Form- A

FORM OF ORDER SHEET

Court of _____

Case No.- 1551/2022

S.No.	Date of order proceedings	Order or other proceedings with signature of judge
1	2	3
1-	31/10/2022	The appeal of Mr. Ghaznfar Ali resubmitted today by Mr. Taimur Ali Khan Advocate. It is fixed for preliminary hearing before Single Bench at Peshawar on _____. Notices be issued to appellant and his counsel for the date fixed. By the order of Chairman REGISTRAR

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

SERVICE APPEAL NO. 1551 /2022

Ghazanfar Ali **V/S** Govt. of KP etc

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S. No.	Documents	Annexure	P. No.
01	Memo of appeal	---	01-04
02	Affidavit	---	05
	Copy of notification dated 07.10.2021	A	06
03	Copy of notification dated 02.02.2018	B	07
04	Copies of departmental appeal and letter dated 29.07.2022	C&D	08-09
05	Copies of judgment dated 09.06.2021 and notification dated 05.07.2022	E&F	10-18
06	Vakalat Nama	---	19

APPELLANT

THROUGH:

(TAIMUR ALI KHAN)
ADVOCATE HIGH COURT

Cell No. 03339390916

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

SERVICE APPEAL NO. 1551 /2022

1671
Dated 21-10-2022

Mr. Ghaznfar Ali, (PMS, BS-20)
DG, Commerce Education & Management Science,
Khyber Pakhtunkhwa, Peshawar.

(APPELLANT)

VERSUS

1. The Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar.
2. The Chief Secretary, Khyber Pakhtunkhwa, Civil secretariat Peshawar.
3. The Secretary, Establishment Department, Khyber Pakhtunkhwa, Civil secretariat Peshawar.
4. The Secretary, Finance Department, Khyber Pakhtunkhwa, Civil secretariat Peshawar.

(RESPONDENTS)

APPEAL UNDER SECTION 4 OF THE KHYBER PAKHTUNKHWA SERVICE TRIBUNALS ACT, 1974 AGAINST THE IMPUGNED ACTION OF RESPONDENTS OF NON-PAYMENT/STOPPAGE OF EXECUTIVE ALLOWANCE DURING OSD PERIOD FROM 07.10.2021 TO 04.03.2022 AND AGAINST THE CONDITION 5 OF THE FINANCE DEPARTMENT NOTIFICATION DATED 02.02.2018, WHEREIN IT MENTIONED THAT "EXECUTIVE ALLOWANCE WILL NOT BE ADMISSIBLE TO OSD POSTS AND AGAINST NOT TAKING ACTION ON THE DEPARTMENTAL APPEAL OF THE APPELLANT WITHIN THE STIPULATED PERIOD OF NINETY DAYS.

21/10/22

PRAYER:

THAT ON THE ACCEPTANCE OF THIS APPEAL, THE CONDITION NO.5 OF THE FINANCE DEPARTMENT

NOTIFICATION DATED 02.02.2018 I.E "EXECUTIVE ALLOWANCE WILL NOT BE ADMISSIBLE TO OSD POSTS" MAY KINDLY BE DECLARED NULL AND VOID AND RESPONDENTS MAY BE DIRECTED TO MAKE PAYMENT TO THE APPELLANT OF UN-PAID EXECUTIVE ALLOWANCE FOR THE PERIOD WHERE THE APPELLANT REMAINED OSD FROM 07.10.2021 TO 04.03.2022. ANY OTHER REMEDY WHICH THIS AUGUST TRIBUNAL DEEMS FIT AND APPROPRIATE THAT MAY ALSO BE AWARDED IN FAVOUR OF APPELLANT.

RESPECTFULLY SHEWTH:

FACTS:

1. That the appellant is presently serving as (PMS, BS-20) DG, Commerce Education & Management Science, Khyber Pakhtunkhwa, Peshawar and is performing his duty with devotion and honesty, whatsoever assign to him.

2. That Respondent No.2 passed a notification dated 07.10.2021, whereby the appellant was transferred from MD Small Industries Board, Khyber Pakhtunkhwa to report to Establishment Department and remained there as OSD from 07.10.2021 to 04.03.2022 and executive allowance was deducted from the salary of the appellant during OSD period from 07.10.2021 to 04.03.2022. **(Copy of order dated 07.10.2021 is attached as Annexure-A)**

3. That the appellant as initial Basic pay was entitled to draw Executive allowance at the rate of Rs.103635/- per month, but he was kept deprived of executive allowance during OSD period from 07.10.2021 to 04.03.2022 in the light of condition 5 of the finance department notification dated 02.02.20218, wherein it is mention that executive allowance will not be admissible to OSD post which is ultra vires to the second proviso section 10 of Civil Servant Act 1973. **(Copy of notification dated 02.02.2018 is attached as Annexure-B)**

