HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.4404 of 2022

Dr. Mutahir Shah

Versus

Federation of Pakistan through Secretary, Ministry of National Health Services, Regulations and Coordination, Islamabad and others

Petitioner by	**:**	**M/s Mohammad Shoaib Shaheen and Mirza Waqas Qayyum, Advocates.**
Respondents by	**:**	**Mr. Umar Sajjad Chaven, Advocate.** **Respondent No.6 in person.** **Mr. Fazal-ur-Rehman Khan Niazi, Deputy A-G.** **Mr. Aqeel Akhtar Raja, Assistant A-G.** **Mr. Mohammad Yasin, Asst. Dir., PIMS.** **Mr. Mansoor Ahmed, Superintendent, Estb. Div.** **Mr. Ashraf Nasar, Deputy Director (Legal), Ministry of NHSR&C.**
Date of Hearing	**:**	**12.10.2023.**

Babar Sattar, J:- The petitioner is seeking antedated promotion to the post of Director, Cardiac Center w.e.f. 02.12.2019 when respondent No.6 was promoted to BS-19 and is seeking the withdrawal of promotion granted to respondent No.6 in BS-18 on 20.03.2014. The petitioner is aggrieved by (i) promotion of respondent No.6 having been made illegally, and (ii) delay in his own promotion.

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2. The learned counsel for the petitioner stated that the petitioner was serving in Pakistan Institute of Medical Sciences **("PIMS")** on deputation from the Government of Baluchistan and was absorbed within the employment of PIMS in the year 2005. The issue of service of deputationist came before the august Supreme Court and ultimately a Committee was constituted to make recommendations with regard to absorption of deputationists, which Committee decided in favour of the petitioner as well as other deputationists. He stated that the petitioner filed multiple petitions before this Court seeking implementation of service structure as well as processing of his case for promotion. The last such petition was ***W.P. No.4239/2019*** in which the Court observed that the petitioner had been promoted and consequently the grievance of the petitioner was redressed. The learned counsel for the petitioner stated that while the petitioner was promoted, respondent No.6, who was junior to the petitioner, was promoted in BS-19 on 02.12.2019. And once the petitioner was promoted in BS-19, his promotion should have been given effect from such date when a junior was promoted so that he was not rendered junior to respondent No.6, as he was never superseded. He relied on ***Dr. Muhammad Amjad Vs. Dr. Israr Ahmed*** **(2010 SCMR 1466),** ***Director General Intelligence Bureau, Islamabad Vs. Amir Mujahid Khan*** **(2011 SCMR 389) and** ***Saleem Ullah Khan Vs. Shahid Hamid*** **(2011 SCMR 788)** for the proposition that the promotion was to be given effect from the date of vacancy or the date of the promotion of the junior. He stated that the petitioner was already serving in BS-18, when

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respondent No.6 was promoted to BS-18 in 2014. He further submitted that the petitioner was also challenging the appointment of respondent No.6 who was an Anesthetist, who was serving in BS-17 as reflected in a seniority list dated 07.04.2010. He stated that under the Service Rules applicable to PIMS eligibility for promotion to BS-18 required that a doctor had to be a medical officer, which respondent No.6 was not, which is why he was in the cadre of Anesthetists. He stated that respondent No.6 was neither eligible to be promoted to BS-18 by virtue of his educational training and experience nor to BS-19, and has been illegally promoted and rendered senior to the petitioner. He also submitted that respondent No.6 was not in good standing with Pakistan Medical and Dental Council and on this basis too he could not have been promoted to BS-20.

