JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR

Writ Petition No.3259-P of 2020
Sawab Khan
Vs.
The Vice Chancellor Agriculture University, Khyber Pakhtunkhwa Peshawar and another.

JUDGMENT

Date of hearing 23.02.2021
For Petitioner:  Mr. Zartaj Anwar Advocate
Respondent(s)  Mr. Muhammad Zafar Tahir Kheli Advocate.

MUHAMMAD NAEEM ANWAR, J.--- Petitioner through this petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has prayed for the following relief:

“On acceptance of this Writ Petition an appropriate writ may please be issued directing the respondents to consider/promote the petitioner to the post of Deputy Director Sports (BPS-8) in accordance with the University Statute, 2016, the petitioner being fit and eligible, highly qualified and having 30 years experience in the relevant field, to be considered/promoted to the post of Deputy Director Sports BS-18, the reluctance on the part of the respondents by not promoting the petitioner to the post of Deputy director Sports BS-18 from the date when he became eligible for the
post, is thus illegal unlawful against the secured and guaranteed rights granted in the Constitution of Pakistan, 1973, with all back and consequential benefits. Or Any other remedy deemed proper in the circumstances of the case and not specifically asked for may also be allowed.”

2. Facts lying in the background of the instant petition are that the petitioner was appointed in ministerial cadre, as junior clerk in BPS-5, of the Agriculture University, Peshawar, in the year 1988 and with the passage of time, he was promoted gradually from BPS-05 to BPS-16. During service he completed his degree of Master of health & Physical Education in 2010, he was upgraded to the post of Assistant Director Sports from BPS-16 to BPS-17, as per the policy of Provincial Government and was awarded personal grade in BPS-17 by the Syndicate in its meeting held on 24.10.2011. It was averred that in consonance with section 28 of the Khyber Pakhtunkhwa Universities Act, 2012, the Statutes of the University were framed and were got approved wherein the criteria for promotion was categorically provided in schedule II of the statute, therefore, he being fit and eligible entitled for promotion to the post of Deputy Director Physical Education. His other colleagues were promoted in accordance with the law and statute of the university but he was deprived of from the promotion and was treated discriminately. In order to get redressal of his
grievance he has submitted his representation/appeal, but no heed was paid to it, hence, the instant petition.

3. Respondents were put on notice, in response to which respondent No.4 has submitted Para-wise comments wherein the issuance of desired writ was opposed on legal and factual grounds, by contending therein that upon recommendations of the Finance and Planning Committee held on 24.10.2011, in 83rd Syndicate meeting the petitioner was awarded personal grade BPS-17, as Assistant Director Physical Education, with effect from the date of meeting of Syndicate i.e., 24.10.2011.

4. Learned counsel for the petitioner while reiterating the facts mentioned in the petition contended that the statute has provided the criteria for promotion to the post of BPS-18 and petitioner being eligible and fit is entitled for promotion in BPS-18, but the respondents are not treating him at par with the other colleagues, who have already promoted in consonance with the statutes of the Agriculture University, 2016. In support of his submission, he also placed reliance on the judgment of this Court rendered in WP No.5704-P of 2019, dated 06.02.2020.

5. Conversely, the learned counsel for respondents have contended that petitioner was never promoted in BPS-17 rather he was awarded personal grade; therefore, he is not entitled for his promotion in BPS-18.

6. Arguments heard; record proved.

7. In essence, grievance of petitioner is that when he is working in BPS-17 since 24.10.2011, & when he was awarded
personal grade, so, on the strength of his 10-year experience as Assistant Director Physical Education qua the criteria for promotion as provided in the statute for the post of Deputy Director Supports in BPS-18 he ought to have been promoted. True, in accordance with the mandate of Khyber Pakhtunkhwa Universities Act, 2012, the Agricultural University Peshawar has framed/enacted its statute, which was properly approved by the respective bodies, the Syndicate and senate. Undisputedly, undeniably and unequivocally the statute has provided a specific criterion, in schedule II, for promotion to the next higher post, wherein at S.No.25 of the Schedule II (Mentioned in Statue 7) for the post to be filled by promotion, which is reproduced as under:

“SCHEDULE-II
(Mentioned in Statute 7)
Posts to be filled by promotion.