4. That being aggrieved form the impugned action of the respondents of non-payment of executive allowance during OSD period from 07.10.2021 to 04.03.2022, the appellant filed departmental appeal on 05.07.2022 to respondent No.2 which was forwarded to respondent No.4 for further necessary action through letter dated 29.07.2022, but no action has taken on the departmental appeal within the statutory

period of ninety days. It is pertinent to mention here that the appellant inadvertently mentioned two durations of OSD periods i.e from 08.02.2019 to 13.06.2019 and from 07.10.2021 to 04.03.2022 in his departmental appeal, but he has granted executive allowance for the OSD period from 08.02.2019 to 13.06.2019, while the executive allowance of the OSD period from 07.10.2021 to 04.03.2022 was not paid the appellant. **(Copies of departmental appeal and letter dated 29.09.2022 are attached as Annexure-C&D)**

5. That now the appellant has no other remedy except to file the instant appeal in this Honorable Tribunal for redressal of his grievance on the following grounds amongst others.

GROUNDS:

A) That non-payment of executive allowance for the OSD period from 07.10.2021 to 04.03.2022 to appellant and condition 5 of notification 02.02.2018 are against the law, rules, facts and material on record, therefore not tenable.

B) That transfer and posting is the prerogative of the competent authority and posting of the appellant as OSD was not made on the choice and willingness of the appellant, but the competent authority has posted him as OSD, therefore the appellant should not be punished to deprive him from executive allowance during OSD period from 07.10.2021 to 04.03.2022 for no fault on his part.

C) That OSD post against which salary of the appellant being drawn is not the service/cadre post of the appellant as no where OSD post is included in the category of posts mentioned in the schedule of post appended to the KP Provincial Civil Service (Secretariat Group) Rules 1997, hence the appellant entitle to executive allowance during OSD period from 07.10.2021 to 04.03.2022.

D) That the posting of an officer as OSD is merely a temporary arrangement and the officer under the rules is full time Government Servant and cannot perform duties other than his actual cadre/post, therefore, the appellant cannot be deprived from executive allowance merely on the basis of OSD.

E) That condition 5 of the notification dated 02.02.2018 is ultra vires of the second proviso of section 10 of the Civil Servant Act 1973 and condition 5 of the notification dated 02.02.2018 was also declared as null and void by this Honorable Tribunal in its judgment dated 09.06.2021 rendered in Service Appeal No.1132/2019 title Muhammad Arshad VS Government of Khyber Pakhtunkhwa, therefore, there remain no ground to deprive the appellant from his legal right of executive allowance for the period he remained OSD from 07.10.2021 to 04.03.2022 on the basis of condition 5 of the notification dated 02.02.2018.

F) That similar nature Service Appeal No.1132/2019 title Muhammad Arshad VS Government of Khyber Pakhtunkhwa has been allowed by this Honorable Tribunal on 09.06.2021 and in the compliance of judgment dated 09.06.2021, executive allowance was allowed to Muhammad Arshad for the period he remained OSD vide notification dated 05.07.2022 and the appellant being similarly placed person is also entitled the same relief under the rule of consistency. **(Copies of judgment dated 09.06.2021 and notification dated 05.07.2022 are attached as Annexure-E&F)**

G) That the appellant is legally entitled for executive allowance for the OSD period from 07.10.2021 to 04.03.2022 and depriving him from his legal right of executive allowance for the said period is against the norms of justice and fair play.

H) That the appellant seeks permission of this Honourable Tribunal to advance others grounds and proofs at the time of hearing.

It is, therefore most humbly prayed that the appeal of the appellant may be accepted as prayed for.

APPELLANT
Ghazanfar Ali

THROUGH:

(TAIMUR ALI KHAN)
ADVOCATE HIGH COURT
PESHAWAR

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

SERVICE APPEAL NO._____/2022

Ghazanfar Ali **V/S** Govt. of KP etc

.....

AFFIDAVIT

I, Ghaznfar Ali, (PMS, BS-20) DG, Commerce Education & Management Science, Khyber Pakhtunkhwa, Peshawar (Appellant) do hereby affirm and declare that the contents of this service appeal are true and correct and nothing has been concealed from this august Court.

DEPONENT

Ghazanfar Ali
(APPELLANT)

A 6

GOVERNMENT OF KHYBER PAKHTUNKHWA ESTABLISHMENT DEPARTMENT

Dated Peshawar October 07, 2021

NOTIFICATION

NO. SO(E-I)/E&AD/1-1/2021. The Government of Khyber Pakhtunkhwa is pleased to order posting/ transfer of the following officers, in the best public interest, with immediate effect:-

SR.#	NAME OF THE OFFICER	FROM	TO
1.	Mr. Ghazanfar Ali (PMS BS-20)	Managing Director, Small Industries Development Board, Khyber Pakhtunkhwa	Report to Establishment Department for further posting.
2.	Syed Zafar Ali Shah (PMS BS-19)	Awaiting posting in Establishment Department	Managing Director, Small Industries Development Board, Khyber Pakhtunkhwa, in his own pay & scale, vice Sr. No. 1

CHIEF SECRETARY
GOVERNMENT OF KHYBER PAKHTUNKHWA

ENDST. NO. & DATE EVEN.

