

BEFORE THE SERVICES TRIBUNAL KHYBER PAKHTUNKHWA,
PESHAWAR

Khyber Pakhtunkhwa
Service Tribunal

Case No. 3502

Date 10-2-2023
Appellant

Mr. Muhammad Masood Afridi
Service Appeal No. 159/2022

Secretary to Govt. of Khyber Pakhtunkhwa Finance Department and
others.

Respondents

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Before the Khyber Pakhtunkhwa, Service Tribunal, Peshawar

Service Appeal No. /2022

Mr. Muhammad Masood Afridi, Assistant Treasury Officer (BS-17), presently working as Assistant Director (General/Trg), Home & Tribal Affairs Department, Khyber Pakhtunkhwa, Civil Secretariat, Peshawar.

(Appellant)

VERSUS

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

RESPONDANTS

PARAWISE COMMENTS ON BEHALF OF RESPONDENTS NO. 1-4

Preliminary Objections.

1. That the appellant has got no cause of action and locus standi to file the instant appeal.
2. That the appellant has not come to this honorable tribunal with clean hands therefore, the appeal is liable to be dismissed.
3. That the appeal is badly time barred.
4. That the appeal is bad in its present form, hence incompetent and is liable to be dismissed.
5. That the instant appeal is not maintainable in the eye of law.
6. That the appellant concealed the material facts and kept this honorable tribunal in dark.
7. That the appeal is bad for misjoinder and non-joinder of necessary parties.
8. That the appellant has not complied with mandatory provisions of relevant rules.

FACTS.

1. No comments. Pertains to record.
2. No comments. Pertains to record.
3. Incorrect. The submissions of the Appellant are incomplete. There is no reference regarding creation of a separate cadre for the *appellant* in any judgment of the PHC / Supreme Court of Pakistan. While, plea of the appellant based on summary initiated in 2013, there is no final decision of the competent authority regarding creation of a separate cadre in the Provincial services and hence pleas of the appellant is baseless. As no cadre/post/nomenclature as Finance Officers (BPS-17) or Assistant Finance Officer (BPS-16) was/is available in the Finance Department, therefore, after merger of erstwhile FATA in Khyber Pakhtunkhwa the Appellant was adjusted in the Treasuries & Accounts Cadre, a subordinate service/ formation of Finance Department, having different nomenclature, job description & service structure etc.
4. Incorrect. That the Appellant was the employee of erstwhile FATA and after merger with Khyber Pakhtunkhwa, the appellant alongwith others were adjusted in the Treasuries & Accounts Establishment which have its own service structure, nomenclature, job description and sufficient career progression/chances of promotion are available to the Appellant.

5. Incorrect. A case for adjustment of the Appellant alongwith others, was processed and subsequent to the approval of the competent authority, the Planning Officers were adjusted in already existing Planning cadre of P&D Department while the Finance Officers were adjusted in the Directorate of Treasuries & Accounts, an attached formation of Finance Department as cadre of Finance officers (BPS-17) and Assistant Finance Officers (BPS-16) do not exist in the Finance Department. In the meanwhile, during the course of hearing the case, the Additional Advocate General also made commitments with court, regarding adjustment of Petitioners in Finance Department, therefore, their adjustment orders after merger of erstwhile FATA was made in the Treasuries & Accounts cadre, having different service structure, nomenclature, job description and sufficient career progression/chances of promotion, clearly stating therein that they shall be placed at the bottom of the seniority list dully accepted by the Appellant. Subsequently, the appellant filed a representation, requesting for backdated seniority. The representation was processed and disposed off in light of Establishment Department's advice as reproduced below:

“Any backdated seniority cannot be granted to any absorbee and his inter-se-seniority, on absorbing in the cadre shall be maintained at the bottom as provided under the Rules regulating the seniority” (Annex-I).

6. Pertains to record, hence no comments.
7. The appellant has got no cause of action to file instant appeal, hence needs to be dismissed.

Grounds.