<table>
<thead>
<tr>
<th>S. No</th>
<th>Designation</th>
<th>BPS</th>
<th>Persons Eligible</th>
<th>Conditions of Eligibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>Dy. Director Sports</td>
<td>18</td>
<td>Asstt. Director Physical Education (BPS-17)</td>
<td>Six (06) years relevant experience as Assistant Director Sports.</td>
</tr>
</tbody>
</table>

8. While relying upon the conditions of eligibility, the petitioner’s contention is that when six years relevant experience as Assistant Director Sports has been provided in the statute and he is working as Assistant Director Physical Education BPS-17 since 2011, as such he is entitled for his promotion to the post of Deputy Director Sports, of course, on the recommendation of Departmental Promotion Committee and with the approval of Syndicate. It is un-denied that petitioner was appointed as Junior Clerk in BPS-5 on 21.08.1989. Later on, selection grade was
granted to him on 30.04.1995, and was promoted to the post of Office Assistant (BS-11) on 14.01.1997. He was appointed as Assistant Director Physical Education (BS-16) on 07.10.2006 and personal grade was granted to him w.e.f. 24.10.2011 in BS-17. The controversy as to whether on the strength of personal grade, as contended by the petitioner, he is falling within the four corners of Schedule II of the university and is eligible for his promotion to the post of Deputy Director Supports? It is an admitted position that there is sky high difference between promotion, selection grade & upgradation. Promotion to the next higher grade on the basis of the criteria laid down by the authority/ law is with regard to his duties/ performance, on the basis of which he has been paid salary / remuneration in that respect, whereas the personal grade is nowhere to be regarded as promotion rather it is persons specific for an individual, when he is upgraded to the next post, it does not mean that he was ever promoted in the next higher scale. In fact, it is the person who is for the time being working in the next higher grade, but the scale/grade in which he is working still remains intact, as the post on his retirement are removal shall remain the same as provided in law. Personal grade is something alike to upgradation when there is no channel for promotion for an individual and in order to compensate him, his post is upgraded or he is awarded personal grade, whereas promotion to the next higher grade shall always be regarded in accordance with the policy, rules which shall be dealt in accordance with law. This controversy was laid to rest by this Court in number of cases. Wherein it was held
that “(up gradation/ selection grade shall never be regarded as
promotion and if an individual is awarded selection grade and
working against a particular post could never claim promotion to
the next higher grade on the basis of personal grade, as it was
persons specific.””

9. A look at the service history of the petitioner, when he was
inducted in the university would make it clear, the details of which
is tabulated as under:

<table>
<thead>
<tr>
<th>Date of Initial</th>
<th>Date of Promotion/</th>
<th>Date of Promotion/Up</th>
<th>Date of Promotion/Up</th>
</tr>
</thead>
<tbody>
<tr>
<td>appointment/BS</td>
<td>Promotion/Up</td>
<td>gradation/Selection</td>
<td>gradation/Selection</td>
</tr>
<tr>
<td></td>
<td>gradation/Selection</td>
<td>Grade.</td>
<td>Grade.</td>
</tr>
</tbody>
</table>

| Junior Clerk BS05 dated 21.08.1989 | BS-07 dated 30.04.1995 (Selection Grade) | Office Assistant BS-11 w.e.f 14.01.1997 | Assistant Director Physical Education BS-16 w.e.f 07.10.2006 | Personal Grade BS-17 w.e.f 24.10.2011 |

