

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR.

Service Appeal No. 1445/2018

Date of Institution ... 20.11.2018

Date of Decision ... 12.11.2019

Shaukat Khan S/O Gul Rahman, Acting Chief Warder at Central Prison Mardan.
... (Appellant)

VERSUS

Home and Tribal Affairs Department through Secretary Home, Civil Secretariat,
Peshawar two others. ... (Respondents)

MIAN AFRASIAB GUL KAKAKHEL,
Advocate

--- For appellant.

MR. ZIAULLAH,
Deputy District Attorney

--- For respondents

MR. AHMAD HASSAN
MR. MUHAMMAD AMIN KHAN KUNDI

--- MEMBER(Executive)
--- MEMBER(Judicial)

JUDGMENT:

AHMAD HASSAN, MEMBER:- Arguments of the learned counsel for the
parties heard and record perused.

ARGUMENTS:

02. Learned counsel for the appellant argued that he joined the Prison Department as Warder on 09.08.1999. That through order dated 14.09.2009, he was promoted to the rank of Head Warder (BPS-07) for showing exceptional gallantry and coupled with the recommendations of the then Minister for Jails, Khyber Pakhtunkhwa. This act of the respondents was covered under Rule-1121(V) of Khyber Pakhtunkhwa Prison Rules 1985. Thereafter, name of the appellant brought at the bottom of the seniority list issued by the respondents in 2010 and 2016. That the DPC in its meeting held on 23.09.2016 considered promotion of Head Warder

to the rank of Chief Warder (BPS-09) under Rule-1121 of rules referred to above. The appellant and others were promoted as per minutes of the meeting of DPC referred to above. Upon promotion, the appellant was posted at District Jail, Karak vide order dated 26.09.2016. The appellant also qualified departmental mandatory examination for promotion to the post of Assistant Superintendant and Deputy Superintendant Jail. The respondents circulated final seniority list of Chief Warder (BPS-09) on 01.08.2017, wherein his name stood at serial no.31. Thereafter, revised seniority list was notified on 29.06.2018 in which his name was relegated to serial no.51 without any justification. It forced to appellant to file departmental appeal on 25.08.2018, which was regretted vide letter dated 12.11.2018, hence, the present service appeal. Learned counsel for the appellant further argued that seniority of the appellant was not fixed according to law and rules. It further showed malafide, ill will and personal grudges of the respondents against the appellant.

03. Learned Deputy District Attorney at the very outset raised preliminary objection on the maintainability of the present service appeal. He clarified that in case relief is granted to the appellant a number of officials senior to the appellant in the seniority list were likely to be affected. However, they have not been arrayed as a necessary party in the present service appeal, therefore, the same was not maintainable in its present forum. He further informed that in a recent judgment of the apex court, it was held that even in case of notional/proforma promotion affectees were to be arrayed as necessary party. That impugned seniority list was notified on 29.06.2018, whereas the appellant filed departmental appeal on 28.08.2018, which was barred by time and not according to yardstick contained in Section-4 of Khyber Pakhtunkhwa Service Tribunal, Act 1974. He also invited attention to concluding para of the departmental appeal dated 25.08.2018 filed by the appellant wherein he had mentioned that earlier through letter no. 7335 registry

no. 979 dated 30.07.2018 an appeal was filed by him but was rejected. It was clear beyond doubt that he had already exhausted the chance of filing departmental appeal and successive departmental appeals were not permissible under the rules. Even on this account the present service appeal was not maintainable (2013 SCMR 911). Learned DDA further argued that as the appellant was promoted to the rank of Head Warder (BPS-07) through order dated 14.09.2009 for showing exceptional gallantry. This order fell in the ambit of out of turn promotion which had been declared illegal by the Supreme Court of Pakistan in judgment reported as 2018 SCMR 1218. Moreover, inter-se-seniority of civil servants upon promotion is determined according to sub-rule-4 of Rule-17 of APT Rules 1989 and notification dated 19.11.2009. Their seniority position remains intact and upon promotion to the higher scale. Final seniority list was issued in accordance with law and rules and was not suffering from any legal infirmity.

CONCLUSION:

04. The appellant joined the Prison Department as Warder on 09.08.1981. On the recommendations of the then Minister for jails and showing gallantry out of turn promotion was awarded to him vide order dated 28.09.2009. This one wrong act of the department laid foundation for subsequent illegalities. As he landed at a higher pedestal through parachute by usurping rights of many seniors but this blame alone cannot be attributed to the appellant. Both the appellant and respondents were hand in glove in this dirty business. Just to draw attention of the respondents to para-3 of their parawise comments that out of turn promotions were held illegal by the apex court judgment reported as 2018 SCMR 1218. However, we would not like to further comment of this aspect of the case.