3. Learned counsel for respondent No.6 (assisted by respondent No.6 in person) submitted that the petitioner was indirectly seeking the determination of seniority of the petitioner over respondent No.6. The question of seniority related to the terms and condition of service of the petitioner and respondent No.6, who were civil servants, and such matter could not be adjudicated by the Court in its view of the bar under Article 212 of the Constitution. He submitted that the petitioner had an alternative remedy of filing a departmental appeal under Rule 4 of the Civil Servants (Appeal) Rules, 1977, which had never been availed. And in the event that he was aggrieved by the decision of the appellate authority, the matter would go to the Federal Service Tribunal. The petitioner never filed a departmental appeal against the seniority lists issued by PIMS

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and could not indirectly seek what could not be granted to him directly. He also objected to the maintainability of the petition on ground of *laches* by stating that the petitioner was promoted in BS-19 on 02.12.2019 and was subsequently promoted in BS-20 on 15.12.2022. The petitioner was promoted in BS-19 on 08.09.2021 and had not challenged the promotion of respondent No.6 in the year 2019. And the challenge brought against the promotion of respondent No.6 in the year 2022 through the instant petition suffered from *laches*. He submitted that respondent No.6 was inducted in BS-17 on 16.10.2002 against a permanent post in PIMS and his seniority was therefore to be counted from the date of his appointment at PIMS on 16.10.2002. The petitioner on the other hand was appointed through the Balochistan Public Service Commission in BS-17 in the health department of Government of Balochistan on 31.05.2001. He was sent to PIMS on deputation and was absorbed as Medical Officer in BS-17 in PIMS on 23.08.2005 in a manner that was not backed by law. The question of his irregular absorption remained open which is also why he was not promoted to BS-19. But notwithstanding the controversy regarding his absorption, the date of his appointment at PIMS was the date of his induction i.e. 23.08.2005, from which date his seniority was to be determined in view of Rule 4 of the Civil Servants' (Seniority) Rules, 1993 **("1993 Rules")**. The petitioner would therefore not claim to be senior to respondent No.6 given that respondent No.6 was inducted in the service of PIMS three years prior to the induction of the petitioner in the service of PIMS. On the question of seniority he submitted that a

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provisional seniority list for BS-18 was issued by PIMS on 11.01.2018, which placed respondent No.6 at serial No.3 reflecting his entry into government service at PIMS as of 16.10.2002 and placed the petitioner at serial No.4 reflecting his entry in government service at PIMS as of 01.09.2005. The officers in the seniority list were invited to submit their objections, if any. And the petitioner never objected to the seniority list. Consequently, a final seniority list for BS-18 was issued on 07.01.2019 placing respondent No.6 at serial No.3 and the petitioner at serial No.4. Respondent No.6 was then promoted to BS-19 on 02.12.2019. PIMS issued a provisional seniority list of BS-18 on 20.11.2020 in which the petitioner was placed at serial No.2 given that he was still in BS-18 while respondent No.6 had been promoted in BS-19. And according in the seniority list issued for BS-19 on 10.01.2022, respondent No.6 was once again placed at serial No.2 and the petitioner was placed at serial No.3 as by then he had also been promoted in BS-19. He submitted that another provisional seniority list of BS-19 was issued on 11.03.2022 in which respondent No.6 was placed at serial No.1 and the petitioner was placed at serial No.2. The said list also reflected in the footnote that no objection was received against such seniority list. It was on the basis of such seniority list that respondent No.6 being at serial No.1 of the seniority list was promoted to BS-20 on 15.12.2022. He submitted that the seniority of respondent No.6 in relation to the petitioner had stood established, as reflected by successive seniority lists, and the question could not be agitated afresh.

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4. Learned counsel for respondent No.6 submitted that under SRO No.796(RA)/82 dated 07.08.1982 issued by the Ministry of Health, it was provided that for eligibility to be promoted to BS-18, medical officers as well as anesthetists were eligible to be promoted. He submitted that the recruitment rules for the post of Assistant Director BS-18 were subsequently framed under SRO No.1303(1)/2005 and had left out the post of Assistant Anesthetists from the feeding cadre for promotion to the post of Assistant Director BS-18. This anomaly was pointed out by PIMS to the Capital Administration and Development Division by letter dated 01.08.2013 and the Capital Administration and Development Division by office memorandum dated 16.08.2013 requested the Establishment Division to grant its approval for amendment in the recruiting rules of the feeding cadre for the post of Assistant Director and include the post of Assistant Anesthetists therein. The Establishment Division by office memorandum dated 26.12.2013 conveyed its approval to the amendment in the recruitment rules and inclusion of the post of Assistant Anesthetists as feeding cadre for promotion to Assistant Director BS-18. The said memorandum stated that the amendment would be notified after obtaining concurrence of Federal Public Service Commission ("FPSC") and a draft notification was issued as well for purposes of gazette notification. The Capital Administration and Development Division issued a reminder on 03.12.2014 seeking concurrence of FPSC which by letter dated 22.01.2014 stated that PIMS was an autonomous body that did not fall within the domain of FPSC and consequently no concurrence was required from FPSC. He