10. That on 24.10.2011, personal grade was given to
him, so far as, the contention of petitioner that as per statute he is
entitled for the post of Dy. Director Sports in BS-18, with six years
relevant experience as Assistant Director Sports is concerned, the
statute provides that the post of Assistant Director Physical
Education in BS-17, is filled by promotion on the basis of selection
and eligibility and for that six years relevant experience as senior/
head-coach (BS-16) in case of promotion, whereas the petitioner
was given selection grade and he was not inducted in BS-17 to the
post of Assistant Director Physical Education either through initial
recruitment or by promotion, therefore, in order to avail the benefit of Schedule II (as mentioned in statute 7) at S.No.25 petitioner is required to go through the selection procedure for his appointment as Assistant Director Physical Education in BS-17 through Selection Board and Syndicate, as provided in the Statute. Under the service rules, the term “up gradation” has been understood in wider sense and assign a meaning of elevation and rising to a higher grade or pay scale. Similarly, in ordinary parlance the term “promotion” is frequently used in cases involving service law which may be understood to mean “moving upwards and leaving the original pedestrian”. A person already holding a position would have promotion if his position is upgraded to a higher post with higher pay scale. The difference between promotion and upgradation is that when incumbent is placed in a higher pay scale, with change in designation with an additional qualification and change in nomenclature, responsibility and duties shall be regarded as promotion. But when the post is placed in higher scale of pay with or without change in designation, without requirement of any new qualification for holding the post in higher grade, not specified in recruitment rules for the existing post, and without involving change and the responsibility, and duties may be regarded as up gradation. Needless to mention that in both the cases, i.e., promotion and up gradation, the incumbent must be placed in higher scale of pay and the element of suitability, eligibility must be involved. Simple is that the promotion is always granted to an employee under the prescribed rules, while
up gradation is extended to ensure that an employee, who may not get chance of promotion on account of a service in cadre, should at least be placed in upper grade in his pay with acclivity in grade, while on the other hand to prevent stagnation. The general purport of this classification, if appears that when the post is placed in higher scale of pay with or without change in designation, without requirement of any qualification and without involving any change in responsibility and duties, even then such placement must be treated as promotion to the higher grade and pay scale, because the grant of up gradation of an employee must enhance his pay and such categorically of improvement can only be dealt with under the head of promotion. It is settled law that when there is a change of grade of post for better there would be an element of selection i.e., promotion and it must be through process of scrutiny. In the matter in hand neither any process of selection was complied with nor in routine the petitioner was entitled, however, keeping in view the service structure and the length of service of petitioner, he was granted personal grade BS-17. Record reflects that vide office order No.323/Estt: S-II, dated 16.10.2006, when the petitioner was serving as Office Assistant (BS-11), was appointed/promoted as Assistant Director Physical Education (BS-16) against the vacant post of Assistant Director Physical Education (BS-17). Record also promulgates that a proposal for creation of post of deputy director (sports) was moved and placed in the meeting of Finance and Planning Committee of University of Agriculture Peshawar, but the committee in its meeting held on
30.05.2018, at agenda item No.6, did not agree with the proposal in the following term.

“Creation of various positions in administrative cadre. Keeping in view the ban on creation of post and poor financial position, the committee did not agree with the proposal.”

11. When learned counsel for the petitioner was confronted regarding the personal grade awarded to the petitioner, he candidly conceded at the bar that his posting to the post of Assistant Director Physical Education has been based on personal grade, without proper procedure through recruitment, scrutiny and the process provided in the statute. When so, the petitioner could not claim for his promotion to the post of Deputy Director Sports, in BS-18, on the strength of his experience, as that of Assistant Director Physical Education. There is no cavil with the proposition that when the law requires a thing to be done in particular mode and procedure, the same must be done in that mode and manner, and not otherwise. Reliance is placed on the case law reported as (2020 SCMR 2129), wherein it was held that: -

“It is well settled principle of law that where a law requires doing of something in a particular manner it has to be done in the same manner and not otherwise. Reliance in this respect is place upon the cases of Muhammad Hanif Abbasi v. Imran Khan Niazi (PLD 2018 SC 189), Shahida Bibi v.
Habib Bank Limited (PLD 2016 SC 995) and Human Rights Cases Nos. 4668 of 2006 and others (PLD 2010 SC 759)."

In case titled Muhammad Hanif Abbasi versus Imran Khan Niazi and others (PLD 2018 SC 189) it was ruled by the apex court that it is settled law that where the law requires something to be done in a particular manner, it must be done in that manner. Another important canon of law is that what cannot be done directly cannot be done indirectly. (Underlined for emphasis)

12. The statute of the university has provided a channel for promotion to the post of Deputy Director sports, which post, if exists, can be filled by promotion from the post of Assistant Director Physical Education having six years relevant experience, but admittedly, the petitioner being awarded personal grade can never be termed to be through due course of law or promoted in BPS-17, as such he could not claim BS-18.

13. For the reasons stated above, the instant writ petition stands dismissed being misconceived and without substance.

Announced.
23.02.2021

CHIEF JUSTICE

JUDGE