05. Now coming to the merits of the case, it is brought on record that in case any relief is granted to the appellant a number of officials are likely to be affected.

However they have not been arrayed as necessary party in the present service appeal. Learned counsel for the appellant when quizzed on this point was unable to defend his position. Moreover, impugned seniority list was notified on 29.06.2018 while departmental appeal was filed by the appellant on 25.08.2018 and time line contained in the rules was not observed thus hit by the principle of limitation. Furthermore, in the concluding para of the departmental appeal referred to above, he had mentioned that earlier through letter no. 7335 registry 979 dated 30.07.2018. He had already filed departmental appeal which was dismissed under the rules. Only one departmental appeal is allowed and that option had already been exercised by the appellant thus departmental appeal was not covered under the rules (2013 SCMR 911). Perhaps the respondents realizing their earlier mistakes made an effort to take corrective measures and assign due rights to the concerned officials serving under their administrative control by rectifying the seniority list. Impugned seniority list was firmed up according to sub-rule-4 of Rule-17 of APT Rules 1989. Even granting seniority to the appellant w.e.f 28.09.1990 on the basis of out of turn promotion was illegal but suffice it to say that being a past and closed transaction sanity demands not to open the Pandora box.

06. As a sequel to the above, the appeal is ~~appeal~~ dismissed. Parties are left to bear their own costs. File be consigned to the record room.



(AHMAD HASSAN)
Member


(MUHAMMAD AMIN KHAN KUNDI)
Member

ANNOUNCED
12.11.2019

29.08.2019

Learned counsel for the appellant and Mr. Usman Ghani learned District Attorney present. Learned counsel for the appellant seeks adjournment. Adjourn. To come up for arguments on 10.10.2019 before D.B


Member


Member

10.10.2019

Appellant in person present. Mr.Ziaullah, DDA alongwith Mr. Salman Shah, Law Officer for respondents present. Appellant seeks adjournment as his counsel is not available today. Adjourn. To come up for arguments on 12.11.2019 before D.B.


Member


Member

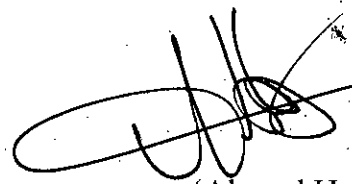
ORDER


12.11.2019

Counsel for the appellant present. Mr. Ziaullah, DDA alongwith Mr. Suleman Shah, Law Officer for respondents present. Arguments heard and record perused.

Vide our detailed judgment of today of this Tribunal placed on file, the appeal is dismissed. Parties are left to bear their own cost. File be consigned to the record room.

Announced:
12.11.2019


(Ahmad Hassan)
Member


(Muhammad Amin Khan Kundi)
Member

16.04.2019

Appellant in person present. Written reply not submitted. Sheryar Assistant Superintendent representative of the respondent department present and seeks time to furnish written reply/comments. Granted by way of another last chance. To come up for written reply/comments on 22.05.2019 before S.



Member

22.05.2019

Appellant in person and Mr. Kabir Ullah Khattak learned Additional Advocate General alongwith Junaid Assistant present. Written reply submitted. To come up for rejoinder if any and arguments on 03.07.2019 before DB.



Member

03.07.2019

Counsel for the appellant and Mr. Riaz Ahmad Paindakheil, Assistant AG for the respondents present. Learned counsel for the appellant requested for adjournment. Adjourned to 29.08.2019 for rejoinder, if any, and arguments before D.B.



(Hussain Shah)
Member



(M. Amin Khan Kundi)
Member

15.02.2019

Learned counsel for the appellant present. Respondents absent. Fresh notice be issued to the respondents with direction to furnish written reply/comments as per preceding order sheet on 22.02.2019 before S.B


Member

22.02.2019

Counsel for the appellant and Addl. AG alongwith Sheryar, Asstt. Supdt. Jail for the respondents present.

Representative of respondents seeks further time for submission of reply. Adjourned to 12.03.2019 on which date the requisite reply shall positively be submitted. Promotions made in the meanwhile on the strength of impugned seniority list shall be subject to the outcome of instant appeal.


