

BEFOR THE KHYBER PAKHTUNKHWA SERVICE
TRIBUNAL PESHAWAR

SERVICE APPEAL No.7676/2021

Zafar Iqbal,
Constable No.1244,
R/o Mir Ahmad Khel,
Tehsil and District, Kohat.

..... Appellant

Versus


The Regional Police Officer,
Kohat Region Kohat and others.

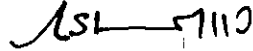
..... Respondents

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Through


Appellant


Ashraf Ali Khattak
Advocate,
Supreme Court of Pakistan

Dated: 02.09.2022

1

BEFOR THE KHYBER PAKHTUNKHWA SERVICE
TRIBUNAL PESHAWAR

SERVICE APPEAL No.7676/2021

Zafar Iqbal,
Constable No.1244,
R/o Mir Ahmad Khel,
Tehsil and District, Kohat.

..... **Appellant**

Versus

The Regional Police Officer,
Kohat Region Kohat and one other.

..... **Respondents**

**Rejoinder on behalf of appellant in response to the reply
submitted by the respondents.**

Respectfully Sheweth,

Rejoinder to Preliminary Objections.

Preliminary objections raised by answering respondents are erroneous and frivolous as having no factual and legal backing. The answering respondents have failed to explain as why appellant has got no cause of action and locus standi? How the instant service appeal suffers from limitation and laches? How appellant is estopped by his own conduct? How the appellant is not an aggrieved person within the meaning of section 4 of the Federal Service Tribunal Act, 1973? How the service appeal is not maintainable? What material facts have been concealed by the appellant and why the appeal is not maintainable? How the appeal is bad for miss-joinder and non of necessary parties? Why the appeal liable to be dismissed? No plausible explanation has been provided/submitted by the answering respondents. No specific and due objection regarding the controversial question of law and fact involved in the instant service appeal has been raised therefore; appellant is unable to submit

proper rejoinder to the preliminary objection raised by the answering respondents.

Rejoinder to Facts

1. That reply to para No.1 of the appeal by the answering respondents is incorrect, hence denied. No proper answer in reference to long standing service comprising of 17 years and commendations certificates honoured by competent authorities to the appellant for his brave services rendered by him beyond the call of his duty has been submitted by the answering respondents.
2. That reply to para No.2 of the appeal by the answering respondents is incorrect, hence denied. Section 16 of the Civil Servants Act, 1973 provide that Civil Servant is liable for prescribed disciplinary action in accordance with prescribed procedure. Rule 9 of the Khyber Pakhtunkhwa Civil Servant (Efficiency & Discipline) Rules, 2011 provides prescribed mechanism in case of willful absence. Rule 9 of E&D Rules 2011 is reproduced for consideration and ready reference;\

“9: Procedure in case of willful absence.—Notwithstanding anything to the contrary contained in these rules, in case of willful absence from duty by a Government servant for seven or more days, a notice shall be issued by the competent authority through registered acknowledgement on his home address directing him to resume duty within fifteen days of issuance of the notice. If the same is received back as undelivered or no response is received from the absentee within stipulated time, a notice shall be published in at least two leading newspapers directing him to resume duty within fifteen days of the publication of that notice, failing which an ex-parte decision shall be taken against the absentee. On expiry of the stipulated period given in the notice, major penalty of removal from service may be imposed upon such Government servant.”

The procedure adopted by the respondent was alien to the above rules and it has been repeatedly held by the Hon’ble Supreme Court of Pakistan as well as by this Hon’ble Tribunal that every action on the part of Government Department shall be valid only if it is initiated and finalized through prescribed procedure.

“Where a law prescribes something to be done in a particular manner, it was to be done on that way or not at all”.

The contention /plea submitted by the answering respondents with reference to alleged show cause notice that show cause notice was issued to the Appellant by the respondent No 2 and served upon him personally and signature was also procured as a token of receipt is false and having no support from the documents attached by the respondents as Annexure D & E, as no signature whatsoever is available on the attached documents. It is further submitted that the

contention of the respondent is also contradictory with the plea taken by the respondent vide Para No 5 of the reply wherein the respondent has submitted that one Elder Malik Himat Ullah Khan has informed the DFC that Appellant (Zafar Iqbal) has sold his house and left to unknown place. Now the question is which statement of the respondent is true and whether respondent could be allowed to approve and reprobate in a single breath. The answer in my humble view and as per law laid down by the Hon'ble Supreme Court of Pakistan that such kind of plea/evidence shall be discarded and the benefit shall be extended in favour of accused official not as matter of grace but as a matter of right.

Rule 9 of E&D Rules 2011 are mandatory in nature, the respondents were legally bound to make publication and reference to the so-called (alleged) absence of the appellant in two leading news papers, but respondent failed to comply with the mandatory provision of rule 9, therefore the whole inquiry proceeding is nullity in the eyes of law and justice. The report of the DFC attached at Page No 16 of the reply is also incorrect; the cell number mentioned in the report (0336-9192020) is not of the appellant. Appellant has no nexus whatsoever with the said cell number.

It is also affect that Mr Malik Himat Ullah Khan is the opponent of the appellant, he has been arrayed as prosecution witness in Suit filed by his relative titled as Zulfikar Hussain Vs Imran Khan etc. In the titled suit Appellant has been arrayed as Defendant NO 14 along with his other family members. In circumstances the alleged statement of Mr Malik Himat Ullah Khan cannot be validly used against the Appellant. (Copy of Plaint is attached as annexure A)

3. That reply to Para no 3 of the appeal by the answering respondent is incorrect, hence denied. At the relevant time the appellant was deputed to perform duty at Hindu Mandir situated at Mian Khel Bazar Kohat. Almost every colleague was in the knowledge of Appellant severe illness and everyone were witnesses of the fact that appellant properly applied for Medical Leave but no heed was paid to the legitimate expectancy of the Appellant.

4. That reply to Para no 4 of the appeal by the answering respondent is incorrect, hence denied. Limitation runs from the date of knowledge. Civil Servant remained in Government service until the is given copy of the termination order. Relies is placed on 2005 PLC CS Page 80 and 2005 PLC CS Page 1300.

5. That reply to Para no 5 of the appeal by the answering respondent is incorrect, hence denied. The detail answer has already been submitted in the above paras. The Cell number 0336-9192020 is not of the Appellant and moreover the documents attached by the respondents as annexure G. G-1 does not bear the signature of the Appellant.
6. That reply to Para no 6 of the appeal by the answering respondent is incorrect, hence denied. The burden of proof with reference to the impugned order of dismissal dated 30.04.2018 and 11.10.2021 lies on the shoulder of respondent. Respondent has to prove the communication of the order. In absence of proof of communication, how it can be held that the appellant is badly time barred. This hon'ble Tribunal vide judgment dated 03.02.2007 in service Appeal No 556 of 2005, service Appeal No 498/2018 decided on 24.01.2022, Service No 5/2018 decided on 28.01.2022 Service No 508/2018 decided on 24.01.2022, Service Appeal No 468/2017 decided on 01.02.2022, Service appeal No 571/2018 decided on 24.01.2022 and Service Appeal titled Fazl-e-Mola Vs Secretary Govt of KPK Population Welfare Department decided on 01.06.2022, has held that limitation runs from the date of communication of the impugned panel order. In the cited Appeals 7 to 8 years delay has been granted. All these Appeals were preferred against the impugned order based on willful absence. The instant Appeal being identical and similar nature also deserve the same treatment. **(Copy of the Judgments of this Hon'ble Tribunal are attached as annexure B)**
7. That reply to Para no 7 of the appeal by the answering respondent is incorrect, hence denied. The detail answer has already been submitted.
8. That reply to Para no 8 of the appeal by the answering respondent is incorrect, hence denied. The detail answer has already been submitted. However it is humbly submitted that Appellant has about 17 years service at his credit and the Hon'ble Supreme Court of Pakistan vide reported Judgment 2013 SCMR Page 817, 2006 SCMR Page 1120, 2009 SCMR P 1197, 2011 TD (Service) 293, PLD 2007 (CS) P 35, 2007 PLC (CS) Page 438 (CS) and 2007 PLC (CS) Page 685 has converted major penalty of dismissal / removal from service into major penalty of compulsory retirement on the basis of 17 years long length of service. Similarly this Hon'ble Tribunal vide service Appeal No 1363/2010, 979/2013, 518/2018, 488/2017, 571/2018, 556/2005 has converted Major penalty of dismissal into major penalty of compulsory retirement on the basis of long service. On this score as well Appellant is entitled for lenient view. **(Copies of the Judgments of Hon'ble Supreme Court of Pakistan are attached as annexure C)**

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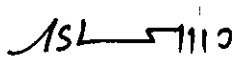
GROUND

A. That no proper and due answer has been submitted by the answering respondents in response to the Grounds taken by the Appellant in his memo of Appeal, therefore, Appellant relies on his stance taken in grounds of Appeal. The contention submitted by the respondents in response to the ground portion of the appeal is nothing more than the petition of the factual position taken by them in response to the factual position of the appeal. Therefore, there is no need to respond to the contention of the respondents being merit less. Appellant has not been treated in accordance with law, rules and policy. Respondents have failed to comply with the prescribed procedure provided in the statute and statutory rules. The Appellant has been condemned unheard and the impugned order is based upon presumption which is no legal value in the eyes of law, therefore, need to be set aside.

In view of the above submitted, it is humbly requested that the Appeal of the Appellant may kindly be allowed as prayed for in the main Appeal and the reply of the respondents may kindly be rejected with cost throughout.

Through


Appellant


Ashraf Ali Khattak
Advocate,
Supreme Court of Pakistan

Dated: 02.09.2022

BEFOR THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

SERVICE APPEAL No.7676/2021

**Zafar Iqbal,
Constable No.1244,
R/o Mir Ahmad Khel,
Tehsil and District, Kohat.**

Appellant

Versus

**The Regional Police Officer,
Kohat Region Kohat and others.**

Respondents

AFFIDAVIT

I, **Zafar Iqbal**, Constable No.1244, Police Force, Kohat R/o Mir Ahmad Khel, Tehsil and District, Kohat, do hereby solemnly affirm and declare on oath that the contents of this rejoinder are true and correct to the best of my knowledge, and nothing has been concealed from this Hon'ble Court.

DEPONENT

H
Hon'ble Iqbal Advocate
Oath Commissioner
Endst No. 3370-75
3-11-2022



العدالت جناب سپیکر سول جج صاحب کورٹ

میرزا خان دہلوی

پیام

ذرا توجہ

دوٹی اسٹریٹ ریڈیو
درخواست عارضی حکم امتناعی

درخواست براداری حکم امتناعی کے طور پر قائم تاکہ مقدمہ عارضی سے عدالت کو بروٹس Disposses کرنے،
خیر قانونی تیسرے کر کے ہمارا وہی مقدمہ میں خیر قانونی تیسرے بدل کرنے اور اپنی سند کو کسی دیگر شخص کے نام خیر قانونی طور پر منتقل
کرنے سے باز رہیں۔

Handwritten signature and date: 09/09/2020

جناب جان اسٹریٹ ریڈیو کے

- ۱۔ کہ سائل عدالت نے امر و حکام بنا میں مقدمہ جتان بنا مارا ہے جس کی کاپی کی قوی امید ہے۔ سائل عدالت کے عرضی دہنی کے
مقدمہ عدالت کو درخواست ہے کہ اسے جرح سے ہٹا دیا جائے۔
 - ۲۔ کہ سائل عدالت کو عرضی حکم امتناعی جتان بنا تاکہ مقدمہ جاری نہ کیا گیا تو سائل عدالت کو قابل تعلق تھانہ جتان بنا۔
 - ۳۔ کہ سائل عدالت کو عرضی حکم امتناعی کے تحت سے مقدمہ درخواست عارضی حکم امتناعی کی منظوری میں ہے۔
- تلا استدعا ہے کہ عرضی حکم امتناعی جتان بنا تاکہ مقدمہ جاری نہ ہو سکے۔

سوری 02-09-2020

ذوالفقار حسین (عدلی)

بذریعہ جرح کی اجازت کے لئے سائل جتان بنا تاکہ مقدمہ جاری نہ ہو سکے

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جان سٹریٹ

اطمینان ہے کہ ملزم اسے عرضی دہنی



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پولیس کے پاس 1000 روپے برآمدہ اول دست 300 روپے برآمدہ دوم دست کی جاتی ہے جس

پر کوٹ ٹیکس خفایہ ہے

پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

خفایہ کے کھاتے پر آتی ہے

پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

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پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

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02-09-2020 مورخہ

ڈی اے اے (پولیس)

ڈی اے اے (پولیس) کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

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پولیس کے پاس 28-1 کے کھاتے پر آتی ہے جو کہ پولیس کے پاس خفایہ اور خفایہ کے کھاتے پر آتی ہے

TESTED TO BE TRUE COPY
02-09-2020
COPING BRANCH KOTAH

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Stamp: STATE IMPROVEMENT BOARD

مکتبہ اسلامیہ

پتہ: ...

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بسم اللہ الرحمن الرحیم
 درود بخواند و در این کتاب ...
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۲۴/۱۱/۲۰۲۱

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روز القدر

ATTENTION TO BE PAID

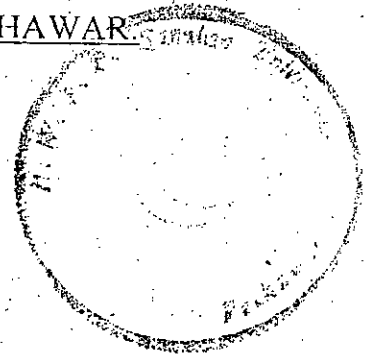
COPIES

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11

Absence - Re-instatement

BEFORE THE NWFP SERVICE TRIBUNAL PESHAWAR



Appeal No. 556/2005

Date of institution - 20.06.2005

Date of decision - 03.02.2007

Muhammad Riaz, Ex-PTC Teacher,
GPS Akhagram, Wari, District Dir Upper.....(Appellant)

VERSUS

1. EDO (S&L) Department, Upper Dir.
2. DCO District Dir Upper.
3. Director (Schools & Literacy) NWFP,
Peshawar.
4. Secretary (Schools & Literacy) Department,
NWFP Peshawar.....(Respondents)

Appeal against the order bearing Endst. No. 11-16/F.
(26)/PF/ concerned /EDO/DO (P)/ADO (Estt:) dated
26/10/2002, whereby the appellant was removed from
service retrospectively w.e.f. 16.6.2002.