Copy forwarded to the:-

1. Principal Secretary to Governor, Khyber Pakhtunkhwa
2. Principal Secretary to Chief Minister, Khyber Pakhtunkhwa.
3. Secretary to Govt. of Khyber Pakhtunkhwa, Industries, Commerce & Technical Education Department.
4. Accountant General, Khyber Pakhtunkhwa.
5. Managing Director, Small Industries Development Board, Khyber Pakhtunkhwa.
6. Director General, Information & P.Rs Khyber Pakhtunkhwa.
7. PS to Chief Secretary, Khyber Pakhtunkhwa.
8. PS to Chief Secretary, Khyber Pakhtunkhwa.
9. PS to Secretary (Estt)/Special Secretary (Estt)/ Special Secretary (SP)/PA to AS (Estt)/AS (HRD)/ SO(Secret)/ SO(HRD-I) & SO(E-II) Establishment Department.
10. PS to Secretary (Admn)/AS(Admn)/D.S.(Admn)/SO(Trans) Estate Officer/DD(IT) and ACSO Cypher Administration Department.
11. Officers concerned.
12. Manager, Govt. Printing Press Peshawar.

(ZIA-UL-HAQ) 10-2021
SECTION OFFICER (E-I)
PH: # 091-9210

IMDAD

B 7

GOVERNMENT OF KHYBER PAKHTUNKHWA
FINANCE DEPARTMENT
(REGULATION WING)

Dated Peshawar the 02/02/2018

NOTIFICATION

No.FD(SOSR-II)8-7/2016-17. The Government of Khyber Pakhtunkhwa has been pleased to sanction Executive Allowance to the tune of 1.5 Initial Basic Pay per month as per Pay Scale 2017 to PAS, PCS and PMS officers working against scheduled posts of Establishment and Administration Department as per rates mentioned against each in the following table with immediate effect.-

S #	Pay Scale	Initial Basic Pay	Rate of Executive Allowance Per Month
01.	PAS/PCS/PMS officers in BS-21	Rs.76,720/-	Rs.1,15,080/-
02.	PAS/PCS/PMS officers in BS-20	Rs.69,090/-	Rs.1,03,635/-
03.	PAS/PCS/PMS officers in BPS-19	Rs.59,210/-	Rs.88,815/-
04.	PAS/PCS/PMS officers in BS-18	Rs.38,350/-	Rs.57,525/-
05.	PAS/PCS/PMS officers in BS-17	Rs.30,370/-	Rs.45,550/-

The above allowance will be admissible subject to the following conditions:-

1. It will be admissible to PAS, PCS and PMS officers working against scheduled posts only.
2. Officers of other cadres working against scheduled posts are not entitled to the above allowance.
3. PAS, PCS and PMS officers posted against scheduled post and are in receipt of such allowances other than regular allowances shall be entitled to one of the allowances, whichever is more beneficial.
4. Executive Allowance shall not be counted towards pension and gratuity.
5. Executive Allowance will not be admissible to OSD posts and officers who are on leave reserve posts.

SECRETARY TO GOVERNMENT
OF KHYBER PAKHTUNKHWA
FINANCE DEPARTMENT

ENDST: NO. & DATE EVEN.

1. The Accountant General, Khyber Pakhtunkhwa, Peshawar.
2. Principal Secretary to Chief Minister, Khyber Pakhtunkhwa.
3. Principal Secretary to Governor, Khyber Pakhtunkhwa
4. The Senior Member Board of Revenue.
5. The Additional Chief Secretary FATA.
6. The Additional Chief Secretary P&D Department.
7. The Secretary KP-Public Service Commission, Peshawar.
8. All the Administrative Secretaries to Govt. of Khyber Pakhtunkhwa.
9. All the Divisional Commissioners in Khyber Pakhtunkhwa.
10. All the Deputy Commissioners in Khyber Pakhtunkhwa.
11. All the District Account Officers in Khyber Pakhtunkhwa.
12. Director, FMIU Finance Department.
13. PSO to Chief Secretary, Khyber Pakhtunkhwa, Peshawar
14. Budget Officer-IV, Finance Department.
15. The PS to Secretary Finance Department.
16. The PS to Special Secretary Finance Department
17. The PA to Additional Secretary (Regulations), Finance Department.
18. Master File.

SECTION OFFICER (SR.II)

Master File.