Chairman

12.03.2019

Learned counsel for the appellant present. Written reply not submitted. Sheryar Superintendent representative of the respondent department present and seeks time to furnish written reply. Granted by way of last chance. To come up for written reply/comments on 16.04.2019 before S.B


Member

07.1.2019

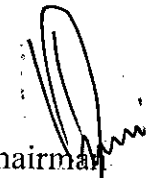
Counsel for the appellant present.

Contends, inter-alia, that in the seniority list of Chief Warders (BPS-09) (Male) of Prison Department issued on 01.01.2018 the appellant was shown at the bottom at S.No. 52 while in the column regarding date of promotion from Head Warder as Chief Warder it is noted against his name to be 28.09.2009. On the other, hand very few of the Chief Warders who were promoted as such, were above the appellant and most of the others, shown to have been senior to the appellant, were promoted as such subsequent to the promotion of appellant. In his view the seriatim in the seniority list was without lawful authority and discriminatory towards the appellant.

In view of the above instant appeal merits admission. Admit. The appellant is directed to deposit security and process fee within 10 days, thereafter, notices be issued to the respondents. To come up for written reply/comments on 15.02.2019 before S.B.

The appeal is accompanied by an application praying for restraining the respondents from actuating promotion on the basis of seniority list dated 29.06.2018. Notice of application be also given to the respondents for the date fixed.



Appellant's Security & Process Fee


Chairman

Form- A
FORM OF ORDER SHEET

Court of _____

Case No. 1445/2018

S.No.	Date of order proceedings.	Order or other proceedings with signature of judge
1	2	3
1-	30/11/2018	<p>The appeal of Mr. Shaukat Khan resubmitted today by Mian Afrasiab Gul Kakakhel Advocate may be entered in the Institution Register and put up to the Worthy Chairman for proper order please.</p> <p> REGISTRAR 30/11/18</p>
2-	07/12/2018	<p>This case is entrusted to S. Bench for preliminary hearing to be put up there on <u>07/01/2019</u>.</p> <p> CHAIRMAN</p>

The appeal of Mr. Shaukat Khan son of Gul Rahman Acting Chief Warder at Central Prison Mardan received today i.e. on 20.11.2018 is incomplete on the following score which is returned to the counsel for the appellant for completion and resubmission within 15 days.

- 1- Memorandum of appeal may be got signed by the appellant.
- 2- Annexures of the appeal may be flagged.
- 3- Annexures A&B of the appeal are missing.
- ✓4- Copy of promotion order dated 26.9.2016 mentioned in para-5 of the memo of appeal are not attached with the appeal which may be placed on it.
- 5- Sub-rule-4 of rule-6 of the Khyber Pakhtunkhwa Service Tribunal rules 1974 requires that every civil servant to whom the relief claimed may affect shall also be shown as respondent.
- 6- In the heading of the appeal there are only three respondents but in the memo of appeal figure of respondent no.4 has been mentioned.
- 7- Three copies/sets of the appeal along with annexures i.e. complete in all respect for Tribunal and one for each respondent may also be submitted with the appeal.

No. 2261/S.T.

Dt. 22/11/2018.

[Signature]
REGISTRAR 22/11/18
SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA
PESHAWAR.

Mian Afrasiab Gul Kakakhel Adv. Pesh.

⇒ Objection are duly removed.

⇒ In reply to objection (5) it is humbly submitted that the appellant is aggrieved from the act of Resp arrayed respondents only.

[Signature]
Advocate.

[Signature]
Adv. 20/11/18

BEFORE THE KHYBER PAKHTUNKHWA PESHAWAR.

In the matter of
Service Appeal No.1445 /2018

Shaukat Khan S/O Gul Rahman (Warder)
Central Prison Peshawar.....Appellant.

VERSUS

1. Secretary to Government of Khyber Pakhtunkhwa,
Home, and T. As Department, Peshawar.
2. Inspector General of Prisons,
Khyber Pakhtunkhwa Peshawar
3. Superintendent Headquarters Prisons,
Khyber Pakhtunkhwa, Peshawar.....Respondents

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S.NO.	DESCRIPTION OF DOCUMENTS	Annex	Page No.
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3-	Civil Servant (Appointment, Promotion and Transfer) Rules,1989	"A"	4 to 5


DEPONENT

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

In Re: Service Appeal No. 1445/2018

Shaukat Khan S/O Gul Rahman
Attached to Central Prison Peshawar.....**Appellant.**

VERSUS

1. Department of Home and Tribal Affairs
Through Secretary Home, Civil Secretariat Peshawar
2. Inspector General of Prisons,
Khyber Pakhtunkhwa Peshawar
3. The Superintendent Headquarters Prisons,
Khyber Pakhtunkhwa, Peshawar.....**Respondents.**

Written Statements on Behalf of the Respondents.