PRAYER.

On acceptance of the appeal, the impugned order may be set
aside and the appellant be re-instated in service with all back
benefits.

Mr. Ashraf Ali Advocate.....For appellant.
Mr. Zaffar Abbas Mirza, Acting Govt. Pleader.....For respondents.

MR. SHAH SAHIB.....MEMBER
MR. MUHAMMAD UMAR AFRIDI.....MEMBER.

ATTESTED
MEMBER
NWFP SERVICE TRIBUNAL
PESHAWAR

34 years
Mirza

JUDGMENT.

SHAH SAHIB, MEMBER :- This appeal has been filed by the appellant against the order dated 26.10.2002 whereby he was removed from service with the prayer that the impugned order may be set aside and he be re-instated in service with all back benefits.

2. Brief facts of the case as averred from the memo of appeal are that the appellant being qualified was appointed as PTC Teacher on the recommendation of Departmental Selection Committee vide order dated 23.4.1998. The appellant applied for leave without pay for a period of three years w.e.f. 1.3.2002 to 28.2.2005 for the construction of his house vide his application dated 11.2.2002 which was duly sanctioned by the competent authority vide order dated 16.4.2002. On the expiry of leave, the appellant submitted his arrival report vide his application dated 28.2.2005 but he was informed through note dated 8.3.2005 that he had been removed from service by an order dated 26.10.2002 w.e.f. 16.6.2002 under the Removal from Service (Special Powers) Ordinance 2000 against which the appellant submitted a departmental appeal on 21.3.2005 but the same has not been disposed of within the statutory period of 60 days. Hence, the instant appeal.

ATTESTED
[Signature]
[Stamp]

3. The respondents were summoned. They appeared through their respective representatives, filed written reply, contested the appeal and denied the claim of the appellant.

4. Arguments of the learned Counsel for the appellant and learned Acting Government Pleader for the respondents have been heard and record perused.

5. It was argued by the learned counsel for the appellant that the Extra Ordinary Leave was granted to the appellant by the department concerned and it was not his fault that the same was granted by an incompetent authority, if any. He pointed out that Respondent No.1 cancelled the appellant's E.O.L after one-and-a-half month on 1.6.2002 without first putting him a notice of the action proposed to be taken against him. These infirmities in the procedure opted by the respondents in passing the impugned order were not maintainable and requested for re-instatement of the appellant in service with back benefits.

6. It was contended by learned AGP, Mr. Zaffar Abbas Mirza, that extraordinary leave was granted to the appellant by incompetent authority and that the same had been later on cancelled by the competent authority i.e. EDO. The appellant was required to resume his duty after the cancellation of his leave but he failed to do so. A show cause notice was published in Daily Mashriq but he

APPEAL
JAWAHAR
MIRZA
ZAFFAR
ABAS

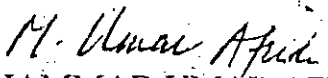
failed to turn up in response of the same. He further argued that the appeal was time barred and proper procedure had been followed prior to issuing the impugned order. He requested for the dismissal of appeal.

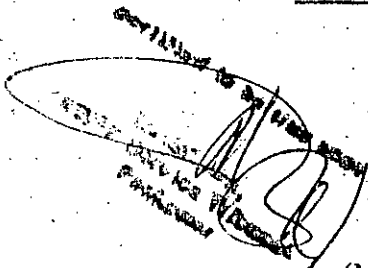
7. After hearing both the sides and having perused the record, the Tribunal tends to agree with the arguments advanced by the learned counsel for the appellant and observes that the bonafide of the appellant could not be doubted. He had moved an application for leave, which had been accepted with the outcome intimated to him. The subsequent cancellation of the appellant's EOL without assigning it any plausible reason and without putting him on a prior notice appears an arbitrary order passed, for which he had not been given an opportunity of being heard. In the circumstances, the appellant appears to have made out a case for interference of the Tribunal. The impugned order is, therefore, set aside and the appellant is re-instated in service. However, the period during which he remained out of service is treated as extra ordinary leave without pay. No order as to costs. File be consigned to the record after completion.

ANNOUNCED.
03.02.2007.


(SHAH SAHIB)
MEMBER.

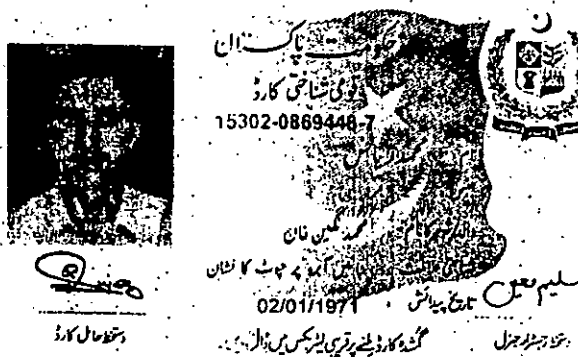
NWFP SERVICE TRIBUNAL
PESHAWAR.


(MUHAMMAD UMAR AFRIDI)
MEMBER.

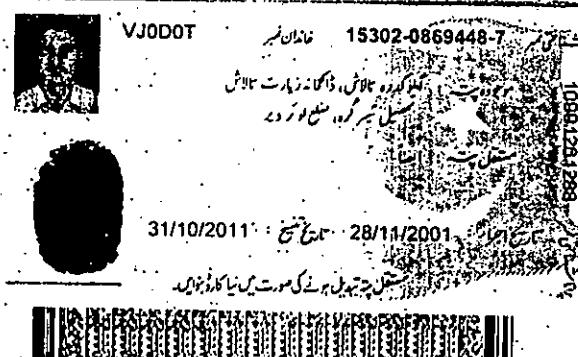

NWFP SERVICE TRIBUNAL
PESHAWAR

15

پاکستان
 قومی شناختی کارڈ
 15302-0869448-7
 محمد حسین خان
 لیکنویں ایف بی ایس
 02/01/1977
 گندھارا روڈ، قریب لیکس میں ڈال ہاؤس
 ریجنل ہیڈ کوارٹر



VJ0D0T
 15302-0869448-7
 محمد حسین خان
 لیکنویں ایف بی ایس
 02/01/1977
 گندھارا روڈ، قریب لیکس میں ڈال ہاؤس
 ریجنل ہیڈ کوارٹر

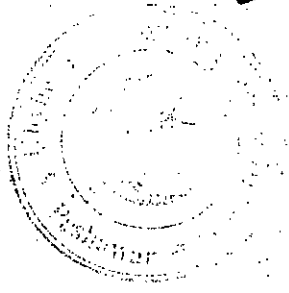


BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No: 498/2018

Date of Institution ... 10.04.2018

Date of Decision ... 24.01.2022



Mashid Ahmad S/o Sher Zada, R/o Village Kokarai, Swat, Ex-Constable No. 1834,
District Police Swat. ... (Appellant)

VERSUS

District Police Officer, Swat and others: ... (Respondents)

Abul Saiful Kamal,
Advocate ... For Appellant

Amir Masood Ali Shah,
Deputy District Attorney ... For respondents

AMAD SULTAN TAREEN ... CHAIRMAN
ATEO-UR-REHMAN WAZIR ... MEMBER (EXECUTIVE)

JUDGMENT

ATEO-UR-REHMAN WAZIR MEMBER (E):- This single judgment shall dispose of the instant service appeal as well as the connected Service Appeal bearing No. 571/2018 titled "Aamir Shah Versus District Police Officer, Kohat and two others", as common question of law and facts are involved therein.

Brief facts of the case are that the appellant while serving as constable in police department, was proceeded against on the charges of absence and was ultimately dismissed from service vide order dated 21-02-2009. Feeling aggrieved, the appellant filed departmental appeal dated 20-03-2009, which was not responded. Subsequent appeal was submitted to respondent No 2, which was rejected vide order dated 12-03-2018, hence the instant service appeal with

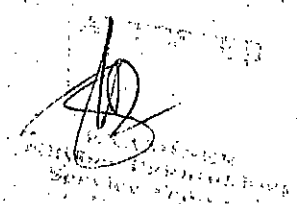
(Signature)
Secretary
Khyber Pakhtunkhwa Service Tribunal
Peshawar

prayers that the impugned orders dated 21-02-2009 and 12-03-2018 may be set aside and the appellant may be re-instated in service with all back benefits.

03. Learned counsel for the appellant has contended that the appellant was dismissed from service on the charges of absence but absence of the appellant was not willful but was due to compelling reason of terrorism; that a large number of police personnel had deserted their jobs due to threats of Taliban, who were again re-instated in service vide orders dated 30-11-2010, 15-03-2017 and 09-08-2017, but case of the appellant was not considered positively; that this Tribunal in numerous cases has already granted relief to the similarly placed employees and the appellant is also requesting for the same treatment under the principle of consistency; that absence of the appellant was not willful, which does not constitute gross misconduct and the penalty so awarded is harsh, which does not commensurate with gravity of the guilt; that the impugned order was issued with retrospective effect, which is void ab initio; that no codal formalities were fulfilled and the appellant has not been treated in accordance with law, hence his rights secured under the Constitution has badly been violated.

04. Learned Deputy District Attorney for the respondents has contended that the appellant was proceeded against on the charges of willful absence from duty, therefore proper departmental proceedings were initiated against him, which culminated into his removal from service under RSO 2000; that the appellant file departmental appeal with a considerable delay, which was rejected being barred by time; that numerous other officials were re-instated into service but every case has its own merits, whereas the appellant was awarded punishment for his own conduct; that final show cause notice was also served at his home address, but the appellant did not turn up, hence he was proceeded in absentia.

05. We have heard learned counsel for the parties and have perused the record.



-06. Placed before us is case of a police constable, who alongwith many other police personnel had deserted their jobs in the wake of insurgency. Police department had constituted a committee for cases of desertion and keeping in view humanitarian aspect, re-instated such personnel into service in large number. Placed on record is a notification dated 30-11-2010, where 253 similarly placed employees had been re-instated on the recommendation of the committee constituted for the purpose. Vide another order dated 07-02-2012, batch of another 12 employees had been re-instated in service. Yet another order dated 15-03-2017 would show that similarly placed employee had been re-instated upon his revision petition on the ground of length of his service and cause of terrorism. Other cases of similar nature are available on record, which would suggest that the provincial government had taken a lenient view keeping in view the peculiar circumstances in the area at that particular time. Even this tribunal has already granted relief in similar nature cases under the principle of consistency. Appellant is also one among those, who had deserted his job due to threats from terrorists. Situation at that particular time was so perturb, as how to proceed such large number of cases of desertion, for which publications were made in newspapers, hence the proceedings so conducted in such like cases were not in accordance with law. In the instant case no regular inquiry was conducted, nor any charge sheet/statement of allegation was served upon the appellant and the appellant was condemned unheard and which shows that the appellant was summarily proceeded without adhering to the method prescribed in law.


At m i factou

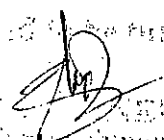
07. We are also mindful of the question of limitation, but since the impugned order was passed without proper legal process and when an adverse order is passed without fulfilling the legal formalities, such order is void and no limitation runs against void order. Still another reason exists for condonation of delay that the impugned order was issued with retrospective effect being void ab initio.

18. In view of the situation mentioned above and keeping in view the principle of consistency, we are inclined to partially accept the instant appeal as well as the connected service appeal by converting the major penalty of dismissal from service into minor penalty of stoppage of increments for two years. The intervening period is treated as leave without pay. Respondents however are at liberty to conduct de-novo inquiry as per mandate of law, if they so desire. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED
24.01.2022


(AHMAD SULTAN TAREEN)
CHAIRMAN


(ATIQ-UR-REHMAN WAZIR)
MEMBER (E)

Original & true copy

Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

Date of Discontinuation of Copy: 20-4-22
Number of Words: 1600
Appointed: 18/1
Date: 18/1
Date of Discontinuation: 21-4-22
Date of Delivery of Copy: 21-4-22

Absence:

(1)

Departmental Appeal
after 8 years (P/3)

BEFORE THE KPK SERVICE TRIBUNAL PESHAWAR

20
—

APPEAL NO. 5 /2018

Noor-Ul-Amin, EX- Constable, No.75/RR
Distt: Swat.

Number of Pages: 1466
Date: 28/12/11

.....(Appellant)

VERSUS

1. The Regional Police Officer, Malakand, Saidu Sharif, Swat.
2. The District Police officer Swat.

.....(Respondents)

APPEAL UNDER SECTION 4 OF THE KPK SERVICE TRIBUNALS ACT, 1974 AGAINST THE ORDER 29.11.2017 WHEREBY, THE DEPARTMENTAL APPEAL OF THE APPELLANT AGAINST THE ORDER DATED 12.10.2009 HAS BEEN REJECTED FOR NO GOOD GROUNDS.

PRAYER:

THAT ON ACCEPTANCE OF THE INSTANT SERVICE APPEAL, THE ORDERS DATED 29.11.2017 AND 12.10.2009 MAY PLEASE BE SET ASIDE AND THE APPELLANT MAY BE REINSTATED IN TO SERVICE WITH ALL BACK AND CONSEQUENTIAL BENEFITS. ANY OTHER REMEDY WHICH THIS AUGUST TRIBUNAL DEEMS FIT AND APPROPRIATE THAT MAY ALSO BE AWARDED IN FAVOUR OF APPELLANT.

Filed on day
28/12/11

21/11/18

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

21
—

Service Appeal No. 5/2018

Date of Institution ... 28.12.2017

Date of Decision ... 28.01.2022

Noor-Ul-Amin, Ex-Constable No. 75/RR Distt: Swat.