SECTION OFFICER (SR.III)

SECTION OFFICER (SR III)

C 8

To

The Chief Secretary.
Establishment Department.
Khyber Pakhtunkhwa

Subject: **GRANT OF EXECUTIVE ALLOWANCE**

Dear Sir,

It is submitted that Khyber Pakhtunkhwa Services Tribunal vide Service Appeal No.1132/2019 (Muhammad Arshad VS Chief Secretary, Khyber Pakhtunkhwa) has declared non admissibility of Executive Allowance during OSDship as discriminatory and violative of Civil Servants Act 1973, and the Tribunal granted admissibility of Executive Allowance against all OSD posts. The Tribunal ruled that,

> *"Depriving a civil servant from such Allowance(s) for his posting as OSD is highly discriminatory on one hand and part of condition No 5 of the Notification," Executive Allowance will not be admissible to OSD posts is in total violation of second section of Section 10 of the Act ibid.... the portion of the impugned Notification to the effect that executive allowance will not be admissible to OSD posts is declared as null and void "*

2. It is clear from the above mentioned text of the judgment of the Tribunal that the judgment is not the appellant specific, rather it is general in nature applicable to all who are posted as OSD. Moreover, the Government has withdrawn appeal against this judgment from the Supreme Court, so it has attained finality.

3. In the light of the above, it is requested that the undersigned may please be granted executive allowance for a period of 10 months (in two parts) when he was OSD, the record whereof is available with SO(E-1) as per detail given below:-

1. From 8th Feb 2019 to 13th June 2019.
2. From 7th Oct 2021 to 4th March 2022.

Yours faithfully.

5/1/2022

(GHAZANFAR ALI)
PMS, BS-20
Director General,
Commerce Education
& Management Sciences.

C.C:

Section Officer (E-I), Govt: of Khyber Pakhtunkhwa, Establishment Department.

(GHAZANFAR ALI)
PMS, BS-20,

D 9

GOVERNMENT OF KHYBER PAKHTUNKHWA ESTABLISHMENT DEPARTMENT

NO. SO (E-I)E&AD/5-198/20
Dated Peshawar, the July 29, 2022

To

The Secretary to Government of Khyber Pakhtunkhwa,
Finance Department.

SUBJECT: REQUEST FOR EXECUTIVE ALLOWANCE DURING OSD PERIOD.

Dear Sir,

I am directed to refer to the subject noted and to enclose herewith copies of applications received from the following officers for grant of Executive Allowance of their OSD period, on the analogy of Mr. Muhammad Arshad (PCS SG BS-20), for further necessary action:-

Sr. No.	Name of officer & designation	OSD Period	
		From	To
1.	Mr. Barkatullah Khan (PMS BS-20), Special Secretary, E&SE Department	19.04.2019	09.01.2020
		01.10.2021	03.06.2021
2.	Mr. Ghazanfar Ali (PMS BS-20), DG, Commerce Education & Management Science, Khyber Pakhtunkhwa.	08.02.2019	13.06.2019
		07.10.2021	04.03.2022
3.	Mr. Muhammad Rehman (PMS BS-19) Director, PDMA	19.01.2021	08.06.2021
		06.10.2021	10.02.2022
4.	Mr. Maqbool Hussain (PMS BS-18), DS, Industries Department	18.04.2022	23.06.2022

Yours faithfully,

Encls: As above:
(Applications of 04-officers)

29/7/2022

(ZIA-UL-HAQ)
SECTION OFFICER (ESTT.I)
PHONE # 091-9210529

Endst. No. & date even.

Copy of above is forwarded to the following for information:-

1. Mr. Barkatullah Khan (PMS BS-20), Special Secretary, E&SE Department.
2. Mr. Ghazanfar Ali (PMS BS-20), DG, Commerce Education & Management Science, Khyber Pakhtunkhwa.
3. Mr. Muhammad Rehman (PMS BS-19) Director, PDMA.
4. Mr. Maqbool Hussain (PMS BS-18), DS, Industries Department.

29/7/2022

E 10

BEFORE THE KHYBER PAKHTUNKHWA SERVICES TRIBUNAL, PESHAWAR.

Service Appeal No. ------1139------ of 2019

Mohammad Arshad, Additional Secretary, Inter-Provincial Coordination Department at Mian Rashid Hussain Shaheed Memorial Block, Civil Secretariat, Peshawar Cantonment ---------- Appellant.

VERSUS

1. The Provincial Government through Chief Secretary, Khyber Pakhtunkhwa, Peshawar.
2. The Chief Secretary, Khyber Pakhtunkhwa, Peshawar.
3. The Secretary Establishment Department, Khyber Pakhtunkhwa, Peshawar.
4. The Secretary, Finance Department, Khyber Pakhtunkhwa, Peshawar ---------- Respondents.