- A. Incorrect. The appeal was examined under the existing rules and disposed off in light of advice of Establishment Department as explained in para-5 of the Facts above. Furthermore, no separate service cadre exists in Finance Department, having the nomenclature of Finance Officer (BPS-17), where their seniority can be maintained.
- B. As explained at A above, Finance Department has no cadre of its own with nomenclature of Finance Officer (BPS-17). The Planning Cadre was established in 2017 i.e., before merger of FATA with the Province of Khyber Pakhtunkhwa hence the Agency Planning Officers were adjusted in that cadre. However, no such cadre, having the posts of Finance Officers exist, hence the Agency Finance Officers / Assistant Agency Finance Officers were adjusted in Treasuries & Accounts Cadre, an attached formation of Finance Department. The nature of adjustment of Agency Finance Officers is different to that of Agency Planning Officers. The Agency Planning Officers were adjusted in the same cadre while the Agency Finance Officers/Assistant Agency Officers were adjusted in a different cadre, having different nomenclature, job description & service structure as per rules/ policy and procedure in vogue. Hence, no discrimination is done to the appellant and is treated in accordance with prevailing rules/ policy of the Provincial Government.
- C. As explained at A & B above. All the posts of Finance officers in the districts are filled from amongst the officers of PMS/PAS cadres and there is no cadre of Finance Officers in Finance Department against which their adjustment was to be made, hence the Appellant alongwith others were adjusted in Treasuries & Accounts Establishment, having a different nomenclature, job description and service structure etc.
- D. Incorrect. After merger of erstwhile FATA with Khyber Pakhtunkhwa the Appellant alongwith others were adjusted in Directorate of Treasuries & Accounts Establishment against the post of Assistant Treasury Officer (BS-17) having a different nomenclature, job description & service structure. However, after his adjustment in a different cadre, his appeal for seniority was processed and examined in light of relevant rules/ policy in consultation with Establishment Department and regretted as per advice of the Establishment Department as reproduced below:

“Any backdated seniority cannot be granted to any absorbee and his inter-se-seniority, on absorbing in the cadre shall be maintained at the bottom as provided under the Rules regulating the seniority” (Annex-I).

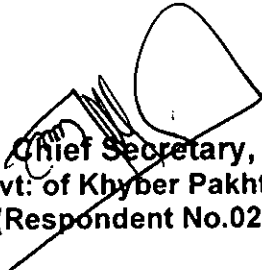
E. As explained at Para-A, B, C & D above.

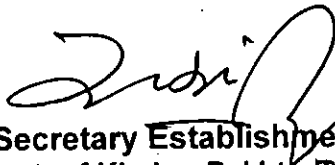
F. Incorrect. The rules do not permit such placement because it will be violation of the existing rules/policy and will also affect the fundamental rights of the serving employees, already working in the cadre before the adjustment of the appellant. The Treasuries & Accounts cadre has its own service structure and the appellant will get sufficient chances of promotion than available to him in the erstwhile FATA.


G. As explained in above paras.

H. The respondents seek permission to raise additional grounds at the time of arguments.

In view of the above, it is humbly prayed for that the appeal, being devoid of merit & wastage of precious time of this court, may kindly be dismissed with cost.


Chief Secretary,
Govt: of Khyber Pakhtunkhwa
(Respondent No.02)


Secretary Establishment
Govt: of Khyber Pakhtunkhwa
(Respondent No.03)


Secretary Finance
Govt: of Khyber Pakhtunkhwa
(Respondent No.04)

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Attention: Alamgir Adil



**GOVERNMENT OF KHYBER PAKHTUNKHWA
ESTABLISHMENT DEPARTMENT
(REGULATION WING)**

No. SOR-VI/E&AD/1-13/2009
Dated: 25th Feb, 2014

1. Addl: Chief Secretary, Govt: of Khyber Pakhtunkhwa, Planning & Development Department.
2. Addl: Chief Secretary (FATA), FATA Secretariat Peshawar.
3. The Senior Member Board of Revenue, Khyber Pakhtunkhwa.
4. All Administrative Secretaries to Govt: of Khyber Pakhtunkhwa.
5. The Secretary to Governor, Khyber Pakhtunkhwa.
6. The Principal Secretary to Chief Minister, Khyber Pakhtunkhwa.