... (Appellant)

VERSUS

The Regional Police Officer, Malakand, Saidu Sharif, Swat and one another

... (Respondents)

Uzma Syed,
Advocate

... For Appellant

Noor Zaman Khattak,
District Attorney

... For respondents

AHMAD SULTAN TAREEN
ATIQU-UR-REHMAN WAZIR

... **CHAIRMAN**
... **MEMBER (EXECUTIVE)**

JUDGMENT

ATIQU-UR-REHMAN WAZIR MEMBER (E):-

This single judgment shall dispose of the instant service appeal as well as the following connected service appeals, as common question of law and facts are involved therein:-

1. Service Appeal bearing No. 6/2018 titled Nizam Khan
2. Service Appeal bearing No. 7/2018 titled Saeed Ullah
3. Service Appeal bearing No. 8/2018 titled Ubaid Ullah

02. Brief facts of the case are that the appellant while serving as Constable in Police Department was proceeded against on the charges of absence from duty and was ultimately dismissed from service vide order dated 12-10-2009. Feeling aggrieved, the appellant filed departmental appeal, which was rejected vide

order dated 29-11-2017, hence the instant service appeal with prayers that the impugned orders dated 12-10-2009 and 29-11-2017 may be set aside and the appellant may be re-instated in service with all back benefits.

03. Learned counsel for the appellant has contended that the appellant has not been treated in accordance with law, hence his rights secured under the law had badly been violated; that the impugned order has been passed in violation of mandatory provision of law, hence such order is void and illegal. Reliance was placed on 2007 SCMR 1129 and 2006 PLC CS 221; that departmental appeal of the appellant was rejected being barred by time, but since the impugned order is void, hence no limitation would run against void order. Reliance was placed on 2015 SCMR 795; that delay if any is condonable if delay already condoned in identical cases. Reliance was placed on PLD 2003 SC 724 and 2003 PLC CS 796; that this tribunal in similar cases has already granted condonation of delay and granted relief, hence the appellant is also entitled to the same under the principle of consistency; that the appellant has been discriminated, as other police officials, who were dismissed with the appellant, have been re-instated, whereas the appellant has been denied the same treatment.

04. Learned District Attorney for the respondents has contended that the appellant willfully absented himself from lawful duty without permission of the competent authority, hence he was issued with charge sheet/statement of allegation and proper inquiry was conducted; that despite repeated reminders, the appellant did not join the disciplinary proceedings; that right from the date of his absence i.e. 06-01-2009 till his order of dismissal i.e. 12-10-2009, the appellant neither reported his arrival nor bothered to join inquiry proceedings rather remain dormant which clearly depicts his disinterest in his official duty; that after fulfillment of all the codal formalities, the appellant was awarded major punishment of dismissal from service in absentia; that the appellant preferred

departmental appeal after lapse of 8 years, which was rejected being barred by time; that stance of the appellant being devoid of merit may be dismissed.

05. We have heard learned counsel for the parties and have perused the record.

06. Placed before us is cases of police constables, who alongwith many other police personnel had deserted their jobs in the wake of insurgency in Malakand division and particularly in District Swat. Police department had constituted a committee for cases of desertion and taking humanitarian view, re-instated such personnel into service in large number. Placed on record is a notification dated 01-11-2010, where 16 similarly placed employees had been re-instated on the recommendation of the committee constituted for the purpose. Other cases of similar nature have been noticed by this tribunal, where the provincial government had taken a lenient view keeping in view the peculiar circumstances in the area at that particular time and re-instated such deserted employees in service after years of their dismissal. Even this tribunal has already granted relief in similar nature cases on the principle of consistency. Appellants are also amongst those, who had deserted their jobs due to threats from terrorists. Coupled with this are dents in the departmental proceedings, which has not been conducted as per mandate of law, as the appellant in case of willful absence was required to be proceeded under general law i.e. Rule-9 of E& D Rules, 2011. Regular inquiry is also must before imposition of major punishment of dismissal from service, which also was not conducted.

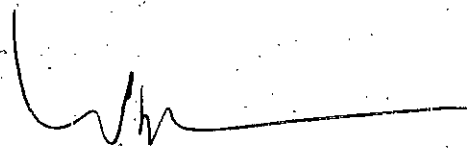
07. Consequently, keeping in view the principle of consistency, the impugned orders are set aside and the appellants are re-instated in service. Since the appeals are decided on technical grounds more so while keeping in view the conduct of the appellants, they shall not be entitled to any of the back benefits, hence the absence period as well as the intervening period during which the appellants has not performed duty shall be treated as extra-ordinary leave

without pay. The department is at liberty to conduct de-novo inquiry against the appellants in accordance with law. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED
28.01.2022



(AHMAD SULTAN TAREEN)
CHAIRMAN



(ATIQ-UR-REHMAN WAZIR)
MEMBER (E)

Major penalty converted to minor.

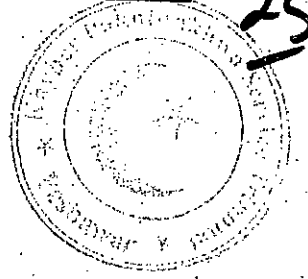
Service Appeal #
for
Appellant. 1/2/18

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 508/2018

Date of Institution ... 11.04.2018

Date of Decision ... 24.01.2022



Muhammad Ayub S/o Sher Ali Khan R/o Navay Kalay Mingora Swat, Ex-Constable
No. 1460, PS, Imam Dhery, Swat. ... (Appellant)

VERSUS

District Police Officer, Swat and others.

... (Respondents)

Arbab Saiful Kamal,
Advocates

... For Appellant

Asif Masood Ali Shah,
Deputy District Attorney

... For respondents

ANMAD SULTAN TAREEN
ATIQ-UR-REHMAN WAZIR

...
...

**CHAIRMAN
MEMBER (EXECUTIVE)**

JUDGMENT

ATIQ-UR-REHMAN WAZIR MEMBER (E):- Brief facts of the case are that the appellant while serving as Constable in Police Department was proceeded against on the charges of absence from duty and was ultimately dismissed from service vide order dated 21-02-2009. Feeling aggrieved, the appellant filed departmental appeal dated 20-03-2009, which was rejected vide order dated 18-09-2017. The appellant filed revision petition dated 27-09-2017, which was also rejected vide order dated 03-10-2017 communicated to appellant on 20-03-2018, hence the instant service appeal with prayers that the impugned orders dated 21-02-2009, 18-09-2017 and 03-10-2017 may be set aside and the appellant may be re-instated in service with all back benefits.

ATTESTED

KHYBER PAKHTUNKHWA
SERVICE TRIBUNAL
PESHAWAR

departmental Appeal after 7 years.

02. Learned counsel for the appellant has contended that the appellant has not been treated in accordance with law, hence his rights secured under the Constitution has badly been violated; that the impugned order is against law, facts and norms of natural justice, therefore not tenable and liable to be set aside; that absence of the appellant was not willful, but was due to compelling reason of terrorism in the area and which does not constitute gross misconduct entailing major penalty of dismissal; that the penalty so awarded is harsh, which does not commensurate with gravity of the guilt; that the appellant has been discriminated as similarly placed employees were re-instated but case of the appellant was not considered.

03. Learned Deputy District Attorney for the respondents has contended that the appellant willfully absented himself from lawful duty and did not turn up despite repeated summons; that the appellant while posted at Imam Dheri check post Police Station Kanjo absented himself without permission of the competent authority vide daily diary No 11 dated 17-10-2008; that the appellant was issued charge sheet/statement of allegation and proper inquiry was conducted; that the appellant was summoned repeatedly but he did not turn up, hence he was proceeded ex-parte; that after fulfillment of all codal formalities, the appellant was awarded with major punishment of dismissal from service vide order dated 2-02-2009; that the appellant filed departmental appeal with delay of more than seven year, which was considered but was rejected vide order dated 11-09-2017 being barred by time.

04. We have heard learned counsel for the parties and have perused the record.

05. Placed before us is case of a police constable, who alongwith many other police personnel had deserted their jobs in the wake of insurgency in Malakand division and particularly in District Swat. Police department had constituted a committee for cases of desertion and taking humanitarian view, re-instated such

Departmental Appeal
for more than 7 year

personnel into service in large number. Placed on record is a notification dated 30-11-2010, where 253 similarly placed employees had been re-instated on the recommendation of the committee constituted for the purpose. Vide another order dated 07-02-2012, batch of another 12 employees had been re-instated in service. Yet another order dated 15-03-2017 would show that similarly placed employee had been re-instated upon his revision petition on the ground of length of his service and threats from Taliban. Other cases of similar nature are available on record, which would suggest that the provincial government had taken a lenient view keeping in view the peculiar circumstances in the area at that particular time. Even this tribunal has already granted relief in similar nature cases on the principle of consistency. Appellant is also one among those, who had deserted his job due to threats from terrorists. Coupled with this are dents in the departmental proceedings, which has not been conducted as per mandate of law, as the appellant in case of willful absence was required to be proceeded under general law i.e. Rule-9 of E& D Rules, 2011. Regular inquiry is also must before imposition of major punishment of dismissal from service, which also was not conducted.

06. In view of the situation mentioned above and keeping in view the principle of consistency, we are inclined to partially accept the instant appeal by converting the major penalty of removal from service into minor penalty of stoppage of increments for two years. The intervening period is treated as leave without pay. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED

24.01.2022

(AHMAD SULTAN TAREEN)

CHAIRMAN

Certified to be true copy

(ATIQ-UR-REHMAN WAZIR)

Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

(ATIQ-UR-REHMAN WAZIR)
MEMBER (E)

converted into
minor penalty

for
Appellant

28

BEFORE THE KPK SERVICE TRIBUNAL, PESHAWAR

(Service Appeal No 488 /2017)

Ex-Constable Momon Khan R/O badeen Payan Post office
Gulbella tehsil District Peshawar. No 5308.

Appellant

VERSES

1. Inspector General of Police, KPK, Peshawar.
2. Deputy Inspector General of police, Peshawar.
3. Superintendent of Police, HQ Peshawar.

Respondents

Khyber Pakhtunkhwa
Service Tribunal

Diary No. 533

Dated 22/5/2017

Service Appeal under section of the KP Service tribunal Act.1974. Against the impugned order dated 09.07.2013, whereby the appellant was removed from service. Against which he filed Department appeal on 02.08.2013, which was rejected on 16.03.2017 copy of was received by the appellant on 15.05.2017.

PRAYERS:

On acceptance of the instant service appeal this honourable tribunal may graciously be pleased to set aside both the impugned order of respondents No 1 dated 16.03.2017 (whereby he maintained the order of removed from service) and respondent No.3 dated 09.07.2013 (whereby he removed the appellant from his legal service) and re-instant the appellant with all back benefits.

RESPECTFULLY SHEWETH

Fact giving rise too the present appeal is as under:

That the appellant was appointed constable in year 2008 and since than he performed his duties up to the entire satisfaction of his superior.

2. That the appellant in the year 2012 also passed elite course which show devotion and dedication towards duty on behalf of appellant.

Departmental Appeal 2 years 5 months

Filed to-day

Registrar

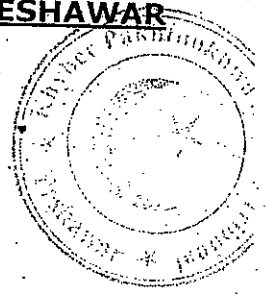
22/5/17

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 488/2017

Date of Institution ... 22.05.2017

Date of Decision ... 01.02.2022



Ex-Constable Momin Khan R/o Badeen Payan Post Office Gulbela Tehsil District Peshawar No. 5308. (Appellant)

VERSUS

Inspector General of Police Khyber Pakhtunkhwa Peshawar and others. (Respondents)

Uzma Syed & Javed Iqbal Gulbela Advocate ... For Appellant

Muhammad Adeel Butt, Additional Advocate General ... For respondents

AHMAD SULTAN TAREEN ... **CHAIRMAN**
ATIQ-UR-REHMAN WAZIR ... **MEMBER (EXECUTIVE)**

JUDGMENT

ATIQ-UR-REHMAN WAZIR MEMBER (E):- Brief facts of the case are that the appellant while serving as Constable in Police Department was proceeded against on the charges of absence from duty and was ultimately dismissed from service vide order dated 09-07-2013. Feeling aggrieved, the appellant filed departmental appeal dated 02-08-2013, which was rejected on 02-11-2016. The appellant filed Revision Petition dated 13-01-2017, which was also rejected vide order dated 16-03-2017, hence the instant service appeal with prayers that the impugned order dated 09-07-2013, 02-11-2016 and 16-03-2017 may be set aside and the appellant may be re-instated in service with all back benefits.

ATTESTED

[Signature]
MEMBER

02. Learned counsel for the appellant has contended that the impugned orders are against law, facts and norms of natural justice, therefore not tenable


and liable to be set aside; that the appellant has not been treated in accordance with law, hence his rights secured under the Constitution has badly been violated; that no proper inquiry was conducted and the appellant was not associated with proceedings of the inquiry; that absence of the appellant was not willful, but was due to illness of the appellant; that the penalty so imposed is harsh, which does not commensurate with gravity of the guilt so committed.

03. Learned Additional Advocate General for the respondents has contended that the appellant deliberately absented himself from lawful duty for about five months and 23 days without permission of the competent authority; that upon allegation of absence, the appellant was served with proper charge sheet/statement of allegation; that separate inquiries for intermittent absence were conducted and upon recommendation of the inquiry officers, the appellant was issued final showcause notice, but the appellant failed to respond to the showcause notice; that the charges of willful absence proved against him, hence he was awarded with major punishment of dismissal from service vide order dated 09-07-2013; that the appellant filed departmental appeal, which was also barred by time for almost two years and five months; that the appellant filed revision petition, which was also rejected being barred by time.

