

**KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

BEFORE: KALIM ARSHAD KHAN, CHAIRMAN
FAREEHA PAUL, MEMBER (EXECUTIVE)

Service Appeal No.1019/2017

Ahmad Shah, Ex-Director, Excise and Taxation Department Khyber Pakhtunkhwa, Peshawar.....(*Appellant*)

Versus

1. The Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat, Peshawar.
2. The Secretary, to Government of Khyber Pakhtunkhwa, Excise & Taxation Department, Peshawar.....(*Respondents*)

Present:

Mr. Muhammad Amin Ayub, Advocate.....For appellant.

Mr. Muhammad Riaz Khan Painsa Khel,

Assistant Advocate GeneralFor respondents.

Date of Institution.....31.08.2017

Dates of Hearing.....25 & 26.04.2022

Date of Decision.....27.04.2022

SERVICE APPEAL UNDER SECTION 4 OF THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL ACT, 1974 FOR PROMOTION TO THE POST OF DIRECTOR (BPS-19) IN THE EXCISE AND TAXATION DEPARTMENT FOR WHICH THE APPELLANT PREFERRED REPRESENTATION ON 08.06.2017 BUT THE SAME WAS NOT DISPOSED OF WITHIN THE STATUTORY PERIOD OF 90 DAYS

JUDGEMENT


KALIM ARSHAD KHAN CHAIRMAN. The appellant had retired from service on 20.05.2015 on attaining the age of sixty years.

2. According to the appellant he being senior most officer in the year 2010, was entitled to promotion to the post of Director General (BPS-19) under the rules; that he submitted a departmental representation on 09.07.2010 for his promotion to the above post, which was not decided and accordingly Service Appeal No.2767/2010, filed by the appellant, was dismissed on 09.12.2010; that the appellant approached the honourable Peshawar High Court in WP No.94/2011 for his promotion, which petition was disposed of with the direction for deciding the departmental representation within a month; that the representation was disposed of and the appellant was informed vide letter dated 01.03.2011 that the vacancies of BPS-19 were available and that the case of the appellant would be considered for promotion to BPS-19 as soon as the Service Rules for newly upgraded posts were finalized; that in the meanwhile the post of Director was upgraded to BPS-20, two new vacancies of Directors BPS-19 were sanctioned vide letter dated 16.03.2011 and the appellant was posted against one of the two in his own pay and scale on 18.04.2011; that aggrieved of the above referred appellate order dated 01.03.2011, the appellant filed service appeal No.563/2011, which was decided on 13.02.2014 with the observation that since no dispute existed between the parties as the Department had admitted in its reply that after framing of the service rules, the case of the appellant would be placed before the PSB for promotion; that the department was directed to finalize/frame the service rules and submit progress report to the Registrar of the Tribunal within a month; that after the decision, the department could not finalize the issue within time, therefore, Execution Petition



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No.33/2014 was filed by the appellant on 27.05.2014, which remained pending until retirement of the appellant on 20.05.2015; that the process of framing of the rules was finalized vide letter dated 07.02.2017; that there had been a commitment on the part of the department in view of the entitlement of the appellant for promotion to BPS-19 w.e.f. the occurrence of the vacancy of Director BPS-19 and after finalization of the rules, the appellant was entitled to promotion with effect from the due date; that he filed representation on 08.06.2017 but awaiting 90 days when that was not responded, he filed the instant appeal.


3. On receipt of the appeal, notices were issued to the respondents to file their reply. The respondents submitted reply and mainly contended that in the absence of any original and appellate order to meet the requirements of section 4 of the Khyber Pakhtunkhwa Service Tribunal Act, 1974; that the appeal was hit by the principle of res. judicata; that the posting of the appellant in his own pay and scale would not give any right to the appellant until and unless regularly promoted in BPS-19; that in the absence of the rules framed for promotion, no promotion could have been made; that the post of the Director BPS-19 was a scheduled post and could be filled in by transfer from amongst AUPG/PAS/PCS-SG/PCS-EG/PMS, therefore, the appellant was not entitled to promotion; that the promotion could not be claimed as a matter of right; that the promotions were to be made as per prevailing rules at the time of promotion and under the prevailing rules there was no quota for promotion to BPS-19.