CRL ORIGINAL PETITION NO. 89/2011, CMA.309-K/2012, CMA.310-K/2012, CrI.M.As42-K/2012, 80-K/201287-K/2012, 13-K/2013, CMA.2453/13, CrI.MA.29-K/2013, CMA.131-K/2013, CrI.M.As.185-K/2012, 225-2013, 226/2013, 227/2013, CMAs, 244-K TO 247-K/2013, 257-K & 258-K/2013, CrI.M.A. 263/2013, CrI. MA. 282 IN CRL ORIGINAL PETITION NO. 89/2011 (2013/SCMR/1752).

is directed to forward herewith copy of Government of Pakistan Cabinet Establishment Division Office Memorandum No. 1/59/2013-Lit-IV dated 31-01-2014 on the subject noted above for information and compliance.

Yours faithfully,

~~ZIRA
25-02-14~~

~~(QURRATUL-AIN)
SECTION OFFICER (REG-VI)~~

Copies forwarded to:-

1. All Divisional commissioners in Khyber Pakhtunkhwa.
2. All Heads of Attached Departments in Khyber Pakhtunkhwa.
3. All Autonomous/Semi Autonomous Bodies in Khyber Pakhtunkhwa.
4. All Deputy Commissioners Khyber Pakhtunkhwa and Political Agents in FATA.
5. The Registrar Peshawar High Court, Peshawar.
6. The Registrar, Khyber Pakhtunkhwa Service Tribunal, Peshawar.
7. The Secretary, Khyber Pakhtunkhwa Public Service Commission, Peshawar.
8. All Additional Secretaries, Deputy Secretaries and Section Officers in Establishment & Administration Department.

~~ZIRA
25-02-14~~

~~SECTION OFFICER (REG-VI)~~

GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT
ESTABLISHMENT DIVISION

No.1/59/2013-Lit-IV

Islamabad, 31 January, 2014

OFFICE MEMORANDUM

CRL. ORIGINAL PETITION NO.89/2011, CMA.309-K/2012, CMA.310-K/2012, CrI.M.As. 42-K/2012, 80-K/2012, 87-K/2012, 13-K/2013, CMA.2453/13, CrI. MA.29- K/2013, CMA.131-K/2013, CrI.M.As.185-K/2012, 225/2013, 226/2013, 227/2013; CMAs.244-K TO 247-K/2013, 257-K & 258-K/2013, CrI.M.A. 263/2013, CrI.M.A. 282 IN CRL. ORIGINAL PETITION NO.89/2011.

The undersigned is directed to say that the Honorable Supreme Court of Pakistan passed judgment on 12.6.2013 on the subject petitions clubbed with a number of other cases and had ordered that a copy of this judgment be sent to all the Chief Secretaries of the provincial as well as the Establishment Secretary with the direction to streamline the service of civil servants in line with principles laid down in this judgment.

It was expected that afore-mentioned judgment was downloaded by all Ministries/ Divisions for compliance. However, for the sake of convenience, the following guidelines/principles are highlighted:-

The Honorable Court has declared the following practices as illegal:-

- i. A civil servant, who after passing the competitive exam in terms of the recruitment rules, is appointed on merits, loses his right to be considered for promotion, when an employee from any other organization is absorbed under the impugned legislative instruments, without competing or undertaking competitive process with the backdated seniority and is conferred the status of a civil servant in complete disregard of recruitment rules.
- ii. Absorption of a non Civil Servant conferring on him status of a Civil Servant and likewise absorption of a Civil Servant from non-cadre post to cadre post without undertaking the competitive process under the recruitment rules.
- iii. Introduction of any validation law in the nature of multiple or parallel legislation on the subject of service law.
- iv. Benefit of 'absorptions' extended since 1994, with or without backdated seniority, are declared ultra vires of the Constitution.

- v. The re-employment/rehiring of the retired Civil/Government Servants under the impugned instruments being violative of the constitution are declared nullity.