04. We have heard learned counsel for the parties and have perused the record.

05. Placed on record is charge sheet/statement of allegation containing allegation of absence from duty. Record is silent as to whether such charge sheet was served upon the appellant or otherwise, but the appellant was dismissed from service vide order dated 09-07-2013. Record would suggest that neither any inquiry was conducted nor the appellant was associated with proceedings of the inquiry, thus the respondents skipped a mandatory step in disciplinary proceedings. The appellant in the first place was not afforded opportunity of defense, as the appellant was not associated with disciplinary proceedings, as he

ATTESTED


P. K. ANAND
Secretary, Government
Service Tribunal
Peshawar

was proceeded against in absentia. The Supreme Court of Pakistan in judgment reported as 2008 SCMR 1369 has held that in case of imposing penalty, the principles of natural justice required that a regular inquiry was conducted in the matter and opportunity of defense and personal hearing was to be provided to the civil servant proceeded against, otherwise civil servant would be condemned unheard and major penalty of dismissal from service would be imposed upon him without adopting the required mandatory procedure, resulting in manifest injustice. The appellant was not treated as per law, as in case of willful absence, the appellant was required to be proceeded against under Rule 10 of E&D Rules, 2011, but the respondents acted in arbitrary manner and dismissed the appellant without adhering to the method prescribed in law.

06. The appellant was not guilty of charges of gross misconduct or corrupt behavior and therefore extreme penalty of dismissal from service for the charge of absence on higher side, hence, quantum of the punishment needs to be reduced. Reliance is placed on 2006 SCMR 1120. The appellant has admitted his absence but his absence was not willful, rather due to his illness and the appellant has taken assistance in his departmental appeal, which was not taken into consideration. Absence on medical grounds even without permission of the competent authority does not constitute gross misconduct entailing major penalty of dismissal from service. Competent authority had jurisdiction to award any of the punishments mentioned in law to the government employee but for the purpose of administration of justice such punishment should be awarded which is commensurate with the magnitude of the guilt, Otherwise the law dealing with the subject would lose its efficacy. Reliance is placed on 2006 SCMR 1120.


07. We are also mindful of the question of limitation, but since the impugned orders were passed in violation of mandatory provisions of law, hence no period of limitation would run for challenging such order. Reliance is placed on 2015 SCMR 795 and 2007 SCMR 834.

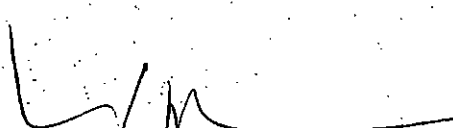
ATTESTED

[Signature]
 Notary Public
 Service Tribunal
 Islamabad


08. In view of the foregoing discussion, the instant appeal is partially accepted. The impugned orders are set aside and major penalty of dismissal from service is converted into minor penalty of stoppage of increments for two years and the intervening period is treated as leave without pay. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED
01.02.2022


(AHMAD SULTAN TAREEN)
CHAIRMAN


(ATIQ-UR-REHMAN WAZIR)
MEMBER (E)

Certified to be true copy


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Service Tribunal
Peshawar

Date of Presentation of Application 19-4-22
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Total 18/-
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20/4/22

BEFORE KPK SERVICE TRIBUNAL PESHAWAR



S.A No. 571 / 2018

33

Aamir Shah S/O Sufi Ali Shah,
R/o Sheikhan Kohat,
Ex-Constable. No. 388,
Police Line Kohat Appellant

File No. 548

Date 12-4-2018

VERSUS

1. District Police Officer, Kohat.
2. Regional Police Office,
Kohat Region Kohat
3. Provincial Police Officer,
KP, Peshawar. Respondents

⊕<=>⊕<=>⊕<=>⊕<=>⊕

**APPEAL U/S 4 OF SERVICE TRIBUNAL ACT, 1974
AGAINST O.B NO. 885 DATED 01-12-2011 OF R. NO.
01 WHEREBY APPELLANT WAS DISMISSED FROM
SERVICE RETROSPECTIVELY OR OFFICE ORDER NO.
2400 / EC DATED 07-03-2018 OF R. NO. 02
WHEREBY REPRESENTATION OF APPELLANT WAS
FILED OR OFFICE ORDER NO. S / 1265 DATED 03-04-
2018 OF R. NO. 03 WHEREBY REPRESENTATION OF
APPELLANT WAS FILED:**

12/4/18

⊕<=>⊕<=>⊕<=>⊕<=>⊕

ATTESTED

[Signature]
Secretary
KPK Service Tribunal
Peshawar

Respectfully Sheweth:

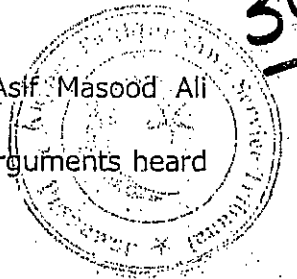
1. That appellant was enlisted in service in the year 2008 as Constable and served the department till the date of removal from service.
2. That appellant was deputed to PTC, Hangu for training in the year 2008 and qualified the same.

12/4/18

Respectfully Sheweth

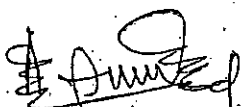
ORDER
24.01.2022

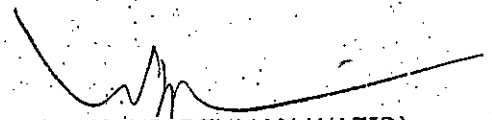
Learned counsel for the appellant present: Mr. Asif Masood Ali Shah, Deputy District Attorney for respondents present: Arguments heard and record perused.



Vide our detailed judgment of today, placed on file of Service Appeal bearing No. 498/2018 titled "Rashid Ahmad Versus District Police Officer, Swat and one another", we are inclined to partially accept the instant service appeal by converting the major penalty of dismissal from service into minor penalty of stoppage of increments for two years. The intervening period is treated as leave without pay. Respondents however are at liberty to conduct de-novo inquiry as per mandate of law, if they so desire. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED
24.01.2022


(AHMAD SULTAN TAREEN)
CHAIRMAN


(ATTIQ-UR-REHMAN WAZIR)
MEMBER (E)

20/4/22 Certified to be true copy

Date of Presentation of Application _____

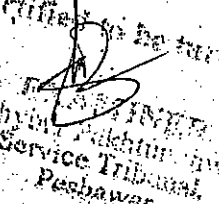
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Applicant Fee _____ 10/-

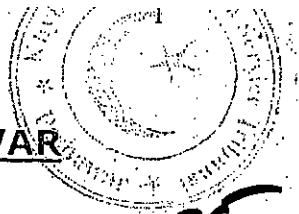
Cost _____ 10/-

Date of Issuance of Copy _____ 21/4/22

Date of Delivery of Copy _____ 21/4/22


Khyber Pakhtunkhwa
Service Tribunal
Peshawar

BEFORE KPK SERVICE TRIBUNAL PESHAWAR



S.A No. 498 / 2018

35

Rashid Ahmad S/O Sher Zada,
R/o Village Kokarai, Swat,
Ex-Constable. No. 1834,
District Police Swat

Khyber Pakhtunkhwa
Service Tribunal

Entry No. 524

Dated 10-4-2018

Appellant

VERSUS

1. District Police Officer, Swat.
2. Regional Police Officer,
Malakand, at Saidu Sharif
Swat

Respondents

⇨⇩⇨⇩⇨⇩⇨⇩⇨⇩⇨

**APPEAL U/S 4 OF SERVICE TRIBUNAL ACT, 1974
AGAINST O.B. NO. 28, DATED 21-02-2009 OF R. NO.
01 WHEREBY APPELLANT WAS DISMISSED FROM
SERVICE FROM 29-10-2008 OR OFFICE ORDER NO.
2503/E DATED 21-03-2018 OF R. NO. 02, WHEREBY
REPRESENTATION OF APPELLANT WAS FILED:**

Filed to-day

Registrar

10/4/18

Respectfully Sheweth:

⇨⇩⇨⇩⇨⇩⇨⇩⇨⇩⇨

1. That appellant was enlisted in service in the year 2008 as Constable and served the department till the date of dismissal from service.
2. That appellant was deputed to PTC, Hangu for training in the year 2008 which was qualified by him.
3. That on 29-10-2008, appellant was posted at PTC Hangu, but absented from duty vide message dated 27-11-2008.

[Signature]
Khyber Pakhtunkhwa
Service Tribunal
Peshawar

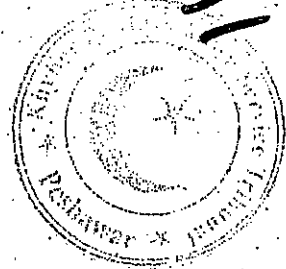
BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

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Service Appeal No. 498/2018

Date of Institution ... 10.04.2018

Date of Decision ... 24.01.2022



Rashid Ahmad S/o Sher Zada, R/o Village Kokarai, Swat, Ex-Constable No. 1834,
District Police Swat. ... (Appellant)

VERSUS

District Police Officer, Swat and others. ... (Respondents)

Arbab Saiful Kamal,
Advocate ... For Appellant

Asif Masood Ali Shah,
Deputy District Attorney ... For respondents

AHMAD SULTAN TAREEN ... **CHAIRMAN**
ATIQU-UR-REHMAN WAZIR ... **MEMBER (EXECUTIVE)**

JUDGMENT

ATIQU-UR-REHMAN WAZIR MEMBER (E):-

This single judgment shall dispose of the instant service appeal as well as the connected Service Appeal bearing No. 571/2018 titled "Aamir Shah Versus District Police Officer, Kohat and two others", as common question of law and facts are involved therein.

02. Brief facts of the case are that the appellant while serving as constable in police department, was proceeded against on the charges of absence and was ultimately dismissed from service vide order dated 21-02-2009. Feeling aggrieved, the appellant filed departmental appeal dated 20-03-2009, which was not responded. Subsequent appeal was submitted to respondent No 2, which was rejected vide order dated 12-03-2018, hence the instant service appeal with

ATTESTED

Secretary, Peshawar

prayers that the impugned orders dated 21-02-2009 and 12-03-2018 may be set aside and the appellant may be re-instated in service with all back benefits.


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03. Learned counsel for the appellant has contended that the appellant was dismissed from service on the charges of absence but absence of the appellant was not willful but was due to compelling reason of terrorism; that a large number of police personnel had deserted their jobs due to threats of Taliban, who were again re-instated in service vide orders dated 30-11-2010, 15-03-2017 and 09-08-2017, but case of the appellant was not considered positively; that this Tribunal in numerous cases has already granted relief to the similarly placed employees and the appellant is also requesting for the same treatment under the principle of consistency; that absence of the appellant was not willful, which does not constitute gross misconduct and the penalty so awarded is harsh, which does not commensurate with gravity of the guilt; that the impugned order was issued with retrospective effect, which is void ab initio; that no codal formalities were fulfilled and the appellant has not been treated in accordance with law, hence his rights secured under the Constitution has badly been violated.

04. Learned Deputy District Attorney for the respondents has contended that the appellant was proceeded against on the charges of willful absence from duty, therefore proper departmental proceedings were initiated against him, which culminated into his removal from service under RSO 2000; that the appellant file departmental appeal with a considerable delay, which was rejected being barred by time; that numerous other officials were re-instated into service but every case has its own merits, whereas the appellant was awarded punishment for his own conduct; that final show cause notice was also served at his home address, but the appellant did not turn up, hence he was proceeded in absentia.

05. We have heard learned counsel for the parties and have perused the record.

ATTESTED


Secretary
Service Tribunal

06. Placed before us is case of a police constable, who alongwith many other police personnel had deserted their jobs in the wake of insurgency. Police department had constituted a committee for cases of desertion and keeping in view humanitarian aspect, re-instated such personnel into service in large number. Placed on record is a notification dated 30-11-2010, where 253 similarly placed employees had been re-instated on the recommendation of the committee constituted for the purpose. Vide another order dated 07-02-2012, batch of another 12 employees had been re-instated in service. Yet another order dated 15-03-2017 would show that similarly placed employee had been re-instated upon his revision petition on the ground of length of his service and cause of terrorism.


Other cases of similar nature are available on record, which would suggest that the provincial government had taken a lenient view keeping in view the peculiar circumstances in the area at that particular time. Even this tribunal has already granted relief in similar nature cases under the principle of consistency. Appellant is also one among those, who had deserted his job due to threats from terrorists. Situation at that particular time was so perturb, as how to proceed such large number of cases of desertion, for which publications were made in newspapers, hence the proceedings so conducted in such like cases were not in accordance with law. In the instant case no regular inquiry was conducted, nor any charge sheet/statement of allegation was served upon the appellant and the appellant was condemned unheard and which shows that the appellant was summarily proceeded without adhering to the method prescribed in law.

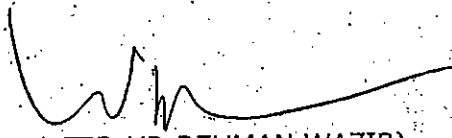
07. We are also mindful of the question of limitation, but since the impugned order was passed without proper legal process and when an adverse order is passed without fulfilling the legal formalities, such order is void and no limitation runs against void order. Still another reason exists for condonation of delay that the impugned order was issued with retrospective effect being void ab initio.

ATTESTED
 [Signature]
 Director, Labour & Welfare
 Government of Punjab
 Lahore

08. In view of the situation mentioned above and keeping in view the principle of consistency, we are inclined to partially accept the instant appeal as well as the connected service appeal by converting the major penalty of dismissal from service into minor penalty of stoppage of increments for two years. The intervening period is treated as leave without pay. Respondents however are at liberty to conduct de-novo inquiry as per mandate of law, if they so desire. Parties are left to bear their own costs. File be consigned to record room.

ANNOUNCED
24.01.2022


(AHMAD SUETAN TAREEN)
CHAIRMAN

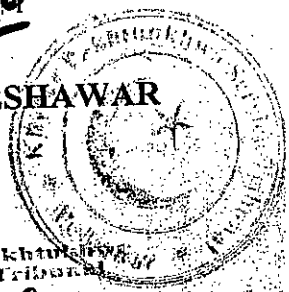

(ATIQ-UR-REHMAN WAZIR)
MEMBER (E)

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OFFICER
Khyber Pakhtunkhwa
Service Tribunal
Peshawar

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BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 859/2019

Fazal Mola,
Ex- Chowkidar,
Population Welfare Department,
Badaber Family Welfare Centre (FWC),
Peshawar,.....