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submitted that subsequently PIMS once again fell within the domain of FPSC and FPSC issued its concurrence and the amendment in the recruitment rules was notified on 29.06.2020. The notification itself provided that FPSC had concurred with the amendment to the rules approved by the Establishment Division on 26.12.2013. This reflected that the Federal Government had approved the amendment to the rules back on 26.12.2013 and it was only the notification that was issued on 29.06.2020. He submitted that there was no illegality with the promotion of the petitioner in the year 2014, as the amendment to the rules had been approved as of 26.12.2013. In the alternative he submitted that the amendment to the rules notified on 02.09.2020 would apply retrospectively being beneficial legislation, the promotion accorded to him from BS-17 to BS-18 on 20.03.2014 could not be undone at this stage. He submitted that with regard to his registration with Pakistan Medical Commission **("PMC")** that he was in good standing with PMC and the petitioner was asserting false facts to claim that he was not duly licensed.

5. The petitioner's challenge to the promotion of respondent No.6 as articulated by learned counsel for the petitioner was threefold. One, when respondent No.6 was promoted to BS-18 he was not eligible as he was not a medical officer. Two, respondent No.6 was promoted to BS-19 on 02.12.2019 and BS-20 on 15.12.2022 even though the petitioner was senior to him. As the petitioner was never superseded and his promotion was only deferred once he was promoted to the same grade the petitioner would resume his seniority in relation to respondent No.6 in view of Rule 3 of the 1993 Rules. And three, the

Uncertify

petitioner's license which is subject to renewal by Pakistan Medical and Dental Council **("PMDC")** was not renewed for a couple of years and respondent No.6 during such period was therefore not entitled to practice medicine. And on this basis too his promotion was liable to be withdrawn.

6. The principle that an infrastructure built on a void foundation comes crumbling down with the foundation is not applicable to the promotion of respondent No.6 to BS-18. It is admitted that anesthetists presently fall within the feeding cadre for being promoted as Medical officer in BS-18. The challenge to respondent No.6's promotion to BS-18 is that at the relevant time in 2014 the rules had not been notified after concurrence by Federal Public Service Commission **("FPSC")**, even though the Federal Government had approved the amendment to the rules in 2013 and they were subsequently notified in 2020, after receiving concurrence from FPSC, as approved by the Federal Government in 2013. Now that respondent No.6 has been subsequently promoted in BS-19 and BS-20, his promotion in BS-18 cannot be rolled back due to confusion over whether the matter fell within FPSC's domain or not, causing delay in notification. In any event, the amendment to the rules is beneficial legislation and will apply retrospectively to cure any irregularity even if one occurred in 2014. Consequently, the infrastructure of respondent No. 6's subsequent promotions to higher grades is not built upon a void foundation as it is no one's case that respondent No.6 is not qualified to serve at PIMS in the post he currently holds in BS-20.