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4. We have heard the learned counsel for the appellant and learned Assistant Advocate General for the respondents.
5. It was argued by the learned counsel for the appellant that in view of the facts and grounds agitated in the appeal and enumerated above, this appeal might be accepted. It was also argued that, being the most senior Deputy Director in BPS-18, the appellant was entitled to promotion to the post of Director BPS-19, especially when there was a new promotion post created and was lying vacant during the service of the appellant and delayed notifying the rules for promotion would not take away the right of the appellant to seek promotion for which he was otherwise eligible and entitled to be considered. He also argued that the department had not refuted the claim of the appellant rather the only excuse it advanced was that there were no rules for promotion framed and as soon as such rules were framed, the appellant would be considered.
6. Conversely the learned Assistant AG for the respondents maintained the stance taken by the respondents in their reply in the appeal and prayed for dismissal of the appeal.
7. There is no denial of the fact that before notifying the new rules entitling the appellant to promotion to BPS-19, he retired from service. His claim is that he was the most senior officer and was legitimately expecting his promotion to BPS-19 especially when there was vacancy of BPS-19.
8. It is the case of the appellant that he was the most senior officer and thus was entitled to be promoted to the next higher post/grade. It is also his case that he was posted against a BPS-19 post in his own pay


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and scale, which too meant that he could be promoted to the next higher grade/post. The contention of the appellant that he was the senior most officer in grade 18 has not been disputed by the respondents. Similarly, the posting of the appellant against higher post/grade in his own pay and scale has also not been disputed. The only hurdle for consideration of the appellant for promotion before his retirement was said to be non-existence of rules for promotion and the same were being framed and because of non-framing of the rules, as according to the respondents, the posts of Director BPS-19 being scheduled post could only be filled in by transfer from amongst AUPG/PAS/PCS-SG/PCS-EG/PMS, therefore, the appellant was not entitled to promotion; that the promotion could not be claimed as a matter of right; that the promotions were to be made as per prevailing rules at the time of promotion and under the prevailing rules there was no quota for promotion to BPS-19 and after retirement of the appellant the rules were notified whereby the post of Director (Revenue) (BPS-19) was to be filled on the basis of seniority-cum-fitness from amongst the Deputy Directors (BPS-18), with at least seven years service as such. The appellant has, though, annexed a photocopy of a document showing that it was the notification vide the newly rules were notified which entitled the appellant to promotion, but the copy does not bear the number, date and signature of any authority. It is noted with concern that the respondents have also not annexed the new rules for proper assistance of the Tribunal. Be that as it may it is an admitted fact that the service rules entitling a Deputy Director (BPS-18), on the basis of seniority-cum-fitness, with seven



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years service at his credit to promotion to the post of Director (Revenue) (BPS-19). The contention of the respondents that before the framing of service rules for promotion post, the appellant could not be considered is well founded because in the absence of the rules the promotion could not have been made. As against that the contention of the appellant that the service rules were framed with considerable delay and the delay on the part of the respondents in framing the rules would not make the appellant to suffer, is not sustainable because rule 3 (1) (a) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion & Transfer) Rules, 1989 provides method of appointment by promotion in accordance with the provisions contained in part-II of the above rules. Sub-rule(2) of rule 3 of the rules says, "(2) The method of appointment, qualifications and other conditions applicable to a post shall be such as laid down by the Department concerned in consultation with the Establishment and Administration Department and the Finance Department". In part-II Rule 7 (3) of the ibid rules requires that "(3) Persons possessing such qualifications and fulfilling such conditions as laid down for the purpose of promotion or transfer to a post shall be considered by the Departmental Promotion Committee or the Provincial Selection Board for promotion or transfer, as the case may be." Keeping these provisions in juxtaposition it is concluded that unless the method of appointment, qualifications and other conditions applicable to the promotion post of the Director is not laid down by the Excise and Taxation Department in consultation with the Establishment and Administration Department and the Finance Department, as required by rule 3 of the