Khyber Pakhtunkhwa
Service Tribunal
Diary No. 901
Dated 27/6/2019

Appellant.

Versus

1. The Secretary,
Govt. of Khyber Pakhtunkhwa,
Population Welfare Department,
Civil Secretariat, Peshawar.
2. The Director General,
Population Welfare Department,
Khyber Pakhtunkhwa,
Plot No.18, Sector E-8,
Phase-7, Hayatabad, Peshawar.
3. The District Population Welfare Officer,
Plot No.18, Sector E-8,
Phase-7, Hayatabad, Peshawar.

SERVICE APPEAL UNDER SECTION 4 OF
THE KHYBER PAKHTUNKHWA SERVICE
TRIBUNALS ACT, 1974 AGAINST THE
IMPUGNED FINAL ORDER OF RESPONDENT
NO. 1 DATED 29-05-2019 PASSED ON THE
DEPARTMENTAL APPEAL OF THE
APPELLANT AGAINST THE IMPUGNED
ORIGINAL ORDER OF DISMISSAL FROM
SERVICE DATED 20-02-2013.

Filed to-day
Registrar
27/6/19

Respectfully Sheweth,

Facts giving rise to the present appeal are as under:

TESTED
EXAMINER
Khyber Pakhtunkhwa
Service Tribunal
Peshawar

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KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

Service Appeal No. 859/2019

BEFORE: MRS. ROZINA REHMAN ... MEMBER (J)
 MISS. FAREEHA PAUL ... MEMBER(E)

Fazal Mola Ex- Chowkidar, Population Welfare Department, Badaber Family Welfare Centre (FWO), Peshawar.

.... (Appellant)

Versus

1. Secretary Govt. of Khyber Pakhtunkhwa, Population Welfare Department, Civil Secretariat, Peshawar.
2. Director General Population Welfare Department, Khyber Pakhtunkhwa, Plot No. 18, Sector E-8, Phase-7, Hayatabad, Peshawar.
3. District Population Welfare Officer, Plot No. 18, Sector E-8, Phase-7, Hayatabad, Peshawar

... (Respondents)

Mr. Ashraf Ali Khattak
Advocate

For appellant

Mr. Muhammad Adeel Butt
Addl. Advocate General

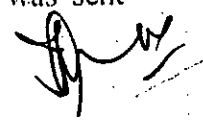
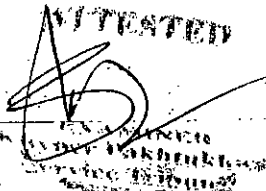
For respondents

Date of Institution.....27.06.2019
Date of Hearing.....01.06.2022
Date of Decision.....01.06.2022

JUDGEMENT

FAREEHA PAUL MEMBER (E): The service appeal in hand has been instituted under Section 4 of the Khyber Pakhtunkhwa Service Tribunal Act, 1974, against the impugned order dated 20.02.2013 whereby the appellant was dismissed from service and order dated 29.05.2019 whereby his departmental appeal was rejected.

2. Brief facts of the case, as given in the memorandum of appeal, are that the appellant was appointed Chowkidar in the respondent department on 17.03.2001. On 06.11.2010 an FIR was lodged against him and other male family members under Sections 302/324/34 PPC. He voluntarily surrendered before the police and was sent

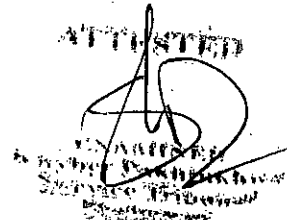

WITNESSED

Khyber Pakhtunkhwa
Service Tribunal

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-
behind the bar. He was released on bail vide order dated 22.06.2014 and reported for duty where he was informed that he had been dismissed from service vide order dated 20.02.2013. After obtaining a copy of the order, he submitted departmental appeal on 24.11.2014 for reinstatement on which the Director General Population Welfare nominated the Assistant Director (Admn) on 17.03.2015 to inquiry into the appeal and submit report within fortnight. Report was submitted on 06.05.2015. Case file is silent about the proceedings after the submission of inquiry report. In the meantime the appellant was acquitted from the charges levelled against him vide judgement of Additional Sessions Judge VIII, Peshawar dated 12.01.2019 based on which he submitted an application dated 04.03.2019 to the Director General Population Welfare for his reinstatement but it was filed vide letter dated 29.05.2019.

3. Respondents were put on notice who submitted written replies/comments on the appeal. We have heard the learned counsel for the appellant as well as the Assistant Advocate General and perused the case file with connected documents minutely and thoroughly.

4. Learned counsel for appellant invited the attention of the tribunal to the recommendations of the inquiry report dated 06.05.2015 which interalia proposed reinstatement of appellant into service w.e.f the date of dismissal from service and treat the period of his absence as leave without pay. It was contended by him that no written order was passed on that recommendation and the appellant was verbally informed that he would be reinstated after decision of the pending criminal case against him but it was not done and his application was filed vide the impugned letter dated 29.05.2019.

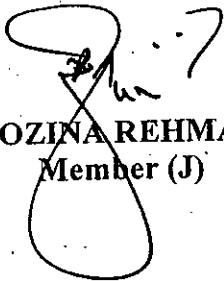
5. The learned Additional Advocate General contended that the appellant remained absconder for 04 years from 06.11.2010, the time when FIR was lodged against him till his surrender on 20.11.2014, which was enough to take action against him as was taken by his competent authorities.

ATTACHED


6. From the arguments presented by the learned counsel for appellant, the learned Additional Advocate General and record available before us, it is clear that appellant was involved in a criminal case which was decided by the court of Additional Sessions Judge VIII, Peshawar and he was acquitted from the charges levelled against him. Perusal of the record further reveals that the appellant was not proceeded against under the Government Servants (E&D) Rules 2011, before awarding major penalty of dismissal from service i.e no formal inquiry was conducted. However, an inquiry that was conducted on the orders of Director General Population Welfare by the Assistant Director (Admn) proposed his reinstatement in service w.e.f date of his dismissal. When the Additional Advocate General was asked about the action taken as a result of that inquiry he could not respond. This shows that no action was taken on the recommendations of the inquiry officer. On the other hand the application for reinstatement submitted by the appellant, after his acquittal from criminal charges, was filed by the competent authority.

7. In view of the facts narrated above, we allow the appeal and set aside the impugned orders dated 20.02.2013 and 29.05.2019 and direct the respondents to reinstate appellant from the date of his dismissal. The period of his absence is treated as leave without pay. Parties are left to bear their own costs. Consign.

8. Pronounced in open court in Peshawar and given under our hands and seal of the Tribunal this 1st day of June, 2022.


(ROZINA REHMAN)
 Member (J)


(FARZEHA PAUL)
 Member (E)

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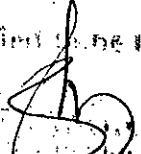
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 Officer
 Service Tribunal
 Peshawar

[Supreme Court of Pakistan]

Present: Tassaduq Hussain Jilani and Sarmad Jalal Osmany, JJ

SECRETARY, GOVERNMENT OF PUNJAB and others---Petitioners

Versus

KHALID HUSSAIN HAMDANI and 2 others---Respondents

Civil Petitions Nos. 1708-L to 1710-L of 2012, decided on 19th February, 2013.

(On appeal from the judgment dated 16-5-2012 passed by the Punjab Service Tribunal, Lahore in Appeals Nos. 1180, 1185 and 1323 of 2011).

(a) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---

---Ss. 13 & 4(1)(a)(v)---Negligence on part of civil servant---Quantum of punishment---Punishment to be proportional to the charge---Scope---Inquiry officer finding civil servant to be contributory negligent and recommending minor penalty---Competent authority enhancing punishment to major penalty without giving reasons for disagreeing with recommendations of inquiry officer, and after relying on a report which was prepared after show-cause notice had been issued to civil servant---Legality---Civil servants were only charged for paying excess advances to a contractor---No charge of corruption was made against them nor was there any allegation against them of making personal gain---Findings recorded by inquiry officer indicated that act of civil servants could be described as "contributory negligence"---Inquiry officer recommended withholding of promotion of civil servants for a specific period of time and recovery of Rs. 2.76 million which had been paid to the contractor---Competent authority issued show cause notices to civil servants, whereafter a report was called from the Chief Engineer---Competent authority enhanced penalty to dismissal from service after relying on the said report---Civil servants were never confronted with the findings of the said report, which was submitted after the inquiry thus it was neither part of the inquiry nor civil servants were given any notice of it---Enhancement of penalty by competent authority on basis of such report was unreasonable and based on extraneous material---Even otherwise quantum of sentence was disproportionate to the gravity of charge as admittedly there was no allegation of collusiveness with the contractor or of corruption---Additionally, competent authority disagreed with the recommendations of the inquiry officer without assigning any reasons---Since competent authority did not agree with recommendations of inquiry officer, it could have proceeded in terms of S.13(6) of Punjab Employees Efficiency, Discipline and Accountability Act, 2006 and either remanded the inquiry to the inquiry officer or could have directed de novo inquiry, instead of enhancing punishment to dismissal from service---Appeal was allowed, civil servants were awarded minor penalty of stoppage of promotion as recommended by the inquiry officer and finding of inquiry officer regarding recovery of money from contractor was set aside, as contractor was not associated with the inquiry proceedings---Supreme Court, however, observed that it would be open for the Department to take appropriate steps provided in law to effect recovery from the contractor.

Shibli Farooqui v. Federation of Pakistan 2009 SCMR 281; Mukhtar Ahmed Bhatti v. Director Food, Punjab 1992 SCMR 1864; Director Food v. Rashid Ahmad and others 1990 SCMR 1446; Deputy Director Food v. Akhtar Ali 1997 SCMR 343 and Muhammad Ibrahim Dasti and another v. Deputy Director Food, Multan and another 1986 PLC (C.S.) 845 ref.

(b) Civil service---

---Negligence on part of civil servant---Scope---Punishment for negligence---Elements of bad faith and

wilfulness might bring the act of negligence within the mischief of misconduct but conduct demonstrating lack of proper care and requisite vigilance might not always be wilful amounting to grave negligence to warrant harsh punishment.

(c) Civil service---

---Misconduct---Punishment, award of---Findings of competent authority-Interference in such findings by concerned Service Tribunal---Scope---Award of appropriate punishment under the law was primarily the function of the concerned administrative (competent) authority and the role of the Tribunal/Court was rather secondary---Court, ordinarily would not substitute its own finding with that of the (competent) authority unless the latter's opinion was unreasonable or was based on irrelevant or extraneous considerations or was against the law declared.

(d) Civil service---

---Misconduct---Punishment, award of---Purpose and scope---Punishment to a delinquent public servant was premised on the concept of retribution, deterrence or reformation---While awarding punishment competent authority had to keep in mind the underlying object of law and the severity of misconduct.

(e) Administrative law---

---Administrative authority---Discretion, exercise of---Scope---Administrative authority had to exercise discretion by applying an independent mind uninfluenced by irrelevant or extraneous considerations.

(f) Civil service---

---Misconduct--- Punishment, award of--- Punishment to be proportional to the gravity of charge--- Scope---Acts of serious misconduct might be visited with major penalty so that not only the offender was brought to justice but also to make it an example for others---Where gravity of charge was of a lesser degree and circumstances reflected absence of bad faith and wilfulness, which amounted to mere negligence, then minor punishment might be a preferred course---Award of minor penalty provided an opportunity to the delinquent public servant to reform himself.

Ranjit Thakar v. Union of India AIR 1987 SC 2386 and Auditor-General of Pakistan v. Muhammad Ali 2006 SCMR 60 rel.

Ch. Muhammad Hanif Khatana, Additional A.-G. and Arshad Javaid Chadhar, Deputy Director Legal, C&W Department for Petitioners.

Hafiz Tariq Naseem, Advocate Supreme Court for Respondent No.1 (in C.Ps. Nos. 1708-L and 1709-L of 2012).

Date of hearing: 19th February, 2013.

ORDER

TASSADUQ HUSSAIN JILLANI, J.---This judgment shall dispose of Civil Petitions Nos. 1708-L to 1710-L of 2012 as they are directed against the same judgment dated 16-5-2012 passed by the learned Service Tribunal vide which respondents' appeals were allowed and by reversing the order of the Competent Authority whereby the respondents were awarded major penalty of dismissal from service and recovery of amount specified was imposed, they were directed to be reinstated into service.

2. Facts in brief are that the respondent officers were proceeded against departmentally on charges of misconduct inter alia on the ground as under:--

"That during their posting in Provincial Highways Division, Sialkot, they committed financial irregularities by making advance payments to the contractor worth Rs. 9.802 million. As a matter of fact, the payment should have been made as per actual work done/executed. This advance payment, in a way, was like making financial comfort to the contractor for the items of work which were not even executed. 46

In view of above, they are guilty of inefficiency, misconduct and corruption as envisaged under the Act *ibid*."

3. The afore-referred charge was relatable to the respondent officers for the period as under:--

"Sr. No.	Name	Designation	Period
1.	Khalid Hussain Hamdani	Executive Engineer, Punjab Highways Division, Sialkot.	18-10-2005 to 16-11-2006
2.	Nawazish Ali Shah	SDO, Punjab Highway, Pasrur with additional charge of the work.	July, 2005 to 25-2-2007
3.	Muhammad Younis Mirza	Sub Engineer, Punjab Highways Division, Sialkot	June 2005 to 18-1-2007

4. The Inquiry Officer having recorded the evidence and examined the relevant material came to the conclusion as under:--

(1) In view of the provisions of clause 51 of the agreement and Article 4.5 (I&J) of B&R Code the responsibility of the Executive Engineer gets lightened to some extent, but in my views he could have performed better than he has done. It is therefore recommended that under para-4(a)(v) of PEEDA Act 2006 minor penalty be awarded to Mr. Khalid Hamdani by stopping his promotion for one year.

