

**KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

BEFORE: **KALIM ARSHAD KHAN ... CHAIRMAN**
FAREEHA PAUL ... MEMBER (Executive)

SCANNED
KPST
Peshawar

Service Appeal No.7354/2021

Date of Institution.....25.08.2021
Date of Hearing.....08.12.2022
Date of Decision.....08.12.2022

Mr. Falak Niaz, Assistant Director BS-17, Directorate of Science & Technology, ST & IT Department Government of Khyber Pakhtunkhwa.

.....*Appellant*)

Versus

1. **The Government of Khyber Pakhtunkhwa** through Chief Secretary Civil Secretariat, Peshawar.
2. **The Secretary** to Government of Khyber Pakhtunkhwa Establishment Department, Civil Secretariat Peshawar.
3. **The Secretary** to Government of Khyber Pakhtunkhwa ST & IT Department, Civil Secretariat Peshawar.
4. **The Director Science & Technology**, Directorate of Science & Technology, Government of Khyber Pakhtunkhwa.
5. **Mr. Muhammad Akif Khan**, Assistant Director (BPS-17), Directorate of Science and Technology.....(*Respondents*)

Present:

Falak Niaz,
Appellant.....In Person.

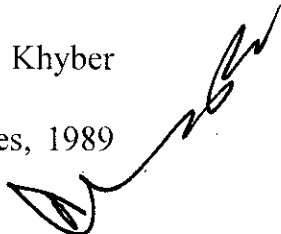
Mr. Muhammad Riaz Khan Paindakhel,
Assistant Advocate General.....For respondents.

APPEAL UNDER SECTION-4 OF THE SERVICE TRIBUNAL ACT, 1974, AGAINST THE IMPUGNED FINAL SENIORITY LIST OF ASSISTANT DIRECTORS BS-17 AND NETWORK MANAGER BS-17 DATED 10.03.2021 BEING ILLEGAL AND WRONG WHEREIN THE APPELLANT WAS DROPPED FROM SENIORITY NO.2 TO SENIORITY NO.3 AND AGAINST NOT TAKING ACTION ON THE DEPARTMENTAL APPEAL OF THE APPELLANT WITHIN THE STATUTORY PERIOD OF THE NINETY DAYS.

JUDGMENT

KALIM ARSHAD KHAN CHAIRMAN: This appeal is against the final seniority list of Assistant Directors BS-17 and Network Managers BS-17 dated 10.03.2021, whereby the appellant was allegedly dropped from seniority No.2 to seniority No.3.

2. The facts, as narrated in the appeal, are that on the recommendations of the Khyber Pakhtunkhwa Public Service Commission, the appellant was appointed as Assistant Director (BS-17) in the Directorate of Science and Technology, on regular basis, in the year 2015; that Khyber Pakhtunkhwa Establishment of Information Technology Board (Amendment) Act, 2018 was promulgated and according to section 3 of the Act, the Directorate of Information Technology, ceased to be an attached department of the Science and Technology and Information Technology Department of the Government and was merged into the Board; that all the civil servants serving in the Directorate of Information Technology were given option either to continue as civil servants or they might opt for the employment of the board and such option was to be exercised within thirty days of the commencement of the Act; that the employees who did not opt for their absorption in the board were to be absorbed in the Directorate of Science & Technology and they could continue to be governed and regulated in accordance with the Khyber Pakhtunkhwa Civil Servants Act, 1973 and the Rules made thereunder; that before absorption i.e. promulgation of the Act of 2018, the appellant had already been the employee of the Directorate of Science & Technology, where separate seniority list was maintained; that, section 8 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 and rule 17 of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion & Transfer) Rules, 1989