APPEAL UNDER SECTION-4 OF THE KHYBER PAKHTUNKHWA SERVICES TRIBUNAL ACT, 1974 (KHYBER PAKHTUNKHWA ACT NO. I OF 1974) AGAINST THE NON-PAYMENT/STOPPAGE OF EXECUTIVE ALLOWANCE FROM 19.11.2018 TO 19.03.2019, CONTAINED IN THE MONTHLY SALARY STATEMENTS FOR DECEMBER, 2018, JANUARY, FEBRUARY, APRIL, 2019 AND PAY PREPARED ON THE BASIS OF FINANCE DEPARTMENT NOTIFICATION DATED 02.02.2018.

Prayer: **The part of the condition No. 5 of the Finance Department notification dated 02.02.2018 i.e. "Executive Allowance will not be admissible to OSD posts", being ultra-vires of second proviso to section 10 of the Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVIII of 1973), therefore, illegal, void ab-initio, may be expunged from the notification and the Respondents may be directed to make payment to the Appellant of un-paid Executive Allowance for the period from 19.11.2018 to 19.03.2019.**

Respectfully sheweth that:-

Facts of the Case

1. The Government of Khyber Pakhtunkhwa, Establishment Department has ordered the posting/transfer of the appellant from Director (Admn. & Finance), Provincial Services Academy, Khyber Pakhtunkhwa to Establishment Department vide notification No. SO(E-I)/E&AD/1-1/2018 dated 13.11.2018 **(Annex-I)**.
2. The appellant has relinquished the charge of the former post on 19.11.2018 (FN) and submitted arrival report on 19.11.2018 (FN) in the Establishment Department **(Annex-II)**.
3. The appellant as per Last Pay Certificate (LPC) issued by the Provincial Services Academy was entitled to draw Executive Allowance at the rate of Rs. 88815/- per month **(Annex-III)**.

ATTESTED

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Peshawar

BEFORE THE KHYBER PAKHTUNKHWA SERVICES TRIBUNAL
PESHAWAR.

Service Appeal No. 1132 of 2019

Mohammad Arshad, Additional Secretary, Inter-Provincial, Coordination Department at Mian Rashid Hussain Shaheed Memorial Black, Civil Secretariat. Peshawar Cantonment.....Appellant

VERSUS

1. The Provincial Government through Chief Secretary, Pakhtunkhwa, Peshawar.
2. The Chief Secretary, Khyber Pakhtunkhwa, Peshawar.
3. The Secretary Establishment Department, Khyber Pakhtunkhwa Peshawar.
4. The Secretary, Finance Department, Khyber Pakhtunkhwa Peshawar.....Respondents.

APPEAL UNDER SECITON-4 OF THE KHYBER PAKHTUNKWHA SERVICES TRIBUNAL, ACT, 1974 (KHYBER PAKHTUNKHWA ACT NO. 1 OF 1974) AGAINST THE NON-PAYMENT/STOPPAGE OF EXECUTIVE ALLOWANCE FROM 19.11.2018 TO 19.03.2019, CONSTRAINED IN THE MONTHLY SALARY STATEMENTS FOR DECEMBER, 2018. JANUARY, FEBRUARY, APRIL, 2019 AND PAY PREPARED ON THE BASI OF FINANCE DEPARTMENT NOTIFICAIOTN DATED 02.02.2018.

Prayer: The part of the condition No. 5 of the Fiancé Department notification dated 02.03.2018 i.e. "Executive Allowance will not be admissible in OSD posts", being ultra-vires of second provision to section 10 of the Civil Servants Act, 1973 (Khyber Pakhtunkhwa Act No. XVII of 1973), therefore, illegal, void ab-initio, may be expunged from the notification and the Respondent may be directed to make payment to the Appellant of un-paid Executive Allowance for the period from 19.11.2018 to 19.03.2019.

Respectfully Sheweth that:-

Facts of the Case

1. The Government of Khyber Pakhtunkhwa, Establishment Department has ordered the posting/transfer of the appellant from Director (Admn. & Finance). Provincial Services Academy, Khyber Pakhtunkhwa to Establishment Department vide notification No. SO(E-I)/E&DA/1-12018 dated 13.11.2018 **(Annex-I).**
2. The appellant has relinquished the charge of the former post on 19.11.2018 (FN) and submitted arrival report on 19.11.2018 (FN) in the (FN in the Establishment Departmental **(Annex-II).**
3. The appellant as per Last Pay Certificate (LPC) issued by the Provincial Services Academy was entitled to draw Executive Allowance at the rate of Rs. 88815/- per month **(Annex-III)**

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No.1132/2019

Date of Institution ... 06.09.2019
Date of Decision ... 09.06.2021

Mr. Muhammad Arshad Additional Secretary Inter-provincial Coordination Department at Mian Rashid Hussain Shaheed Memorial Block Civil secretariat Peshawar Cantonment.