(2) Sub-Divisional Officer and Sub-Engineer are responsible for detailed measurement and are basically responsible for the wrong entries of the work. Since a lot of work has been executed by them after running bill No. 18 and over payment which was initially Rs. 9.808 Million has been reduced to Rs.2.764 Million. Therefore it is recommended that under para-4(a)(v) of PEEDA Act 2006 promotion of Mr. Nawazish Ali Shah and Mirza Muhammad Younish Sub-Engineer to the next higher rank be withheld for a period of two years.

(3) I have checked the ledger of account of this work. It has come to my knowledge that neither security nor any guarantee is otherwise available with the Department so as to adjust the over payment of Rs.2.764 million. Since the construction Company Messrs Tarmac Pak is the main beneficiary of this over payment, it is recommended that this amount be recovered from Messrs Tarmac Pak if they are working in the Department on any other project. In other case, this amount of Rs. 2.764 million be recovered from them as arrear of land revenue."

5. The Competent Authority issued notice to the respondent officers in terms of the findings in the inquiry and being not satisfied with the assessment of the alleged excess payment made to the contractor directed the Chief Engineer to carry out measurement of the work subject matter of the inquiry and submit report and without confronting the respondent officers with the findings of the said report submitted by the Chief Engineer imposed penalties in terms as follows:--

Sr. No.	Name and Designation	Penalties
1.	Mr. Khalid Hussain Hamdani, District Officer (Roads), Vehari	(i) A major penalty of Recovery of Government loss amount to Rs.6.598 million. (ii) Major penalty of dismissal from service.
2.	Syed Nawazish Ali Shah, Deputy District Officer (Roads), Tandlianwala.	Major penalty of dismissal from service.

3.	Mirza Muhammad Younis, Sub-Engineer, o/o XEN, Provincial Highways Division, Sialkot.	Major penalty of dismissal from service.
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The learned Service Tribunal allowed the appeal.

6. Learned Additional Advocate General sought leave on the ground that the learned Service Tribunal in reversing the order of the Competent Authority did not appreciate the evidence led; that if the Service Tribunal was of the view that the inquiry had not been conducted as mandated in law or the respondents had not been granted hearing after the submission of report of the Chief Engineer the proper course for the Service Tribunal would have been to remand the case for a de novo inquiry and reversing the order of the Competent Authority in the case of serious misconduct is not sustainable in law.
7. Learned counsel for the respondents, on the other hand, defended the impugned judgment by submitting that the respondent officers had been subjected to lengthy inquiry; that the Inquiry Officer having elaborately discussed the evidence led had recommended award of minor penalties to the respondents but the Competent Authority without giving any reason disagreed with it and imposed major penalty of dismissal from service along with recovery of the amount mentioned above; that according to the Inquiry Officer the excess payment was made only to the tune of Rs. 2.76 million but the Competent Authority enhanced it to Rs.6.518 million on the basis of the report submitted by the Chief Engineer with which the respondent officers were never confronted; that the Inquiry Officer as also the Competent Authority totally ignored the fact that a sum of Rs. 66 lacs of the contractor was lying with the Government which was forfeited and if there was any excess payment, the same has been made good and that in any case learned Additional Advocate General has not raised any question of law of public importance within the meaning of Article 212(3) of the Constitution to warrant interference. In the alternative learned counsel added that if the Court is not satisfied with the submissions made by him the Court may substitute the penalty of dismissal from service with the penalties awarded by the Inquiry Officer as they were the result of proper hearing of the respondents.
8. Having considered the submissions made by learned Law Officer and learned counsel for the respondents, we find that the basic charge against the respondents was of excess advances made to the contractor. In such like cases, there are two types of advances made to the contractor i.e. 'mobilization advance' which is against the guarantee before the start of the work. There is no allegation that any mobilization advance was made. The second advance is the 'secured advance' which is made against material stacked at site for executing the work. The respondent officers were charged with making secured advance payments in excess. The question whether there has been excess payment or not is a question of fact which can only be decided by factual inquiry which inter alia may include measurement of the work, subject matter of inquiry. As held by the Tribunal, only visible parts of the work done were measured and hidden/concealed and eroded parts of the work were not taken into account. There is nothing on record to indicate as to why the measurement of launched stone work, eroded earth work and steel/high tension wires used in the concrete work was not carried out. After going through the inquiry report and having already given show cause notices to the respondents, the Competent Authority called for a report from the Chief Engineer. On court query, learned Additional Advocate-General admitted in all fairness that the act of the Competent Authority in calling for a fresh report from the Chief Engineer after respondents had been issued show cause notices on the basis of the findings of the Inquiry Officer and awarding penalty to the respondents on the said report of the Chief Engineer was not tenable in law. He further admitted that the respondent officers were never confronted with the findings in the said fresh report received from the Chief Engineer. He however, suggested that it is a fit case for de novo inquiry.
9. There was no charge of corruption against the respondents nor there is any allegation of making personal gain and the tenor of the findings recorded by the Inquiry officer indicates that the act of the respondents could be described as contributory negligence. The Inquiry Officer who carried out a detailed inquiry found that in making the excess payment to the Contractor even the Divisional Accountant was partly liable on account of his omission to keep the requisite check. The finding about the said officer is

Case Judgement

that he has miserably failed in the performance of his duties." The context in which he gave this finding would be of relevance. He observed as follows:--

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"As far as the provision of Article 4.5 (I&J) is concerned it certainly provides some relief to the Executive Engineer by way of check measurement either of 24 bills or 10% of the amount paid during one year. But this relief is not available to any Executive Engineer without any check and balance. The requirement of Article 4.5 (I&J) of the B&R Code binds the Executive Engineer to physically carry out necessary check and a record thereon is to be maintained and which is to be the personal responsibility of the Divisional Accountant to preserve the abstract of checking. I could not find such a record in the entire proceedings. Accordingly, Divisional Accountant has miserably failed in the performance of his duties. In addition to it higher rates of reinforcement steel of Rs.7,500 per % Kg has been allowed for girders whereas this rate was quoted as Rs.6,000 per % Kg by the contractor. In my earnest views this was also the responsibility of the Divisional Accountant to watch out and not to allow any rate other than quoted rates by the contractor."

With regard to the role and liability of the accused officers, the Inquiry Officer came to the conclusion as under:--

"In the beginning of each measurement book, there are instructions for posting. Para 3 writing of detail measurements should be recorded by Executive Engineer, Sub-Divisional officers, Assistant Engineers and by Executive Sub-Ordinate (Sub-Engineer). If this paragraph is read with Article No. 4.5(5) it becomes clear that the officer responsible for making detail measurements are Sub-Divisional officer and Sub-Engineers. On large works, Sub-Divisional Officer is responsible for entries himself whereas for small works he require to check various %ages as laid down in B&R code Article 4.5. But as a common agreeable practice invoke(sic.) in the department, the detail measurements are recorded by the Sub-Engineer and 100% check is applied by the Sub-Divisional Officer. In view of this discussion it is obvious that the responsibility of measuring works rests with the Sub-Engineer and Sub-Divisional officer. Another question needs discussion, whether there can be any mistake or error in recording the measurements or not. The reply again comes from Article 4.5 of the B&R code which clearly states that there may be chances of erroneous measurements but the error has been limited to 2% only. In the instant case the variation plus and minus both are there, over all impact cost wise remains within 2% of the permission limit (if the latest position of the work is considered including work pre-audited as well as not pre-audited). As such the intensity of wrong measurement though it is there yet it gets eased out to certain extent. The Sub-Divisional Officer Provincial Highway Sub-Division Pasroor and his Sub-Engineer are therefore guilty of wrong measurements."

10. The Competent Authority, it appears, neither examined the evidence recorded during inquiry nor appreciated the findings given by the Inquiry Officer and proceeded to enhance the penalty by converting the same into major penalty of dismissal from service and the recovery from Rs. 2.76 million as determined by the Inquiry Officer to Rs. 6.518 million merely on the basis of a report submitted by the Chief Engineer after the submission of inquiry report and issuance of show cause notices to the respondent officers. If he was of the view that the finding of the Inquiry Officer qua the quantum of excess payment was factually incorrect, he could have directed de novo inquiry or could have confronted the respondent officers with the report of the Chief Engineer. He even did not specifically disagree with the findings of the Inquiry Officer with regard to the nature of the misconduct committed by the respondent officers which persuaded the latter to recommend minor penalties. The authority enhanced the penalty merely on the basis of Chief Engineer's report that the excess payment made was more than what was calculated by the Inquiry Officer. There is no cavil to the proposition that the act of carelessness on the part of a civil servant could be a valid ground to award penalty. Elements of bad faith and willfulness may bring the act of negligence within the mischief of 'misconduct' but a conduct demonstrating lack of proper care and the requisite vigilance may not always be willful amounting to grave negligence to warrant harsh punishment.

11. The learned Additional Advocate-General to be fair to him did not defend the manner in which he proceeded and suggested remanding the case for de novo enquiry. However, since the respondent-officials

have undergone the agony of a protracted enquiry, that course in the facts of this case may not be tenable more so when the entire evidence is on record. What in the aforementioned circumstances and the evidence led should be the appropriate punishment? The award of appropriate punishment under the law is primarily the function of the concerned administrative authority and the role of the Tribunal/Court is rather secondary. The court ordinarily would not substitute its own finding with that of the said authority unless the latter's opinion is unreasonable or is based on irrelevant or extraneous considerations or is against the law declared.

12. The law provides for more than one kind of punishments keeping in view the object of such penal provisions and the gravity of the charge in a case. Conceptually punishment to a delinquent public servant is premised on the concept of retribution, deterrence or reformation. In awarding punishments, the Competent Authority has to keep in mind the underlying object of law and the severity of the misconduct.

13. In the administrative law, the authority is vested with a certain amount of discretion and the said discretion has to be exercised by applying independent mind uninfluenced by irrelevant or extraneous considerations. In *Messrs Gadoon Textile Mills v. WAPDA* (1997 SCMR 641), this Court was called upon to comment on the ambit of the discretionary power vested in an administrative authority. While analyzing the opinion, this Court observed as follows:--

"42. To make exercise of discretionary power valid it is necessary that apart from being legal it is also reasonable. While conferring discretion on an authority the statute does not intend to arm such Authority with unfettered discretion which may be beyond the limits of reason, and comprehension of a man of ordinary intelligence. Wade in *Administrative Law* has traced the principles of reasonableness which according to him is firmly established at least from 16th century and has quoted *Rooke's case* (1598) 5 Co. Rep. 99b where the Commissioner of Sewers had levied charges for repairing a river bank on one adjacent owner instead of apportioning it among all the owners, who had benefited. Although the power to levy charge was there, it was disallowed as inequitable and unreasonable. Coke observed:--

"....and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and abstance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit."

This view has prevailed throughout till the modern times.

43. In *Brean v. Amalgamated Engineering Union* (1971) 2 QB 175 Lord Denning MR. observed as follows:-

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this; the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be set aside. That is established by *Padfield v. Minister of Agriculture, Fisheries and Food* which, is a landmark in modern administrative law."

14. One of the most articulate judicial expositions of reasonableness in exercise of statutory discretion in English jurisdiction is found in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223. Lord Greene speaking for the Court in the said case explained this concept in terms as follows:--

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the words 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a

discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority..... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

15. This view was reiterated in *Union of India v. Ganayutham (dead) by LRs.* (AIR 1997 SC 3387) and it was inter alia held as follows:--

"To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test."

16. The doctrine of proportionality is yet another principle of judicial review of administrative actions. Particularly when it comes to quantum of sentence. While quashing the punishment in a Court-Martial case and describing it to be strikingly disproportionate, the Indian Supreme Court in *Ranjit Thakur v. Union of India* (AIR 1987 SC 2386) explained the concept as under:--

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

17. Acts of serious misconduct may be visited with major penalty so that not only the offender is brought to justice but also to make it an example for others. This is deterrent and has reformatory effect on society. However, if the gravity of the charge is of a lesser degree and the circumstances reflect absence of bad faith and willfulness which may amount to mere negligence then the minor punishment may be a preferred course. The award of minor penalty provides an opportunity to the delinquent public servant to reform himself. In *Auditor-General of Pakistan v. Muhammad Ali* (2006 SCMR 60), this Court upheld the order of the Federal Service Tribunal wherein the major penalty of compulsory retirement was converted into reduction in timescale by three stages for a period of two years without cumulative effect. The Court while doing so, observed as follows:--

"The purpose of deterrent punishment is not only to maintain balance with the gravity of wrong done by a person but also to make an example for others as preventive measure for reformation of the society, whereas the concept of minor punishment in the law is to make an attempt to reform the individual wrong doer. In service matters, the extreme penalty for minor acts depriving a person from right of earning would definitely defeat the reformatory concept of punishment in administration of justice."

18. The Inquiry Officer in the case in hand submitted the inquiry report to the Competent Authority so as to enable the latter to proceed further as provided in law. Section 13 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 lays down a procedure to be followed by the Competent Authority and it reads as follows:--

"13. Order to be passed by the competent authority on receipt of report from the inquiry officer or inquiry committee.---(1) On receipt of the report from the inquiry officer or inquiry committee, as the case may be, the competent authority shall examine the report and the relevant case material and determine whether the inquiry has been conducted in accordance with the provisions of this Act.

(2) If the competent authority is satisfied that the inquiry has been conducted in accordance with the provisions of this Act, it shall further determine whether the charge or charges have been proved against the accused or not.

(3) Where the charge or charges have not been proved, the competent authority shall exonerate the accused by an order in writing.