gave protection of seniority to the appellant, which, according to the appellant, were silent regarding determination of seniority of the absorbed employees, whereas as per the Establishment & Administration Department (Regulation Wing) Letter No. SOR-I(E&AD)1-200/98 dated 08.06.2001 "Policy for Declaring Government Servant as Surplus and their subsequent absorption/adjustment, although the employees of the erstwhile Directorate of Information Technology were not declared surplus but still Government of Khyber Pakhtunkhwa Surplus Pool Policy para-6 clause (a to d) would be followed while determining seniority of the absorbed employees; that any backdated seniority could not be granted to the absorbed employee and his inter-se seniority, on absorption, was required to be maintained at the bottom; that the private respondent Muhammad Akif Khan was appointed as Assistant Director (BS-17) on 07.04.2014 and was later on absorbed in the Directorate of Science and Technology; that rule 17(3) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion & Transfer) Rules, 1989 states that the seniority inter-se of civil servants (appointed to a service, cadre or post) shall be determined "*in the event of merger/restructuring of the departments, attached departments or subordinate offices, the inter se seniority of civil servants affected by merger/restructuring as aforesaid shall be determined in accordance with the date of their regular appointment to a cadre or post*"; that the mentioned rule 17(3) was not applicable in the instant case because the private respondent was initially appointed in the Directorate of Information Technology (DOIT), the merger/restructuring of erstwhile Directorate of Information Technology took place with the Khyber Pakhtunkhwa Information Technology Board and not with the Directorate of Science & Technology and only employees of Ex-DOIT, who had given written option for absorption, were absorbed in the Directorate of Science & Technology; so in the instant case policy of absorption would apply for the purpose of determination of seniority; that the private respondent Muhammad

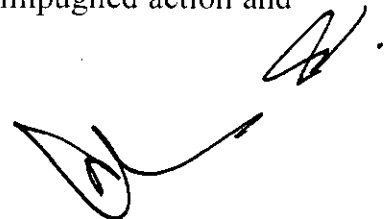
Akif Khan was placed at serial No.1 in the tentative seniority list (16.01.2020) of Assistant Directors & Network Administrators without keeping in view the impugned legislation and absorption of an employee would deprive the seniority and progression of career of meritorious civil servants; that the appellant challenged the tentative seniority list; that in a meeting, the final seniority of BS-17 was discussed and rectified and a corrected seniority list was issued on 12.06.2020, wherein the appellant was placed at his proper place, S.No.2, but on an observation of the Secretary Establishment, the final seniority list was issued on 10.03.2021, relegating the appellant in seniority by placing him at serial No.3 and placing respondent No.5 at serial No.1; that the appellant filed departmental appeal on 22.03.2021 for rectification of the seniority list and on receiving no response from the department, he filed this appeal.

3. On receipt of the appeal and its admission to full hearing, the respondents were summoned. Respondents put appearance and contested the appeal by filing written reply raising therein numerous legal and factual objections. The defence setup was a total denial of the claim of the appellant.

4. We have heard the appellant in person and learned law officer for the respondents.

5. Reiterating the facts and the grounds urged in the memorandum and grounds of appeal, it was contended by the appellant that the impugned actions by the respondents were not justified and it was prayed that the same might be set aside restoring the seniority of appellant as prayed by him in his appeal.

6. On the other side the learned law officer defended the impugned action and prayed for dismissal of the appeal.



7. Admittedly on promulgation and commencement of the Khyber Pakhtunkhwa Establishment of Information Technology Board (Amendment) Act, 2018, vide Section-3A status of Directorate of Information Technology employees was dealt with. Relevant part of section 3A is reproduced as under:

"Insertion of new section in the Khyber Pakhtunkhwa Act No. XI of 2011, --In the said Act, after section 3, the following new section 3A shall be inserted namely:

"3A Status of the Directorate of information Technology and its employees. On commencement of the Khyber Pakhtunkhwa establishment of Information Technology Board (Amendment) Act, 2018,-

(i).....

(ii).....

(iii) All the civil servants serving in Directorate of Information Technology, shall be given an option, either to continue to serve as civil servant or may opt for the employment of the Board. The option shall be exercised within a period of thirty days after the commencement of the Khyber Pakhtunkhwa Establishment of Information Technology Board (Amendment) Act, 2018. Those employees, who do not opt for their absorption in the Board, shall be absorbed in the Directorate of Science and Technology where they can continue to be governed and regulated in accordance with the Khyber Pakhtunkhwa Civil Servants Act, 1973 and the rules made there under;"

8. Clause(iii) of the above section is very much clear regarding governance and regulation of the employees, who did not opt for their absorption in the Board and they were to be absorbed in the Directorate of Science and Technology where they were to be governed and regulated in accordance with the Khyber Pakhtunkhwa Civil Servant Act, 1973 and the rules made thereunder.