... (Appellant)

VERSUS

The Provincial Government through Chief Secretary Education and three others.

... (Respondents)

MUHAMMAD ARSHAD
Appellant ... In Person

MR. RIAZ AHMAD PAINDAKHEIL
Assistant Advocate General ... For Respondents

MR. SALAH-UD-DIN ... MEMBER (J)
MR. ATIQ UR REHMAN WAZIR ... MEMBER (E)

JUDGMENT: -

Mr. ATIQ UR REHMAN WAZIR: - Brief facts of the case are that the appellant while posted as OSD in Establishment Department for almost five months was kept deprived of the executive allowance in light of Finance Department Notification dated 02-02-2018, which bars executive allowance to OSD posts. The appellant chalienged the said clause of the notification in a departmental appeal dated 15-05-2019, which was processed and forwarded to Finance Department for necessary action, but the appellant was not apprised of

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any decision within the stipulated time period, hence the appellant filed the instant appeal with prayers that part of condition No. 5 of the Finance Department Notification dated 02-02-2018 i.e. "Executive allowance will not be admissible to OSD posts", being ultra-vires of second proviso to Section 10 of the Civil Servant Act, 1973(Khyber Pakhtunkhwa Act No XVIII of 1973), therefore, illegal, void ab-initio, may be expunged from the notification and the respondents may be directed to make payment to the appellant of un-paid executive allowance for the period from 19-11-2018 to 19-03-2019.

02. Written reply/comments were submitted by respondents.

03. While challenging vires of Finance Department Notification dated 02-02-2018, the appellant Pro se argued the case and contended that this Tribunal has got jurisdiction to entertain the appeal of the appellant and referred to the judgment of Supreme Court of Pakistan reported in 1991 SCMR 1041, which allows a civil servant to file appeal before the Service Tribunal, if a statutory rule or a notification adversely affects the terms and conditions of a civil servant. The appellant contended that since part of condition No 5 of the said notification adversely affect pay/allowances of the appellant, and the fact cannot be denied that pay/allowance does come under the definition of terms and conditions of service, therefore, this Tribunal has got jurisdiction to entertain the instant appeal. The appellant further added that such condition of the impugned notification is in total contravention to second proviso of Section 10 of the Civil Servant Act, 1973, which is ultra-vires of the basic law, illegal and void ab-initio. The appellant further argued that where an executive order/notification and clause of an Act are in contradiction to each other, provisions of the Act would prevail. The appellant contended that the OSD post (BPS-19), against which salary of the appellant has been drawn is not the

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service/cadre post of the appellant, as nowhere OSD post is included in the category of posts mentioned in the Schedule of posts appended to the Khyber Pakhtunkhwa, Provincial Civil Service (Secretariat Group) Rules, 1997, hence he is entitled to receive the executive allowance in view of Section- 10 of the Act ibid. On the question of limitation, the appellant accentuated that his appeal is otherwise well in time but he also referred to judgments of Supreme Court of Pakistan in 2006 PLC (CS) 1124 and 1995 PLC (CS) 1026, wherein it has been held that pay and allowances being continuous cause of action are not hit by limitation. The appellant prayed that in view the mentioned facts, part of condition No. 5 of the Finance Department Notification dated 02-02-2018 i.e. *Executive allowance will not be admissible to OSD post*, being ultra-vires of second proviso to Section 10 of the Civil Servant Act, 1973, therefore , illegal, void ab-initio, may be expunged from the notification and the respondents may be directed to make payment of un-paid executive allowance to the appellant for the period from 19-11-2018 to 19-03-2019.

04. Learned Assistant Advocate General appeared on behalf of official respondents contended that the appellant has challenged vires of a notification issued on 02-02-2018, whereas he preferred departmental appeal on 05-09-2019, which is barred by time. That the officer was never posted outside the cadre post, rather posting of an officer as OSD is merely a temporary arrangement and second proviso to Section 10 of the Act is not applicable in his case. Learned Assistant Advocate General further added that the appellant did not perform any duty during the period and such allowance is only admissible to the officers, who are actually working against the post of Schedule-II of PMS Rules, 2007. Learned Assistant Advocate General added that policy making is the domain and discretion of the competent authority,

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which cannot be challenged. Reliance was placed on CA No. 827/2020. Learned Assistant Advocate General prayed that the instant appeal being devoid of merit may be dismissed.