(4) Where the charge or charges have been proved against the accused, the competent authority shall issue a show cause notice to the accused by which it shall-

(a) inform him of the charges proved against him and the penalty, or penalties proposed to be imposed upon him by the inquiry officer or inquiry committee;

(b) give him reasonable opportunity of showing cause against the penalty or penalties proposed to be imposed upon him and to submit as to why one or more of the penalties as provided in section 4 may not be imposed upon him and to submit additional defence in writing, if any, within seven days of the receipt of the notice, before itself or the hearing officer, as the case may be;

(c) indicate the date of personal hearing or appoint a hearing officer to afford an opportunity of personal hearing on his behalf; provided that the hearing officer shall only be appointed where the competent authority is of the rank of Secretary to Government of the Punjab or above.

(d) provide a copy of the inquiry report to the accused; and

(e) direct the departmental representative to appear, with all the relevant record, on the date of hearing before himself or the hearing officer, as the case may be.

(5) After affording personal hearing to the accused or on receipt of the report of the hearing officer, the competent authority shall, keeping in view the findings and recommendations of the inquiry officer or inquiry committee, as the case may be, facts of the case and defence offered by the accused during personal hearing, by an order in writing--

(i) exonerate the accused; or

(ii) impose any one or more of the penalties specified in section 4:

Provided that --

(i) Where charge or charges of grave corruption are proved against an accused, the penalty of dismissal from service shall be imposed, in addition to the penalty of recovery, if any; and

(ii) Where charge of absence from duty for a period of more than one year is proved against the accused, the penalty of compulsory retirement or removal or dismissal from service shall be imposed upon the accused.

(6) Where the Competent Authority is satisfied that the inquiry proceedings have not been conducted in accordance with the provisions of this Act or the facts and merits of the case have been ignored or there are other sufficient grounds, it may, after recording reasons in writing, either remand the inquiry to the inquiry officer or the inquiry committee, as the case may be, with such directions as the competent

authority may like to give, or may order a de novo inquiry.

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(7)

(8)

The Competent Authority purportedly proceeded in terms of subsection (5)(ii) read with subsection (6) of section 13 referred to above. However, contrary to what is required under section 13(6) of the Act, the Competent Authority did not give any reason for disagreeing with the recommendations of the Inquiry Officer. Under the afore-referred provision, the Competent Authority could either proceed in terms of subsection (5)(i) and (ii) "keeping in view the findings and recommendations of the inquiry officer or inquiry committee, as the case may be, facts of the case and defence offered by the accused during personal hearing" or could have proceeded in terms of subsection (6) of section 13 and "either remand the inquiry to the inquiry officer" or could have directed de novo inquiry "after recording reasons in writing" if he was of the view that "merits of the case have been ignored or there are other sufficient grounds". Having not agreed with findings and recommendations made in the inquiry report, the Competent Authority instead of following the options available to him under subsection (6) of section 13 quoted above, proceeded to award major penalty of dismissal from service.

19. While examining the penalty awarded in the light of two salutary principles of judicial review of administrative actions, discussed in paras 14 to 17 above i.e. 'reasonableness' and 'proportionality', we find that the Competent Authority disagreeing with the recommendation of the Inquiry Officer enhanced the penalty by relying on a report of the Chief Engineer submitted after the inquiry which was prepared on the asking of the said Authority. This was neither part of the inquiry nor the respondent officers were given any notice of the said report. After the submission of the inquiry report, show cause notices were issued to the respondent officers and it was only thereafter that the Competent Authority asked the Chief Engineer to submit a report in the preparation of which the respondent officers were admittedly not associated. The award of penalty on the basis of the said report was unreasonable and was squarely hit by Wednesbury test of reasonableness. The enhancement of penalty in the afore-referred circumstances was based on an extraneous material and cannot stand the threshold of the said test and therefore is not sustainable. The quantum of sentence even otherwise was disproportionate to the gravity of the charge as admittedly neither there was an allegation of collusiveness with the contractor or of corruption. Respondents' case in these circumstances calls for judicial review of the penalty awarded.

20. In *Shibli Farooqui v. Federation of Pakistan* (2009 SCMR 281), 7 out of 10 charges stood proved against the accused official but keeping in view the nature of the charges framed against him, the Authorized Officer proposed the penalty of reduction of pay by two stages in the timescale for a period of two years. The Competent Authority, however, disagreed and imposed major penalty of dismissal from service. This Court set aside the said order and remanded the case to the said authority to pass a fresh order by observing as under:--

"12. Nevertheless, the "authority" without taking into consideration the recommendations of the Authorized Officer of the status of the Auditor-General of Pakistan completely overlooked his recommendations and went on to impose an extremely harsh penalty of removal from service. Mr. M.M. Aqil Awan, learned counsel for the appellant relied upon, the judgment of this Court in the case of *Chief Director Central Directorate of National Savings v. Rahat Ali* reported in 1996 SCMR 248 wherein it was held that if the authority was not inclined to agree with the findings of the Authorized Officer it was required to record proper reason for doing so after notice to the affected civil servant. It was further observed that public power could not be exercised arbitrarily or capriciously. No reasons have been recorded by the "authority".

13. We are also conscious" of the well-recognized principle that when a decision is rendered by an administrative authority it is essential that an appropriate balance must be struck between the adverse effects which the decision may have on the rights or interests of the person contemned and the purpose which the authority is seeking to pursue, proportionately by now is a well recognized concept of

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administrative law and this Court in the case of Independent Newspaper Corporation (Pvt.) Ltd. and another v. Chairman, Fourth Wage Board and Implementation Tribunal for Newspaper Employees, Government of Pakistan, Islamabad and 2 others reported in 1993 SCMR 1533 held as follows:--

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"The principle is well-settled that when express statutory power is conferred on a public functionary, it should not be pushed too far, for such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. In the words of Scarman L.J. "excessive use of lawful power is itself unlawful."

21. In Mukhtar Ahmed Bhatti v. Director Food, Punjab (1992 SCMR 1864), this Court set aside the order of the Competent Authority as no reasons have been given. The Court held as follows:--

"9. Thirdly, the Enquiry Officer had conducted a fact-finding enquiry into the conditions of storage and the nature of the duties performed by the appellants in looking after the stored wheat. It had apportioned the responsibilities accordingly. It appears on paper to be an objective report. It is not disputed by anybody as to the powers of the competent authority to form opinion different from that of the Enquiry Officer with regard to involvement of the appellants. But that has to be done on some well-founded principle or fact. None has been disclosed in the Order's of the competent authority and whatever appears is not a rational yardstick in apportioning the responsibility of the appellants."

22. In Director Food v. Rashid Ahmad and others (1990 SCMR 1446) the accused officers were charged for being responsible for shortage in the storage of procured wheat. The Authorized Officer recommended that the loss to a reasonable extent be written off as for substantial damage the concerned officers were not responsible. The Competent Authority, however, enhanced the penalty. The Service Tribunal after examining the case on merits set aside the order of recovery passed by the Competent Authority. This Court upheld the order by holding that the storage conditions were far from satisfactory and the Inquiry Officer as also the decision of the Tribunal was based on the said consideration. In Deputy Director Food v. Akhtar Ali (1997 SCMR 343), the civil servant was charge sheeted when shortage in the storage of procured wheat was detected. He was awarded major penalty of dismissal from service on the basis of the inquiry report. The Tribunal was of the view "that the Enquiry Officer relied upon the record and had not inspected the stores at the spot; that evidence of Mr. Muhammad Ajmal Ghazali, AFC had unduly weighed with the Enquiry Officer in finding the respondent guilty as he was himself involved in the case" and 'further was not allowed to be cross-examined by the respondent which was obligatory under the Rules; "that the respondent having been retired was no more a 'civil servant' within the purview of section 2(1)(b) of the Punjab Civil Servants Act (VIII of 1974) read with the Instructions Annex 'X' dated 7-9-1982 when the penalty of recovery of losses and that of retirement was imposed." The Tribunal in the afore-referred reasons allowed the appeal and set aside the order of the Competent Authority. This Court took note of the poor storage conditions, which was supported by documentary evidence. It also referred to another judgment in Muhammad Ibrahim Dasti an another v. Deputy Director Food, Multan and another (1986 PLC (C.S.) 845) to hold that the wheat was stored in open in shape of 'Gunjies' and then in a house type godowns, the loss occurring as a result of heavy rains, infestation and other vagaries of nature which is beyond the control of those responsible, the recovery of the losses so occurred cannot be made. In the afore-referred circumstances, this Court upheld the judgment of the learned Service Tribunal.

23. In accepting the appeals, the learned Service Tribunal non-read the material evidence led during the inquiry. It also erred in not appreciating the mandate of law that if the charge stands proved penalty has to follow. The impugned judgment is thus not sustainable. Consequently, for reasons given above, these petitions are converted into appeals and partly allowed and the judgment of the Service Tribunal is set aside. The respondents are awarded the penalty as recommended by the Inquiry Officer i.e. respondent Khalid Hussain Hamdani, Executive Engineer, is awarded minor penalty of stoppage of promotion for one year and respondents Nawazish Ali, Sub-Divisional Officer and Mirza Muhammad Younis, Sub-Engineer's promotion shall be withheld for a period of two years under para-4(a)(v) of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006. So far as the finding of recovery of rupees 2.764 million which as per the Inquiry Officer was the excess payment made to the contractor and

was recommended to be recovered by the Department from Messrs Tarmiac Pak as arrears of land revenue would not be tenable because the contractor was not associated with the said inquiry. However, it would be open for the Department to take appropriate steps provided in law to effect the said recovery from the contractor.

MWA/S-14/SC

Order accordingly.

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[Supreme Court of Pakistan]

Present: Iftikhar Muhammad Chaudhry and Mian Muhammad Ajmal, JJ**SECRETARY TO GOVERNMENT OF THE PUNJAB FOOD DEPARTMENT, LAHORE and another---Petitioners**

Versus

JAVED IQBAL and others---Respondents

Civil Petitions Nos.2558-L, 2598 to 2601-L of 2003, decided on 20th February, 2004.

(On appeal from the judgment/order, dated 1-8-2003 passed by Punjab Service Tribunal, Lahore in Appeals Nos.274, 346, 347, 354, 410 of 2003).

Punjab Removal from Service (Special Powers) Ordinance (XVII of 2000)---

---S. 3---Service Tribunals Act (LXX of 1973), Ss.4 & 5---Constitution of Pakistan (1973), Art.212(3)---'Misconduct'---Connotation---Quantum of punishment---Principle---Reduction in penalty---Service Tribunal, jurisdiction of---Civil servants were dismissed from service on the charges of inefficiency and negligence but Service Tribunal converted the penalty from dismissal into reduction in pay scale---Validity---Definition of word 'misconduct' in Punjab Removal from Service (Special Powers) Ordinance, 2000, was almost the same which had been assigned to it in Punjab Civil Servants (Efficiency and Discipline) Rules, 1999---Charges of guilty of misconduct or corruption were always considered at higher pedestal than the charge of inefficiency---Competent authority had jurisdiction to award any of the punishments mentioned in law to the Government employee but for the purpose of safe administration of justice such punishment should be awarded which commensurate with the magnitude of the guilt otherwise the law dealing with the subject would lose its efficacy---Civil servants were not guilty of the charge of misconduct or corruption, therefore, extreme penalty of removal from service for the charge of inefficiency or negligence was on higher side---Service Tribunal had rightly reduced the quantum of punishment awarded to the Civil servants by the competent authority---Supreme Court declined to interfere with the judgment passed by Service Tribunal---Leave to appeal was refused. Ms. Yasmin Sehgal, Assistant A.-G. (Punjab) and Mian Ghulam Hussain, Advocate Supreme Court for Petitioners (in all cases). Abdul Wahid Chaudhry, Advocate. Supreme Court and Ch. Mehdi Khan Mehtab, Advocate-on-Record for Respondents (in C.Ps. Nos. 2558-L and 2598-L to 2600-L of 2003). Nemo for Respondents (in C.P. No.2601-L of 2003).

Date of hearing: 20th February, 2004.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, J.--- By means of instant common judgment we intend to dispose of listed petitions for leave the appeal arising out of the judgment, dated 1st August, 2003 passed by Punjab Service Tribunal, Lahore in pursuance whereof quantum of punishment awarded to respondents of removal from service altered to the following effect:---

Sr.No	Name of respondent and C.P. No.	Punishment awarded.
1	Javed Iqbal Tariq Mehmood	Respondent (in C.P. No.2558-L of 2003) Respondent (in C.P. 2601-L)
		Reduction in pay by three stages.

		of 2003)	
2	Rana M. Irshad Mehdi Shah Rana M. Amin	Respondent (in C.P.2598-L of 2003) Respondent (in C.P.2599-L of 2003) Respondent (in C.P.2600-L of 2003).	Reduction to the lower post for a period of two years with effect from 22-10-2002.

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Concluding para. from the impugned judgment being identical in all the cases for convenience is reproduced hereinbelow:---

"All the appellants were awarded punishment of removal from service. Appellants are definitely guilty of culpable negligence, dereliction of duty, want of care and caution and utter slackness. The question, however, hounds the mind is whether the penalty was commensurate with the gravity of the charges or was too harsh. Anjum Sardar, A.C.I. of Food Directorate, Lahore was entrusted with the job of fumigation. P.W.2 in his statement has placed equal blame on Anjum Sardar that he had to check the results of fumigation and to re-fumigate if necessary, in case desired results were 'not achieved. Anjum Sardar, as deposed by P.W.2 did not care to know about the results of fumigation. He fumigated 20 shells on 24-6-1999 and again six shells on 5-7-1999, but on second visit he did not bother to check the results of 11 days earlier fumigation of 20 shells. In other words, Anjum Sardar ran off with a minor penalty, though recommended major by enquiry officer, although he contributed towards the negligence as much as the appellants. All said and done penalty of removal from service awarded to appellants Rana Muhammad Irshad, Mehdi Shah and Rana Muhammad Ameen to major penalty of reduction to the lower post for a period of 2 years w.e.f. 22-10-2002. They shall be reinstated in service and period from the date of removal from service till their reinstatement shall be treated as leave extraordinary without pay. As regards, Tariq Mehmood, appellant in Appeal No.410/2003, who was inducted in service as Food Grains Supervisor, his penalty of removal from service is altered to reduction in pay sale by 3 stages. He shall be also reinstated in service and the intervening period between his removal from service and reinstatement shall be treated as leave extraordinary without pay.