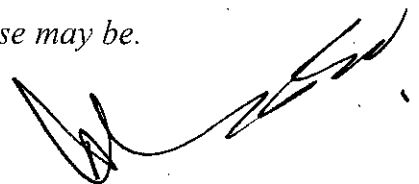
9. There is no denying the fact that both the appellant and private respondent were initially recruited as Assistant Directors BS-17, on the recommendation of the Khyber Pakhtunkhwa Public Service Commission. The appellant was appointed on 20.11.2015 while the private respondent was appointed on 07.04.2014.

10. The contention of the appellant is that he, being already employed in the Science and Technology and Information Technology, Khyber Pakhtunkhwa, was

to rank senior on absorption of private respondent from another department to his department, irrespective of the fact whether private respondent No.5 was appointed earlier than the appellant. He relied on the surplus pool policy of the government notified vide No. SOR-I(E&AD)1-200/98 dated 08.06.2001. But clause (iii) of Section 3A of the Act of 2018 has required that the services of the absorbed civil servant would be governed and regulated in accordance with the Khyber Pakhtunkhwa Civil Servants Act, 1973 and the rules made thereunder, therefore, reliance of the appellant on the surplus pool policy and his contending that seniority of private respondent would be determined on the analogy of the surplus pool policy, is totally misconceived, irrelevant and unjustified for the reason that , when the Act of 2018 has required regulation and governance of services of the absorbed employees under the Khyber Pakhtunkhwa Civil Servants Act, 1973 and the rules made thereunder then we have to see the case under the provisions of Section-8 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 and Rule-17 of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules 1989 and we cannot look the matter in correlation to the surplus pool policy as contended by the appellant.

11. Section-8 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 pertains to Seniority and is reproduced below:

8. (1) For proper administration of service, cadre or 2[post] the appointing authority shall cause a seniority list of the members for the time being of such service cadre or 3[post] to be prepared but nothing herein contained shall be construed to confer any vested right to a particular seniority in such service, cadre or 4[post] as the case may be.



(2) Subject to the provisions of sub-section (1), the seniority of a civil servant shall be reckoned in relation to other civil servants belonging to the same service or 5[cadre] whether serving in the same department or office or not, as may be prescribed.

(3) Seniority on initial appointment to a service, 6[Cadre] or post shall be determined as may be prescribed.

7[(4) Seniority in a post, service or cadre to which a civil servant is promoted shall take effect from the date of regular appointment to that post:

12. Similarly Rule-17 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 is also reproduced as under:

17. Seniority :- (1) the seniority inter se of civil servants (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 for 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) 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) 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.

Provided that if the date of regular appointment of two or more civil servants in the lower post is the same, the civil servant older in age, shall be treated senior.

13. In the absence of any specific provision in the Act of 2018 regarding fixation of seniority of the absorbed employees vis-à-vis the employees already working in the department/institution, where the employees are being absorbed, coupled with the fact that the appellant as well as private respondent No.5, both, were initially recruited in BS-17 as Assistant Director, on the recommendation of the Khyber Pakhtunkhwa Public Service Commission but obviously in different selection processes, the private respondent being selectee of the earlier selection while the appellant being selectee of the later selection. In such a situation clause (a) sub-rule (1) and sub-rule(3) of Rule-17of the above Rules, would come into play. According to clause (a) of sub-rule (1),the persons selected in an earlier



selection shall rank senior to the persons selected in later selection. The private respondent, admittedly, being selectee of the earlier is thus to rank senior to the appellant and was rightly placed senior. Similarly, sub-rule (3) of rule 17 also requires that 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. Both the appellant and the private respondent are regular employees having been appointed on the recommendations of the Khyber Pakhtunkhwa Public Service Commission but, as aforesaid, through different selection processes and on different dates but fact remains that both were appointed as Assistant Directors in BS-17. The regular appointment of the private respondent was made in the year 2014 while that of the appellant was made in the year 2015, therefore, the seniority of the appellant and of the private respondent was correctly determined. Reliance is placed on 1998 SCMR 633 titled "Zahid Arif versus Government of NWFP etc", wherein the august Supreme Court of Pakistan held as under:

"---R. 17(a)---Constitution of Pakistan (1973), Art. 212(3)---Seniority-- Appointment of civil servant to post in later selection---Petitioner's name had been placed next to respondents although he had been placed higher on merit list than respondents---Civil servant's appeal against seniority list had been dismissed mainly on the ground that respondents being nominees for first batch were to rank higher than civil servant on account of their initial selection---Rule 17(a), North-West Frontier Province (Appointment, Promotion and Transfer) Rules, 1989, provided that person selected for appointment to post in earlier selection would rank senior to person selected in later selection---"