Preliminary Objections

- i. That the appeal is incompetent and is not maintainable in its present form.
- ii. That the appellant is estopped by his own conduct to bring the present appeal.
- iii. That the appellant has got no cause of action
- iv. That the appellant has no locus standi.
- v. That the appeal is bad for mis-joinder and non-joinder of necessary party.
- vi. That the appeal is hit by laches.

Respectfully Shewith

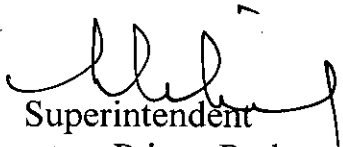
- 1- Pertains to the record, therefore no comments.
- 2- Correct.
- 3- Correct to the extent of out of turn promotion on the basis of gallantry however Supreme Court in Judgment Reported as 2018 SCMR 1218 out of turn promotion has been declared illegal.
- 4- According to sub-rule (4) of Rule 17 added vide Notification No. SOR-VI(E&AD)1-3/2008 dated; 19-11-2009, that " the inter-Se-Seniority of Civil Servant in a certain cadre to which promotion is made from different lower posts, carrying the same pay scale shall be determined from the date of regular appointment/promotion of civil servants in the lower posts," **(Annex-A)** meaning thereby that inter-se-seniority of the co-officials appointed prior to the appellant but promoted on later dates shall remain intact, therefore plea of the petitioner carries no weight.
- 5- Pertains to the record, hence no comments.
- 6- Pertains to the record, hence no comments.
- 7- Pertains to the record, hence no comments.

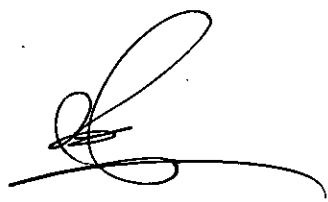
- 2
- 8- Misleading, as elaborated in Para-4 above.
 - 9- Correct, plea of the appellant was rejected by the Respondents No.2 being not in accordance with rules in vogue of the government as elaborated in para-4 above.
 - 10- Pertains to the record, hence no comments.


GROUND: -

- I. Misleading. Accepting plea of the appellant means sheer violation of right of his 20 co-officials who are senior from the appellant with respect to seniority/length of service, experience and eligibility as well.
- II. Meritorious service and illustrious career should not affect seniority on merit of his co-officials, therefore plea is weightless.
- III. Misleading, as elaborated in Para-4 above.
- IV. Incorrect, seniority must be granted on merit in accordance with law & Rules.
- V. The Revised Final Seniority list of chief Warder of Prisons Department, Khyber Pakhtunkhwa Peshawar dated; 29-06-2018 by the respondents is torally in accordance with law/rules in vogue.
- VI. Incorrect, as elaborated in Para-1 above.
- VII. Pertains to the record, hence no comments.
- VIII. Further assistance shall be made at the time of arguments after due permission of the court.

In light of above, it is humbly prayed that appeal for grant of seniority illegally may be rejected/filed in the best interest of this department please.


Superintendent
Headquarters Prison Peshawar.
(Respondent No.3)


Inspector General of Prisons
Khyber Pakhtunkhwa Peshawar
(Respondent No.2)


Secretary to
Government Khyber Pakhtunkhwa
Home & T.As Department Peshawar.
(Respondent No.1)

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

In Re: Service Appeal No. 1445/2018

Shaukat Khan S/O Gul Rahman

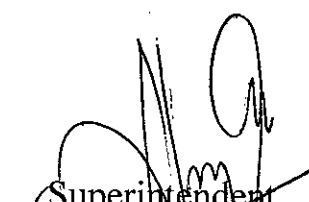
Attached to Central Prison Peshawar.....**Appellant.**