05. Arguments heard and record perused.

06. The question of jurisdiction is taken up first for consideration. The appellant is seeking entitlement to the executive allowance and it is well settled that allowance of any type is covered by the term pay, which come under terms and condition of service of a civil servant, regarding which, the Judgment of worthy Supreme Court of Pakistan reported as 1991 SCMR 1041 is very clear. The relevant portion of the same is reproduced as under:

" From the above-cited cases, it is evident that it has been consistently held interalia by this court that a civil servant if is aggrieved by a final order, whether original or appellate, passed by a departmental authority in respect of his terms and conditions, his remedy, if any, is by way of an appeal before the Service Tribunal even where the case involves vires of a particular Service Rule or a Notification or the question, whether an accused civil servant can claim the right to be represented by a counsel before the inquiry officer. We are inclined to hold that if a statutory rule or notification adversely affects the terms and conditions of a civil servant, the same can be treated as an order in terms of sub-section (1) of Section 4 of the Act in order to file an appeal before Service Tribunal".

07. Furthermore, this Tribunal has already entertained and decided a Service Appeal No. 868/2019 announced by a larger bench of this Tribunal on 14-01-2021, where the appellant had challenged vires of Service Rules, adversely affecting terms and conditions of his service and which was supported by judgments of Supreme Court of Pakistan in 1991 SCMR 1041, PLD 2004 SC 317, 2002 PLC (CS) 94, 2012 PLC (CS)1211, 2018 PLC (CS) 40,

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2019 PLC (CS)995 and PLD 1980 SC 153. We are thus sure that this Tribunal is vested with the jurisdiction to entertain the instant appeal.

08. Now the question of limitation is taken up for discussion. The contention of the learned assistant advocate general that departmental appeal of the appellant is barred by time, does not hold any force, as the notification in question was general in nature and not specific for the appellant. When part of condition No. 5 of the said notification started adversely affecting pay/allowances of the appellant, he preferred departmental appeal, which was well within time. Moreover, the question relating to pay and allowances being recurring cause of action, therefore, fresh cause of action accrues to a civil servant on receipt of salary of each month. It is thus held that the departmental appeal as well as the instant service appeal of the appellant are within time.

09. Now the moot question as to whether the appellant is entitled to receive executive allowance, while serving against OSD post, is taken up for discussion. In order to appreciate the controversy properly, it would be advantageous to reproduce the second proviso of Section 10 of Civil Servant Act, 1973, which is as under:

"Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which he would have been entitled if he had not been so required to serve".

10. Placed on record is a notification dated 26-06-1997 showing eleven categories of posts in BPS-19 pertaining to the service/cadre of the appellant, but the post of OSD is nowhere mentioned in the schedule of posts. Schedule-II of PMS Rules, 2007 as mentioned by respondents in their comments was

ATTESTED

EXAMINER
Khyber Pakhtunkhwa
Service Tribunal
Peshawar

also checked, which contains 13 categories of posts in BPS-19, but no mention of the post of OSD. It is thus clear that upon the order of the competent authority, the appellant was required to serve on a post outside his service or cadre, therefore in light of second proviso of the Act ibid, the appellant is well within his right to claim the payment of executive allowance, as he would have been entitled to payment of the same, had he been posted on a post within his service or cadre. Contention of the learned Assistant Advocate General to the effect that OSD is a temporary arrangement and the officer did not actually perform any duty, therefore, he is not entitled to executive allowance, is misconceived for the reason that had such contention being true, then the appellant would not have been found entitled to other allowances already included in his pay. Since it was not the choice and willingness of the appellant to be posted as OSD, therefore, he cannot be legally deprived of the payment of executive allowance. In these circumstances, the impugned part of condition No 5 to the effect that executive allowance will not be admissible to OSD posts being in derogation of second proviso to Section 10 of the Civil Servant Act, 1973 is liable to be struck down, particularly for the reason that the Act is having overriding effect on any executive order/notification. It is further clarified that salary of the appellant contains basic pay, qualification pay and almost ten allowances including the executive allowance and depriving a civil servant from such allowance(s) on his posting as OSD is highly discriminatory on the one hand and part of the condition No 5 of the notificaton i.e. "Executive allowance will not be admissible to OSD posts" is in total violation of the second proviso of Section 10 of the Act ibid.

11. In view of the foregoing discussion, the instant appeal is allowed and the portion of the impugned notification to the effect that executive allowance

ATTESTED

Also checked, which contains 13 categories of posts in 2015-16 but no mention of the post of OSD. It is thus clear that upon the order of the competent authority, the appellant was required to serve on a post outside his service or order, therefore in light of second proviso of the Act Ibid, the appellant is well within his right to claim the payment of executive allowance, as he would have been entitled to payment of the same, had he been posted on a post within his service or cadre. Contention of the learned Assistant Advocate General to the effect that OSD is a temporary arrangement and the officer did not actually perform any duty, there, he is not entitled to executive allowance, is misconceived for the reason that had such contention being true, then the appellant would not have been found entitled to other allowances already included in his pay. Since it was not the choice and willingness of the appellant to be posted as OSD, therefore, he cannot be legally deprived of the payment of executive allowance. In these circumstances, the impugned part of condition No. 5 to the effect that executive allowance will not e admissible to OSD posts being in derogation of second proviso to section 10 of the Civil Servant Act, 1973 is liable to be struck down, particularly for the reason that the Act is having overriding effect on any executive order/notification. It is further clarified that salary of the appellant contains basic pay, qualification pay and almost ten allowances including the executive allowance and depriving a civil servant corm such allowance(s) on is posting as OSD is highly discriminatory on the one hand and part of the condition No. 5 of the notification i.e. "Executive allowance will not be admissible to OSD posts" is in total violation of the second proviso of Section 10 of the Act Ibid.