The Apex Court has further held that:-

- a) No non-civil servant can be transferred and appointed by way of deputation, in any government department to any cadre and or non-cadre. The procedure provided under Esta Code has been approved by this Court in the case of Muhammad Arshad Sultan.
- b) No civil servant of a non-cadre post can be transferred out of cadre to be absorbed to a cadre post which is meant for recruitment through competitive process.
- c) The procedure provided under the Esta Code requires that a person who is transferred and appointed on deputation must be a government servant and such transfer should be made through the process of selection. The borrowing Government has to establish the exigency in the first place and then the person who is being transferred/placed on deputation in Government must have matching qualifications, expertise in the field with required experience.
- d) An employee holding a post under any authority or corporation, body or organization established by or under any Provincial or Federal law or which is owned or controlled by Federal or Provincial Government or in which Federal Government or Provincial Government has controlling share or interest could not be conferred status of a civil servant.
- e) It is settled principle of law that if the right of promotion is not blocked by re-employment then such powers can be exercised, then too in exceptional cases for a definite period. Besides it violates the fundamental rights of the serving civil servants, who on account of such rehiring on contract are deprived of their legitimate expectancy of promotion to a higher cadre, which is violative of the provisions of Articles 4, 9 and 25 of the Constitution.
- f) The absorption and out of turn promotion under the impugned legislative instruments will also impinge on the self respect and dignity of the civil servants, who will be forced to work under their rapidly and unduly promoted fellow officers, and under those who have been inducted from other services/cadres regardless of their (inductees) merit and results in the competitive exams (if they have appeared for exam at all) and as a result the genuine/bonafide civil servants will have prospects of their smooth progression and attainment of climax of careers hampered, hence the impugned instruments are violative of Article 14 of the constitution.
- g) Locus poenitentiae is the power of receding till a decisive step is taken but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order.

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~~(b) Any backdated seniority cannot be granted to any absorbee and his inter-se seniority, on absorption in the cadre shall be maintained at the bottom as provided under the Rules regulating the seniority.~~

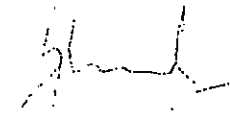
All Ministries/ Divisions and Departments/Organizations/under them are requested to comply with the judgment of the Apex Court in letter and spirit.]

(Muhammad Shakel Malik)
Joint Secretary

All Ministries/Divisions/Departments.

Copy forwarded for information to

1. Chief Secretary, Government of the Punjab, Lahore.
2. Chief Secretary, Government of the Sindh, Karachi.
3. Chief Secretary, Government of the kpK, Peshawar.
4. Chief Secretary, Government of the Balochistan, Quetta.
5. Chief Secretary, Gilgit Baltistan.
6. Chief Secretary, Government of A.J&K, Muzaffarabad.


(Naseer Ahmad)
Deputy Secretary

BEFORE THE SERVICES TRIBUNAL KHYBER PAKHTUNKHWA,
PESHAWAR

Service Appeal No.159/2022
Mr. Muhammad Masood Afridi

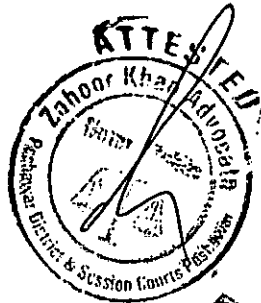
Versus

Secretary to Govt. of Khyber Pakhtunkhwa Finance Department and
others.

Reply /Parawise Comments on Behalf of Secretary Finance Govt. of
Khyber Pakhtunkhwa Respondent No.04.

AFFIDIVAIT

I Hamid Hussain Shah, Section Officer Govt.of Khyber Pakhtunkhwa Finance Department do hereby solemnly affirm and declare on oath that the contents of Para-wise Comments in Service Appeal No.159/2022 on behalf of Secretary to Govt. of Khyber Pakhtunkhwa Finance Department is true and correct to the best of my knowledge and belief and that nothing has been concealed from the Honourable Tribunal.



10 FEB 2023

Hamid Hussain Shah
Deponent