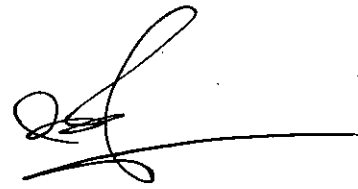
VERSUS

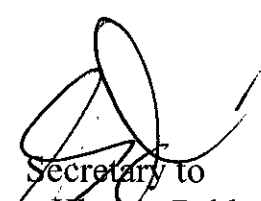
- 1. Department of Home and Tribal Affairs
Through Secretary Home, Civil Secretariat Peshawar
- 2. Inspector General of Prisons,
Khyber Pakhtunkhwa Peshawar
- 3. The Superintendent Headquarters Prisons,
Khyber Pakhtunkhwa, Peshawar.....**Respondents.**

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENTS No. 1 to 3

We the undersigned respondents do hereby solemnly affirm and declare that the contents of the Para-wise comments on the above cited appeal are true and correct to the best of our knowledge and belief and that no material facts have been kept secret from this Honorable Tribunal.


 Superintendent
 Headquarters Prison Peshawar.
 (Respondent No.3)

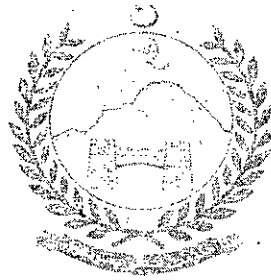

 Inspector General of Prisons
 Khyber Pakhtunkhwa Peshawar
 (Respondent No.2)


 Secretary to
 Government Khyber Pakhtunkhwa
 Home & T.As Department Peshawar.
 (Respondent No.1)

5/4/18

Amendment 'A'

For official use



GOVERNMENT OF KHYBER PAKHTUNKHWA

**THE KHYBER PAKHTUNKHWA CIVIL SERVANTS
(APPOINTMENT, PROMOTION AND TRANSFER)
RULES, 1989**

Compiled by:

O&M SECTION, REGULATION WING
ESTABLISHMENT & ADMINISTRATION DEPARTMENT
GOVERNMENT OF KHYBER PAKHTUNKHWA

PART-VI

S E N I O R I T Y

17. **Seniority** :- (1) the seniority inter se of civil servants ¹(appointed to a service, cadre or post) shall be determined:-

- (a) in the case of persons appointed by initial recruitment, in accordance with the order of merit assigned by the Commission ²[or as the case may be, the Departmental Selection Committee;] provided that persons selected for appointment to post in an earlier selection shall rank senior to the persons selected in a later selection; and
- (b) in the case of civil servants appointed otherwise, with reference to the date of their continuous regular appointment in the post; provided that civil servants selected for promotion to a higher post in one batch shall, on their promotion to the higher post, retain their inter se seniority as in the lower post.

Explanation-I:- If a junior person in a lower post is promoted to a higher post temporarily in the public interest, even though continuing later permanently in the higher post, it would not adversely effect the interest of his seniors in fixation of his seniority in the higher post.

Explanation-II:- If a junior person in a lower post is promoted to a higher post by superseding a senior person and subsequently that senior person is also promoted the person promoted first shall rank senior to the person promoted subsequently; provided that junior person shall not be deemed to have superseded a senior person if the case of the senior person is deferred for the time being for want of certain information or for incomplete record or for any other reason not attributing to his fault or demerit.

Explanation-III:- A junior person shall be deemed to have superseded a senior person only if both the junior and the senior persons were considered for the higher post and the junior person was appointed in preference to the senior person.

(2) Seniority in various cadres of civil servants appointed by initial recruitment vis-à-vis those appointed otherwise shall be determined with reference to the dates of their regular appointment to a post in that cadre; provided that if two dates are the same, the person appointed otherwise shall rank senior to the person appointed by initial recruitment.

³(3) In the event of merger/restructuring of the Departments, Attached Departments or Subordinate Offices, the inter se seniority of civil servants affected by the merger/restructuring as aforesaid shall be determined in accordance with the date of their regular appointment to a cadre or post.

⁴(4) The inter-se-seniority of civil servants in a certain cadre to which promotion is made from different lower posts, carrying the same pay scale shall be determined from the date of regular appointment/promotion of the civil servants in the lower post.

¹ Substituted for the words appointment to a post in the same basic pay scale in a cadre by Notification No. SOR-I(S&GAD)4-1/80, dated 17-05-1989.

² The words inserted by Notification No. SOR-I(S&GAD)4-1/80/II, dated 04-02-1996.

³ Sub-rule (3) of Rule 17 added vide Notification No. SOR-I(E&AD)4-1/80/IV, dated 28-5-2002.

⁴ Sub-rule (4) of Rule 17 added vide Notification No. SOR-VI (E&AD) 1-3/2008 dated 19-11-2009.