11. In view of the foregoing discussion, the instant appeal is allowed and the portion of the Impugned notification to the effect that executive allowance

will not be admissible to OSD posts is declared as null and void. The appellant is held entitled to payment of the executive allowance for the period from 19-11-2018 to 19-03-2019 with all consequential benefits if any. No orders as to costs. File be consigned to record room.

ANNOUNCED
09.06.2021

(SALAH-UD-DIN)
MEMBER (JUDICIAL)

(ATIQ UR REHMAN WAZIR)
MEMBER (EXECUTIVE)

Certified to be ture copy
Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

Date of Presentation of Application 11-06-2021
Number of Words 3200
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Urgent —
Total 34.00
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Date of Complection of Copy 18-06-2021
Date of Delivery of Copy 18-06-2021

F 18

GOVERNMENT OF KHYBER PAKHTUNKHWA
FINANCE DEPARTMENT
(REGULATION WING)

Dated Peshawar the 5th July, 2022

NOTIFICATION

NO. SO(SR-IV)/FD/1-1/Executive Allowance (Muhammad Arshad)/2022: In pursuance of judgment of Services Tribunal Khyber Pakhtunkhwa on 09-06-2021 in execution petition No-166/22 in service appeal No- 1132/19 case titled Mr. Muhammad Arshad v/s Govt. of Khyber Pakhtunkhwa and upon decision of Provincial Cabinet in its meeting held on 13-06-2022, the Government of Khyber Pakhtunkhwa has been pleased to allow Executive Allowance to the officer i.e. Muhammad Arshad for the period he remained OSD with effect from 19.11.2018 to 19.03.2019.

2- The said benefits shall, however, be specific to the petitioner and shall not be treated/quoted as precedent.

Secretary to Govt. of Khyber Pakhtunkhwa
Finance Department

Endst: No & date even

Copy of the above is forwarded the:-

1- The Accountant General, Khyber Pakhtunkhwa.
2- Secretary to Government of Khyber Pakhtunkhwa Establishment Department.
3- The Director FMIU, Finance Department with the request to upload the same on Finance Department website.
4- The Director, Staff Training Institute (STI) E&A Department.
5- The Principal Secretary to Chief Minister Khyber Pakhtunkhwa
6- PSO to Chief Secretary Khyber Pakhtunkhwa.
7- Registrar, Services Tribunal Khyber Pakhtunkhwa Peshawar.
8- The Section Officer (Cabinet) Government of Khyber Pakhtunkhwa Establishment & Administration Department with reference to his letter No- SOC (E&AD) 9-74/2022 dated 20th June, 2022.
9- PS to Secretary to Government of Khyber Pakhtunkhwa Finance Department.
10- PS to Special Secretary (A & R), Finance Department.
11- PS to Special Secretary (Budget), Finance Department.
12- PA to Additional Secretary (Reg) Finance Department.
13- PA to Deputy Secretary (Reg-I) Finance Department.
14- Master File.

(MAQSOOD KHAN)
SECTION OFFICER (SR. IV)

1 of 1

VAKALAT NAMA

NO. _____ 2022

IN THE COURT OF KP Service Tribunal Peshawar

Ghazanfar Ali (Appellant) (Petitioner) (Plaintiff)

VERSUS

Govt: of KP etc (Respondent) (Defendant)

I/We, Ghazanfar Ali

Do hereby appoint and constitute *Taimur Ali Khan, Advocate High Court Peshawar,* to appear, plead, act, compromise, withdraw or refer to arbitration for me/us as my/our Counsel/Advocate in the above noted matter, without any liability for his default and with the authority to engage/appoint any other Advocate/Counsel on my/our costs.

I/We authorize the said Advocate to deposit, withdraw and receive on my/our behalf all sums and amounts payable or deposited on my/our account in the above noted matter. The Advocate/Counsel is also at liberty to leave my/our case at any stage of the proceedings, if his any fee left unpaid or is outstanding against me/us.

Dated _____/2022

Ghazanfar 5/10/2022
(CLIENT)

ACCEPTED

TAIMUR ALI KHAN
Advocate High Court
BC-10-4240
CNIC: 17101-7395544-5
Cell No. 0333-9390916