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7. The petitioner's basic claim to seniority is rooted in notification dated 31.03.2008 pursuant to which the petitioner was promoted to BS-18. Both the petitioner and respondent No.6 were subsequently promoted to the post of Assistant Director BS-18 on 20.04.2014. It is the petitioner's contention that he was already in BS-18 since 2008 and consequently, the re-designation of his post from Medical Officer to Assistant Director did not mean that he was promoted to BS-18 in the year 2014. And as the petitioner was promoted to BS-18 prior to respondent No.6 he would remain senior to respondent No.6 even if respondent No.6 was promoted in BS-19 or BS-20 ahead of the petitioner, given that the petitioner was never superseded and was either not considered or the consideration of promotion was deferred. It is well settled that the seniority of a civil servant is determined from the date of absorption or appointment in the post on the basis of which he claims seniority as provided in Rule 4 of the 1993 Rules. This was most recently reiterated by the Supreme Court in ***Chairman Federal Board of Revenue and others Vs. Iqbal Hussain Shaikh and others (2016 SCMR 773)*** wherein the following was held:

> *"Rule 4 of the Rules of 1993, which has been reproduced hereinabove on its plain reading leaves no room for doubt that the seniority of persons on deputation is to be reckoned from the date of their regular appointment in the transferee Group or Department and not from their posting or transfer or any earlier date. The wording in the said provision is clear and obvious and leaves little room for any other contrary interpretation."*

Reliance can also be placed on ***Hamid-ul-Hussain and others Vs. Federation of Pakistan through Secretary,***

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Establishment and others ***(2006 SCMR 832)*** and ***S.M. Farooq and others Vs. Mohammad Yar Khan and others (1999 SCMR 1039)***. There is some dicta in ***Iqbal Hussain Shaikh and two others Vs. Chairman, Federal Board of Revenue and another*** ***(2013 SCMR 281)***, which seems to suggest that date of seniority could be treated from the date of transfer to the office at which an officer was serving. This was a judgment rendered by two-member bench and a subsequent judgment by three-member bench in ***Chairman Federal Board of Revenue and others Vs. Iqbal Hussain Shaikh and others*** ***(2016 SCMR 773)*** have clarified the law in relation to Rule 4 of the 1993 Rules.

8. In the instant case the record reflects that respondent No.6 was appointed at PIMS in BS-17 on 16.10.2002 and the petitioner was inducted into the service of PIMS on 01.09.2005. And the seniority list the details of which have been recounted in the arguments of the learned counsel for respondent No.6 in para-03 above also reflects that respondent No.6 has consistently been placed senior to the petitioner in the seniority lists. Even in the event that the petitioner was promoted to BS-18 in 2008 while respondent No.6 was promoted to BS-18 in 2014, it has been argued by the learned counsel for the petitioner himself that where an officer has not been superseded, the seniority in the next grade will remain the same as the seniority in the previous grade. The record reflects that respondent No.6 was senior to the petitioner in BS-17 and it can therefore not be countenanced that the petitioner somehow became senior to respondent No.6 in BS-18.

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9. The record also reflects that PIMS had issued seniority lists and such seniority lists have not been challenged by the petitioner. The petitioner had a right to challenge the seniority list for BS-18, BS-19 as well as BS-20 to the extent that he was aggrieved by them pursuant to Rule 4 of the Civil Servants Appeals Rules, 1977, but the petitioner has not done so. The record reflects that the petitioner had previously filed W.P. No.1148/2019 before this Court seeking that his name be considered for promotion. The petition was disposed of by order dated 12.09.2019 in view of the fact that PIMS had submitted that the petitioner's name for consideration was being sent to the Departmental Promotion Committee. The petitioner then filed W.P. No.4239/2019 seeking that he be promoted. The petitioner was promoted during the pendency of the petition and did not assert any other claim in relation to his promotion and was satisfied that he had been promoted to BS-19. Consequently, by order dated 04.10.2022 the petition was disposed of. It appears that the petitioner then filed the instant petition because respondent No.6 was promoted to BS-20. The basic grievance of the petitioner remains that respondent No.6 has continuously been treated as senior to the petitioner and has consequently been promoted ahead of him in BS-19 and BS-20. The petitioner has however not raised the question of seniority or challenged the seniority lists and placement of the petitioner and respondent No.6 therein. The question of seniority relates to the terms and conditions of service and the High Court is barred from adjudicating such issue in view of the bar under Article 212 of the Constitution. This Court therefore finds that the petitioner

Uncertify

is seeking a relief from this Court indirectly that he cannot seek directly. To the extent that the petitioner claims that he should be treated as senior to respondent No.6, he has failed to make out a case on merits for the reasons mentioned above. In any event such relief cannot be sought by the petitioner in view the bar under Article 212 of the Constitution, and to such extent the petition is not maintainable.