Similarly in 1996 PLC (CS) 85 titled "Dr Badshah Gul versus Prof. Dr Shafiq Ahmad and 19 others", the august Supreme Court was pleased to have found that holding of post and continuous regular appointment to that post was determining

factor for inter se seniority. It was added that, when two different teaching institutions wherein doctors were employed, were amalgamated and merged together....After merger of two institutions inter se seniority was to be determined amongst the doctors teaching in both the institutions---Post would, therefore, be the determining factor for deciding inter se seniority between civil servants holding the same post. As mentioned above, both the appellant and the private respondent are holder of the same post and grade, the private respondent being selected and appointed earlier than the appellant, would rank senior after merger and in view of the provisions of section 3A of the Act of 2018 by way of which the services of the absorbed employees were to be governed and regulated by the Khyber Pakhtunkhwa Civil Servants Act, 1973 and the rules made thereunder.

14. This being so this appeal has no merits and is, therefore, dismissed. We direct that the costs shall abide by the result of this appeal. Consign.

15. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 8th day of December, 2022.*


KALIM ARSHAD KHAN
Chairman


FAREEHA PAUL
Member (Executive)

ORDER


8th Dec, 2022

1. Appellant in person present. Mr. Muhammad Riaz Khan Paindakhel, Asst: AG for respondents present.

2. Vide our detailed judgement of today placed on file, this being so this appeal has no merits and is, therefore, dismissed. We direct that the costs shall abide by the result of this appeal. Costs shall follow the event. Consign.

3. *Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal on this 8th day of December, 2022.*


(Kalim Arshad Khan)
Chairman


(Fareeha Paul)
Member(Execution)


08.11.2022


Counsel for the appellant present.

Naseer Ud Din Shah learned Assistant Advocate General
for the respondents present.

Learned counsel for the appellant requested for
adjournment in order to further prepare the brief. Adjourned. To
come up for arguments on 08.12.2022 before D.B.

SCANNED
KPST
Reshawan


(Fareeha Paul)
Member (E)


(Rozina Rehman)
Member (J)

07.04.2022

Appellant along with his Counsel present. Mr. Kabirullah Khattak Adl. AG alongwith Mr. Iftikhar Ali (Supdt) for respondents present and submitted written reply/comments, which is placed on file. To come up for arguments before D.B on 11.07.2022.



Chairman

11-7-2022

Due to holidays of Eid Ul Azha
the case is adjourned to 14-10-2022

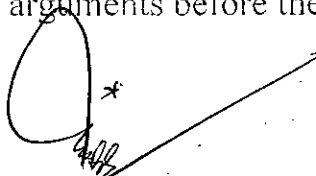


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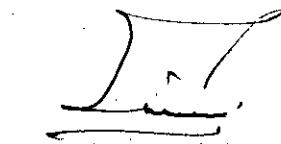
14.10.2022

Clerk of learned counsel for the appellant present. Mr. Iftikhar Ali, Superintendent alongwith Mr. Kabirullah Khattak, Additional Advocate General for the respondents present.

Clerk of learned counsel for the appellant requested for adjournment on the ground that learned counsel for the appellant is not available today due to strike of lawyers. Adjourned. To come up for arguments before the D.B on 08.11.2022.



(Mian Muhammad)
Member (E)



(Salah-ud-Din)
Member (J)

09.11.2021

Counsel for the appellant present. Preliminary arguments have been heard.

SCANNED
KPST
Peshawar

This appeal pertaining to seniority is admitted for regular hearing, subject to all just and legal objections, including limitation. The appellant is directed to deposit security and process fee within 10 days. Thereafter, notices be issued to the respondents for submission of written reply/comments in office within 10 days after receipt of notices, positively. If the written reply/comments are not submitted within the stipulated time, or extension of time is not sought through written application with sufficient cause, the office shall submit the file with a report of non-compliance. File to come up for arguments on 23.12.2021 before the D.B.

Appellant Deposited
Security & Process Fee

23.12.2021

Counsel for the appellant and Mr. Muhammad Adeel Butt, Addl. AG for official respondents present. None present on behalf of private respondent No. 5 hence proceeded against ex-parte.

