitation is not attracted. Reliance is made on following judgments reported as: PLD 1962 Supreme Court 409, PLD 1964 Supreme Court 520, PLD 192 Supreme Court 373, 2002 PLC (C.S) 1487, 2003 PLC (C.S) 796, 2006 PLC (C.S) 1124 and 2013 SCMR 752. The apex Court *vide* its judgment dated 23.09.2015 in Civil Appeal No. 306-K of 2015 titled Askari Hasnain *vs.* Secretary Establishment and others reported as 2016 SCMR 871 has held as:

“Proviso of R.17 of Fundamental Rules entitles the petitioner for proforma promotion, which order, in no way, would affect the serving officers, as he has already attained the age of superannuation.”

That appellant prayer is for same relief as allowed under the aforesaid judgment dated 23.09.2015 by granting proforma promotion in terms of Rule-17 of the Fundamental Rules from the date his junior (Respondent No. 3) though wrongly but was promoted as Deputy Superintendent with effect from 15.11.2010.

4. In the comments filed by the respondents, point of limitation was raised and it was on limitation, the learned counsel averred that the appeal, being, is hopelessly time barred, it should be dismissed without touching the merits of the case as has been laid down by the apex Court in its various rulings, case reported in 2011 SCMR 676, by relying on 1987 SCMR 92, 2008 SCMR 2022 if there is any time barred issue each days delay has to be explained with proper justification in this case the appellant even not filed any application for condonation of delay. The superior Courts in cases reported in 1998

SCMR 882, 1999 PLC (CS) 510 and 1999 PLC (CS) 862 have held that "Successive departmental representations/appeal cannot extend period of limitation." The appeal is misconceived as no discrimination has been done to the appellant. The promotion cases of said inspector could not be processed after amendment in the Recruitment Rules notified SRO dated 25.04.2015, as well as the cadre/post of Deputy Superintendent/Senior Intelligence Officer was declared as dying cadre/post and the existing vacancies as well as future vacancies to be occurred on retirement/promotion etc. in the cadre will be converted as Inspector Customs/Intelligence Officer automatically. The FBR *vide* letter dated 28.04.2014 circulated revised seniority list of 237 serving Inspectors (BS-16) of Customs, Sales Tax & Federal Excise. Later on, the Chief Commissioner RTO-III, Karachi *vide* letter dated 02.06.2016 forwarded the representation dated 16.05.2016 of the appellant for promotion to the post of Deputy Superintendent. However, the promotion case of said inspector could not be processed due to amendment in the Recruitment Rules notified *vide* SRO dated 25.04.2015. The appellant who appeared at S. No. 5 of seniority list of Inspectors of Customs Department but would not be promoted to the post of Superintendent Customs along with other Inspectors as had stood retired with effect from 02.03.2017 from service. There is no justification to process the promotion case of appellant and grant him promotion from November, 2010 with all back benefits of the entire period as admissible under FR-17 when vacancies of Deputy Superintendent were available. The appellant submitted representation to the Collector in the year 2009 then he again filed representation on 13.01.2012 and thereafter he filed his third representation dated 16.05.2016 which was not considered, therefore, he filed appeal before FST, Karachi for the same purpose. The appellant has approached the Tribunal after retirement and in this connection reliance is placed on 2006 SCMR 1465, wherein it was held that "*Promotion after retirement, claim forValidity.... Promotion to a retired civil servant from back date could not be granted*". It was contended that promotion from back date is not available to a retired civil servant as per Honourable FST, Lahore judgment dated 01.06.2001 in case of *Muhammad Aslam Sultan vs. G.M. Pakistan Railway* (Appeal No. 1077(L)/1988) duly upheld by the Honourable Supreme Court of Pakistan reported as (2006 SCMR 1465). The appellant has retired from service on 24.12.2016, therefore, his request

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to give retrospective effect to his promotion is not maintainable in view of above judgments. According to Section 4(b) of the Service Tribunals Act, 1973, no appeal shall lie on matters relating to the determination of fitness of a person to hold a particular post or to be promoted to a higher post or grade. In view of this appeal position, the appeal/petition of the appellant is liable to rejection. It was accordingly prayed that the appeal be dismissed with compensatory cost.

5. We have heard the learned counsel for the parties and considered the record available on record minutely with the assistance of the learned counsel for the both sides, written arguments have also been gone through.

6. Before dilating upon merits of the case, we will first take up the issue of limitation and repeated representations raised on behalf of the respondents. The admitted position is that the appellant for the first time made a representation against non-inclusion of his name in the list of Inspectors who were to be considered for promotion as Deputy Superintendent and correction in the seniority list of Inspectors which was duly forwarded by the Regional Tax Office Karachi on 11.02.2009 and also included the name of private respondent but no action was taken by FBR. In the meantime, FBR *vide* order dated 15.10.2010 promoted thirty three Inspectors including the private respondent. Thereafter second representation was made on 13.01.2012 which again did not invoke any response. The last representation was filed on 16.5.2016 which was forwarded by Regional Tax Office -III, Karachi to FBR *vide* letter dated 02.06.2016 which was not decided and therefore after expiry of ninety days service appeal was preferred before this Tribunal on 09.09.2016. The appellant was aggrieved as FBR fixed the seniority of the private respondent leading to his promotion without deciding his representation, although RTO *vide* letter dated 11.02.2009 forwarded representation of the appellant as well as that of the private respondent. By failing to decide the representation preferred by appellant, the aggrieved civil servant has a continuing cause of action and for a continuing cause of action there is no fixed period of limitation. Besides we are fortified by a judgment of Supreme Court 2019 SCMR 648 *Qazi Munir Ahmed vs. Rawalpindi Medical Collage and Allied Hospital* in Civil Petition Nos. 606 and 607 of 2018 decided on 06.03.2019 which states that no period of limitation ran against a void order. Even if the appeal filed by the appellant was barred by time, there is a lawful justification to entertain and decide the appeal on merit. Even otherwise, the order of the competent authority to assign seniority at 1650-A of the seniority list to the private respondent without any formal speaking order as per