10. The petition is also not maintainable on ground of *laches*. PIMS has continued to issue seniority lists which have never been challenged by the petitioner and despite having been treated as a junior to respondent No.6, the petitioner awakes from slumber every time that respondent No.6 is promoted to a higher grade and agitates the matter of his promotion afresh. The consequence of not raising a grievance in relation to a seniority list at the correct time was explained by the Supreme Court in ***Ch. Liagat Ali and another Vs. Province of Punjab and others (2012 SCMR 1700)***, wherein the following was held:

> *16. Admittedly the seniority lists published from time to time which remained unchallenged and in all those lists, appellants were placed junior to the respondents … the appellants accepted the afore-referred departmental construction and the seniority lists which reflected acquiescence to their inter se seniority in the department. Having accepted the inter se seniority position, it is rather late in the day for the appellants to have challenged it after almost more than 15 years. In a similar case reported at Wazir Khan v. Government of N.-W.F.P. (2002 SCMR 889), the Court had dismissed the appeal, repelled the argument of a continuous wrong and upheld the judgment of the Service Tribunal by inter alia holding that*

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> *"the appellant having accepted the junior position assigned to him in the revised seniority list published in 1981, would be estopped to re-open the same and agitate it at the belated stage in 1997 and resultantly the appeal preferred by him before the Service Tribunal was rightly dismissed as hopelessly barred by time." A similar view was taken in Rashida Asif v. Aasia Gondal (2010 SCMR 450) where the acquiescence and contumacious conduct of the petitioner was inter alia found to be a ground to dismiss the petition.*

The Court therefore finds that the petition is not just liable to be dismissed due to the bar under Article 212 of the Constitution but is also not maintainable for suffering from *laches*.

11. To the extent that the petitioner claims that respondent No.6 was not duly licensed by PMC, the matter requires factual determination which cannot be made by this Court in its constitutional jurisdiction. PMC is the regulator that licenses medical practitioners and to the extent that there is any apprehension that the petitioner entertains in relation to whether respondent No.6 has been duly licensed or not or whether he is in good standing, he can avail an appropriate remedy under provision of the Pakistan Medical Commission Act, 2020, and the rules and regulations framed therein.

12. For the aforementioned reasons, the petition is ***dismissed*** for not being maintainable subject to a cost of Rs.25,000/- payable by the petitioner to respondent No.6 within a period of thirty days. Learned counsel for the petitioner will file a certificate with the Deputy Registrar (Judicial) of this Court stating that the order granting costs has been complied with by or before the expiry of 30-day period.

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13. By order dated 03.10.2023 the Court had issued a notice to Mr. Umar Sajjad Chaven, AHC, to explain as to why he appeared on 16.03.2023 as counsel for respondent No.6 even though the Court was informed on 03.10.2023 that respondent No.6 had appointed a fresh counsel who needed time for preparation. Mr. Umar Sajjad Chaven, AHC submitted that he had been issued a power of attorney which was never withdrawn and he had subsequently informed by respondent No.6 that he had been superseded. Once a counsel accepts a brief and files a power of attorney before the High Court he must continue to appear before the Court and can only withdraw by seeking permission from the Court. Similarly, it is a settled convention that any time that an existing counsel is superseded by a fresh counsel, the fresh counsel seeks no objection certificate from the previous counsel and files the same before the Court. These are conventions that have enabled the maintenance of amiable relationship between members of the bar and the Court expects that the senior counsel who appears before the Court continue to abide by them to discharge their obligations to fellow counsels in accordance with the requirements of the Legal Practitioners and Bar Councils Rules, 1976. This Court is satisfied that Mr. Umar Sajjad Chaven, AHC did not misconduct himself and the notice issued to him stands recalled.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 20.10.2023.

JUDGE

M.A. Raza

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