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rules, the promotion could not be made. Before the rules for promotion could be framed, the appellant stood retired and before his retirement no PSB was held nor was he ever considered for promotion for the obvious reason of non-existence of rules for promotion. While framing of rules for promotion remained pending for years and the inordinate delay so caused by the department in framing the rules could not be a ground to withhold promotion to the appellant, was also a contention of the appellant in his appeal. This contention is also baseless as until the rules are framed and finalized by the Standing Service Rules Committee (SSRC) approved and vetted by Public Service Commission, the process of promotion could not be initiated. At the time when the appellant was in service, there were no rules in existence for promotion to the post of Director (Revenue) (BPS-19), while such rules were admittedly framed and notified after the retirement of the appellant. Even otherwise the amended rules notified after retirement of the appellant cannot be given retrospective effect. Reliance is placed on 1987 SCMR 359 titled "*Water and Power Development Authority versus Irtiqah Rasool Hashmi*". Therefore, the appellant had no *locus standi* to file this appeal.

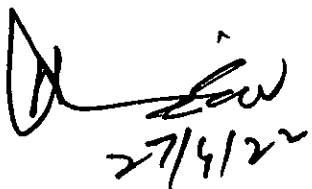
9. The other contention of the appellant that, when he was posted against the upgraded post in his own pay and scale he, this meant that the post was vacant and he could instead be promoted against the said post, is also misconceived as no rules were in existence for making promotion against the only promotion post of the Director (Revenue) (BPS-19) at the time when the appellant was posted against the same in his own pay and scale. Posting of an officer in his own pay and scale or even


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promotion on officiating basis both are just stopgap arrangements. It is also undisputed that before the retirement of the appellant no meeting of the Departmental Promotion Committee or for that matter the PSB was held so as to consider his case from the angle that before his retirement he was either not considered during the DPC/PSB meeting (had that been held at that time) or he was considered but deferred or superseded etc.

10. Besides it has not been mentioned anywhere in the copy of the unsigned notification annexed by the appellant himself with the appeal, that the retired civil servants could also be promoted, therefore, the benefit which has not been extended in the rules, could not be extended by this Tribunal.

11. Last but not the least the promotion cannot be claimed as a vested right. The august Supreme Court in a case titled "*Abdul Hameed versus Ministry of Housing and Works Government of Pakistan, Islamabad through Secretary*" reported as PLD 2008 SC 395, held that, "*it is well recognized principle of law that in case of non-selection post, the promotion is made on the basis of seniority-cum-fitness and no civil servant can ask for, or claim a promotion as a matter of right as it is within the exclusive domain of the Government. Neither the promotion could take place automatically, nor is seniority alone the deciding factor, as number of factors constitute fitness for promotion*". It was further held by the honourable Supreme Court that, "*It is an admitted fact that during the pendency of his appeal, the petitioner stood retired, as such could not be considered for promotion with retrospective effect.*"


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12. The upshot of the above discussion is that this appeal is not well founded and is, therefore, dismissed. Consign.

13. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 27th day of April, 2022.*



KALIM ARSHAD KHAN
Chairman

FAREEHA PAUL
Member Executive

(Approved for Reporting)

27th April, 2022

Learned counsel for the appellant present. Mr. Muhammad Riaz Khan Paindakhel, Asstt. AG for the respondents present. Arguments heard and record perused.

2. Vide our detailed judgment of today, containing 09 pages, this appeal is not well founded and is, therefore, dismissed. Consign.

3. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 27th day of April, 2022.*



(KALIM ARSHAD KHAN)
Chairman

(FAREEHA PAUL)
Member (E)