requirement of Section 24-A of the General Clauses Act, X of 1897 and is to be treated as void, as the learned counsel for the respondent has been unable to place before us copy of letter dated 10.04.2009 whereby seniority of the private respondent was decided which subsequently was the basis for his promotion *vide* order dated 15.11.2012. In terms of the law laid down by the apex Court in the judgment reported as *Yousaf Ali vs. Muhammad Aslam Zia* (PLD 1958 SC 104) no period of limitation runs against the void order.

7. We are of the considered view that by assigning the seniority to the private respondent and at the same time failing to decide the representation of the appellant which was forwarded to the competent authority *vide* letter dated 11.02.2009, the appellant was subjected to discriminatory treatment as established from facts and documentary evidence placed before the Tribunal which is violation of Article 25 of the Constitution of Pakistan. It has been settled by the Supreme Court that seniority of a civil servant was to be reckoned from the date of initial appointment and not from the date of confirmation or regularization. No lawful justification was forwarded for assigning seniority to the private respondent in terms of Civil Servants (Seniority) Rules, 1993 leading us to conclude that Board Letter C.No. 7(5)M.IV/2009 dated 10.04.2009 is not based on settled principles of law on the subject and thus are inclined to declare it as a void order. A

8. With regard to the merits of the case, it is an admitted position that the appellant was appointed as UDC on 23.08.1982 in the defunct Collectorate of Central Excise and Land Customs, Karachi and then promoted as Inspector (BS-11) on 29.11.1988, whereas the private respondent was directly appointed on temporary basis as Inspector on 18.06.1988. Rule 6 of the Civil Servants (Seniority) Rules, 1993 provides that "*persons promoted to higher posts in a particular calender year shall, as a class be senior to those appointed by initial appointment to such posts in that year*" meaning thereby that the appellant was to be considered as senior to the private respondent. Interestingly in the Combined Seniority List of Inspectors/Intelligence Officers dated 20.02.1993, name of the appellant was at S.No 1654 and this list was not contested by the private respondent. Representation was filed by the private respondent as well as the appellant on 11.02.2009 but FBR only decided the representation of the private respondent and after fixing his seniority at S.No. 1650-A promoted him *vide* order dated 15.11.2010. We feel it necessary to highlight the importance of a departmental appeal filed by a civil servant for the

redressal of his grievance. It may be noticed that the very concept of 'appeal' universally recognized is that the appeal is meant for reconsideration of the decision of the lower authority for reversal/review (*Black's Law Dictionary, Seventh Edition, Page-94*). Again in *Muhammad Ayub and another vs. Muhammad Yaqoob and another* (PLD 1975 Lahore 445) it was held that on filing of appeal, the matter gets re-opened and it becomes sub-judice to be decided in accordance with law. Thus when a departmental appeal/representation is filed by a civil servant in terms of Section 22 (2) of the Civil Servant Act, 1973, the departmental authority concerned is duty bound to consider the same objectively and if mairked to reject the same to record reasons for doing so and to pass a speaking order in terms of Section 24-A of the General Clauses Act, 1987 and inform the person concerned so that he may seek remedy is so desired in accordance with law. The respondent failed to explain as to why the representation of the appellant was not finalized as per provisions of Civil Servants (Seniority) Rules, 1993. Resultantly, the appellant was not considered for promotion by the said DPC. It may be noted that at that time cases of promotion/seniority of Inspectors were dealt with by the defunct Collectorate of Customs, Sales Tax and Federal Excise, Lahore and perusal minutes of the meeting of DPC held on 27.08.2009 revealed seniority of private respondent was placed at newly created S. No. 1650-A but he was not considered for promotion as record of ACRs was not available. This lead us to the conclusion that the appellant was discriminated as representation dated 11.02.2009 filed by the appellant as well as private respondent forwarded to competent authority was decided only in respect of private respondent while that of the appellant was kept pending which had implications in terms of promotion and consequent financial benefits.

9. In view of the forgoing discussions, we have arrived at the conclusion that the appellant has not been dealt with in accordance with law and we, therefore, inclined to direct FBR to place the case of the appellant before the relevant forum; Selection Board/Promotion Committee for consideration strictly in accordance with relevant rules/law in the light of Finance Division O.M. No. F.No. 2(1)FR-17/2021 dated 20.05.2022 on merit within a period of three months.

10. No order as to costs. Parties may be informed.

(Y.A.)

Appeal allowed.