The respondents have not furnished reply/comments. Learned AAG seeks further time to contact them. Let the respondents be afforded with last chance to furnish reply/comments on or before next date with the warning that in case they fail to submit the written reply/comments their right for reply/comments shall be deemed as struck off by virtue of this order. Case to come up for arguments on 07.04.2022 before the D.B.



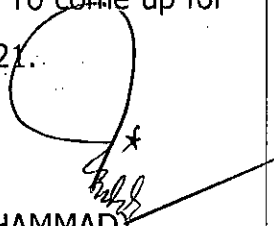
Chairman

Form- A

FORM OF ORDER SHEET

Court of _____

Case No.- 7354 /2021

S.No.	Date of order proceedings	Order or other proceedings with signature of judge
1	2	3
1-	30/08/2021	<p>The appeal of Mr. Falak Niaz resubmitted today by Syed Noman Ali Bukhari Advocate may be entered in the Institution Register and put up to the Worthy Chairman for proper order please.</p> <p style="text-align: right;"> REGISTRAR</p>
2-	22.10.2021	<p>This case is entrusted to S. Bench for preliminary hearing to be put up there on <u>22/10/21</u>.</p> <p style="text-align: right;"> CHAIRMAN</p> <p>Learned counsel for the appellant present.</p> <p>Learned counsel for the appellant requests for adjournment on the ground that he has not prepared the brief. To come up for preliminary hearing before the S.B on <u>09/11/2021</u>.</p> <p style="text-align: right;"> (MIAN MUHAMMAD) MEMBER (E)</p>

**BEFORE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR
CHECK LIST**

Case Title: _____ vs _____

S.#	Contents	Yes	No
1.	This appeal has been presented by: _____		
2.	Whether Counsel / Appellant / Respondent / Deponent have signed the requisite documents?		
3.	Whether Appeal is within time?		
4.	Whether the enactment under which the appeal is filed mentioned?		
5.	Whether the enactment under which the appeal is filed is correct?		
6.	Whether affidavit is appended?		
7.	Whether affidavit is duly attested by competent oath commissioner?		
8.	Whether appeal/annexures are properly paged?		
9.	Whether certificate regarding filing any earlier appeal on the subject, furnished?		
10.	Whether annexures are legible?		
11.	Whether annexures are attested?		
12.	Whether copies of annexures are readable/clear?		
13.	Whether copy of appeal is delivered to A.G/D.A.G?		
14.	Whether Power of Attorney of the Counsel engaged is attested and signed by petitioner/appellant/respondents?		
15.	Whether numbers of referred cases given are correct?		
16.	Whether appeal contains cuttings/overwriting?		
17.	Whether list of books has been provided at the end of the appeal?		
18.	Whether case relate to this Court?		
19.	Whether requisite number of spare copies attached?		
20.	Whether complete spare copy is filed in separate file cover?		
21.	Whether addresses of parties given are complete?		
22.	Whether index filed?		
23.	Whether index is correct?		
24.	Whether Security and Process Fee deposited? on _____		
25.	Whether in view of Khyber Pakhtunkhwa Service Tribunal Rules 1974 Rule 11, notice along with copy of appeal and annexures has been sent to respondents? on _____		
26.	Whether copies of comments/reply/rejoinder submitted? on _____		
27.	Whether copies of comments/reply/rejoinder provided to opposite party? on _____		

It is certified that formalities/documentation as required in the above table have been fulfilled.

Name: _____

Signature: _____


Dated: _____

The appeal of Mr. Falak Niaz, AD, Directorate of Science & Tech., presented today i.e. on 25.08.2021 is incomplete on the following score which is returned to the counsel for the appellatant for completion and resubmission within 15 days.

- 1- Annexures of appeal may be attested.
- 2- Check list is not attached with the appeal.

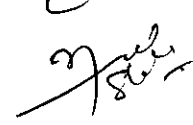
No. 1682 /S.T,

Dt. 26/08 /2021


REGISTRAR
SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA
PESHAWAR.

Syed Noman Ali Bukhari Adv. Pesh.

Q Respected Sir,

Objection removed & file re-submitted


BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL
PESHAWAR

Appeal No. _____ /2021

Mr. FALAK NIAZ

VS

Govt: OF KP

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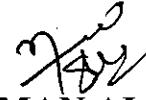
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APPELLANT

Mr. FALAK NIAZ

THROUGH:



(SYED NOMAN ALI BUKHARI)
ADVOCATES, PESHAWAR.

Date 23-08-21