(2). Precisely stating the facts of the case are that petitioners were proceeded against departmentally under the provisions of Punjab Removal from Service (Special Powers) Ordinance, 2000 [hereinafter referred to as the Ordinance, 2000] on stated allegations being inefficient etc. in performing their duties at P.R. Centre Musa Virk, District Khanewal in 1999. Additional Director of the Directorate of Food, Punjab visited the said P.R. Centre in November, 1999 and submitted a report to the Secretary Food Department in respect of heavy infestation in the Godowns. Each employee i.e. respondents alleged to have been guilty of negligence and inefficient in performance of their duties relating to fumigation to the stocks etc. The Investigating Officer so appointed recommended against each of the respondents for punishment of removal from service. Such recommendations were, however, accepted by the competent authority as such, they were removed from service. On appeal learned Service Tribunal vide impugned judgments, separately passed in each case but by making common conclusion, while maintaining the punishment reduced its quantum, details of which have already been furnished hereinabove. As such instant petitions for leave to appeal have been filed by the Department.

(3). Ms. Yasmin Sehgal, learned Assistant Advocate-General appeared on behalf of Government of Punjab and contended that the respondents are responsible for causing huge damage to the wheat stock meant for the supply throughout in the Province of Punjab on account of their inefficiency and negligence, therefore, the punishment of removal from service was rightly awarded to the respondents by the department but learned Service Tribunal without assigning any strong justification had reduced the same.

(4). It is to be noted that respondents vide Civil Petitions Nos.2523-L, 2531-L and 2532-L/2003 had also challenged the impugned judgments but during arguments withdrew the same with the permission of the Court.

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(5). It is important to note that under section 3 of the Ordinance, 2000 the competent authority can award one of the following punishments if in its opinion a person is found inefficient or has ceased to be efficient for any reason or guilty of misconduct or corrupt or may reasonably be considered as corrupt:---

(a) Removal from service; or

(b) compulsory retirement from service; or

(c) reduction to lower post or pay scale; or

(d) one or more minor penalties as prescribed in the Punjab Civil Servants (Efficiency and Discipline) Rules, 1999.

(6). It is also important to note that the word 'inefficient' has not been defined in this Ordinance, however, definition of the word 'misconduct' is almost the same which has been assigned to it in Punjab Civil Servants (Efficiency and Discipline) Rules, 1999. There is no gain in saying that charges of guilty of misconduct or corruption are always considered at higher pedestal than the charge of inefficiency. No doubt the competent authority had jurisdiction to award any of the above punishments to the Government employee but for the purpose of safe administration of justice, such punishment should be awarded which commensurate with the magnitude of the guilt otherwise the law dealing with the subject will lose its efficacy. In instant case admittedly respondents are not guilty of the charge of misconduct or corruption, therefore, extreme penalty of removing them from service for the charge of inefficiency or negligence was on a high side. As such we are of the opinion that to meet the ends of justice learned Service Tribunal has rightly reduced the quantum of punishment awarded to the respondents by the competent authority. As the judgment of the Service Tribunal has proceeded on recognized principles of law as has been discussed herein above, therefore, impugned judgment admits no interference by this Court. Thus for the foregoing reasons instant petitions are dismissed and leave declined.

M.H./S-31/SC Petitions dismissed.

2009 S C M R 1197

[Supreme Court of Pakistan]

Present: Javed Iqbal, Nasir-ul-Mulk and Sayed Zahid Hussain, JJ

AKHTAR ALI----Petitioner

Versus

**DIRECTOR, FEDERAL GOVERNMENT, EDUCATIONAL INSTITUTION PGET DTA,
RAWALPINDI and others----Respondents**

Civil Petition No.704 of 2008, decided on 21st April, 2009.

(On appeal from the judgment, dated 19-3-2009 of the Federal Service Tribunal, Islamabad passed in Appeal No.23(P)(C.S.) of 2003).

Removal from Service (Special Powers) Ordinance (XVII of 2000)---

----S. 3---Service Tribunals Act (LXX of 1973), S.5---Modifying of order---Compulsory retirement---Absence from duty---Acquittal from criminal charge---Civil servant was removed from service on the allegation of his wilful absence from duty---Plea raised by civil servant was that his absence from duty was due to circumstances beyond his control as he had been involved in murder case---Validity---Service Tribunal while dealing with appeal, had power under S.5 of Service Tribunals Act, 1973, to vary and modify order of departmental authority---Supreme Court while sitting in appeal over judgment of Service Tribunal could also exercise such power to meet the ends of justice---Civil servant, who had long unblemished service record of about 17 years and he, by force of circumstances (involvement in case in which he was later on acquitted), was prevented from performing his duty---Civil servant was absent from duty entailing some penalty under law and his removal from service was too harsh penalty for him--Supreme Court converted petition for leave to appeal into appeal and converted penalty of removal from service into compulsory retirement---Appeal was allowed.

Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60; Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P. and 3 others 2008 PLC (C.S.) 77; Shamim Ahmed Kazmi v. Pakistan International Airlines Corporation and another 2005 SCMR 638; Agriculture Development Bank of Pakistan through Chairman and another v. Akif Javed 2005 SCMR 752; Javed Akhtar and others v. Chief Engineer, Highway Department and others 2006 SCMR 1018; Islamic Republic of Pakistan v. Dr. Safdar Mahmood PLD 1983 SC 100; Water and Power Development Authority, Lahore and 2 others v. Muhammad Yousaf, Test Inspector PLD 1996 SC 840; Mian Shafiuddin, Deputy Director and 4 others v. Surat Khan Marri, Director Regional Information Office, Islamabad and 41 others 1991 SCMR 2216; Aijaz Nabi Abbasi v. Water and Power Development Authority and another 1992 SCMR 774; Inspector General (Prisons) N.-W.F.P Peshawar and another v. Syed Jaffar Shah, Ex-Assistant Superintendent Jail and others 2006 SCMR 815; Abdul Sattar and another v. Director Food, Punjab and others 2007 PLC (C.S.) 319 and Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others 2008 PLC (C.S.) 428 ref.

Amjad Ali, Advocate Supreme Court for Petitioner.

Agha Tariq Mehmood, D.A.-G. for Respondents.

Date of hearing: 21st April, 2009.

Appellant involved in murder case and marked absent.

Removal converted into compulsory retirement

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JUDGMENT

SAYED ZAHID HUSSAIN, J.--- Akhtar Ali petitioner was Trained Under Graduate Teacher (TUGT) F.G. High School (PRC), Mardan who on 19-8-2000 absented from duty. He was, suspended on 27-9-2000 which suspension was extended latter on and was issued notice dated 19-4-2001 for being absent from duty. Since no reply was received show-cause-notice dated 6-7-2001 was issued calling for reply thereto within 15 days. As this notice also remained unresponded, a final show-cause notice dated 4-9-2001 was issued in terms of section 3(i)(b) of Removal From Service (Special Powers) Ordinance, 2000.. He was eventually removed from service on 23-10-2001. Departmental appeal for reinstatement in service was made by him on 18-11-2002. Having no response to the same, he approached the Federal Service Tribunal through an appeal dated 6-2-2003, which was dismissed by the learned Federal Service Tribunal, Islamabad on 19-3-2008. Aggrieved thereby he has invoked the jurisdiction of this Court under Article 212(3) of the Constitution of Islamic Republic of Pakistan. In that notice to respondents was ordered to be issued by this Court to consider the quantum of punishment in the matter.

2. The learned counsel for the petitioner and the learned Deputy Attorney-General have been heard primarily to consider as to whether the penalty of removal from service was justified in the facts and circumstances of the case. The contention of the learned counsel for the petitioner is that the absence of the petitioner from duty was due to the circumstances beyond his control as he had been involved in a murder case in case F.I.R. No.511, dated 19-8-2000 registered under section 302/34, P.P.C., which fact was brought to the notice of the Headmaster of the School informing that due to threat to his life it had become impossible for him to attend the school and he may be granted leave with effect from 21-8-2000. It is contended that he was acquitted in that case on 13-11-2002 by the Trial Court on the basis of compromise. Whereafter, he approached his school when he learnt of his removal from service and agitated the matter, departmentally and thereafter before the learned Tribunal. According to him the view taken by the learned Tribunal in the case was not based on correct appreciation of the matter. He places reliance upon Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60 and Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P and 3 others 2008 PLC (C.S.) 77 to contend that harsh penalty of removal from service deserved to be reduced to some minor penalty.

3. The learned Deputy Attorney General, Pakistan, however, supports the order made by the departmental authority and the judgment of the Federal Service Tribunal and seeks dismissal of the petition.

4. The factual background is not in dispute. We have considered the matter from various angles and find that the petitioner who got employment as Teacher in the year, 1984, had unblemished service record but due to involvement in the case he absented from duty with effect from 19-8-2000 due to threat to his life. He had made an application to the Headmaster of the school also to this effect. The notices dated 19-4-2001, 6-7-2001 and 4-9-2001 remained unresponded having not been received by him. These were the circumstances preventing him from continuing to perform his duty as a teacher. As soon as he was acquitted by the Court on 13-11-2002 he approached the authorities and agitated the matter for his reinstatement within the Department and before the Tribunal. No doubt he remained absent but the punishment he has been awarded i.e. removal from service, appears to be too harsh and disproportionate. It may be observed that while proceeding against a person under section 3 of the Removal From Service (Special powers) Ordinance, 2000, the competent authority had the discretion to dismiss or remove from service or compulsorily retire from service, or reduce the person concerned to lower post or pay scale or impose one or more minor penalties. It may be observed that Clause (a) of section 3(1) of the Ordinance deals with the inefficiency of a person in Government service or being habitually absent from duty without prior approval of leave. But a person guilty of misconduct (clause.b) or a person who is corrupt (clause c) etc. have been dealt with separately. While imposing penalty the competent authority is thus expected to keep in mind the gravity and severity of the allegations and past conduct of the person concerned. The petitioner's removal from service was not the only option for the competent authority. He could be awarded other penalty of lesser implications. When he filed appeal before Federal Service Tribunal even the learned Tribunal did not advert to this aspect of the matter although under section 5 of

the Service Tribunals Act, 1973, the Tribunal had power on appeal to "confirm, set aside, vary or modify the order appealed against". There is no dearth of precedents where the Tribunal modified the orders of the departmental authority by converting the penalties and substituting order in place of removal from service. For instance in Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P and 3 others 2008 PLC (C.S.) 77, the N.-W.F.P Service Tribunal ordered the conversion of dismissal order from service with that of compulsory retirement. Incidentally, in that case also the appellant had been involved in a murder case who had been sentenced to imprisonment for life and after undergoing the sentence, years after his dismissal from service he filed appeal before the Service Tribunal and the Tribunal altered the penalty. The petition for leave C.P.No.249-P of 2007 filed by the Government of N.-W.F.P. against the order of the Tribunal was dismissed by this Court on 24-12-2008. In Shamim Ahmed Kazmi v. Pakistan International Airlines Corporation and another, 2005 SCMR 638, the Federal Service Tribunal had ordered the conversion of dismissal from service into compulsory retirement which was maintained by this Court by dismissing the petition thereagainst. In Agriculture Development Bank of Pakistan through Chairman and another v. Akif Javed 2005 SCMR 752, the penalty of dismissal from service was modified by the Federal Service Tribunal to compulsory retirement whereagainst the petition was dismissed by this Court. In Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60, removal from service order was converted into reduction in time scale by the Federal Service Tribunal whereagainst the appeal of the Department was dismissed by this Court. Reference may also be made to Javed Akhtar and others v. Chief Engineer, Highway Department and others 2006 SCMR 1018. As to the scope of powers of the Tribunal under the Service Tribunals Act and of this Court under Article 212 reference may be made to Islamic Republic of Pakistan v. Dr. Safdar Mahmood PLD 1983 SC 100, Water and Power Development Authority, Lahore and 2 others v. Muhammad Yousaf, Test Inspector PLD 1996 SC 840; Mian Shafiuddin, Deputy Director and 4 others v. Surat Khan Marri, Director Regional Information Office, Islamabad and 41 others 1991 SCMR 2216 and Aijaz Nabi Abbasi v. Water and Power Development Authority and another 1992 SCMR 774.

5. Even this Court while hearing petition under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, had been exercising its jurisdiction in appropriate cases of converting the penalty found not commensurate to the nature of the charges. In Inspector General (Prisons) N.-W.F.P Peshawar and another v. Syed Jaffar Shah, Ex-Assistant Superintendent Jail and others 2006 SCMR 815, the judgment of the Tribunal was modified to convert the penalties imposed by the departmental authority. In Abdul Sattar and another v. Director Food, Punjab and others 2007 PLC (C.S.) 319, this Court ordered the conversion of penalty of dismissal from service into compulsory retirement from service. In Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others 2008 PLC (C.S.) 428, modifying the judgment of the learned Tribunal this Court ordered the conversion of penalty of compulsory retirement into reduction of two steps in time scale for a period of two years.

6. The object of making reference to the above cited precedents is that not only the Tribunal while dealing with an appeal under section 5 of the Act has the power to vary and modify the order of departmental authority; this Court while sitting in appeal over the judgment of the learned Tribunal can also exercise such a power to meet the ends of justice dependent upon of course the facts and circumstances of each case.

7. In the instant case as noted above the petitioner who had a long unblemished service of about 17 years had by force of circumstances (involvement in a case in which he was latter on acquitted) been prevented from performing his duty as teacher. He was absent from duty entailing some penalty under the law. His removal from service in the circumstances was too harsh a penalty for him. We had therefore, on conclusion of hearing passed the following short order:--

"For the reasons to be recorded separately, after having heard the learned counsel for the parties at length, we are inclined to convert this petition into appeal which is accepted and penalty of removal from service is converted to that of compulsory retirement."

These are the reasons for the above order accepting the appeal partially with no order as to costs.

2007 P L C (C.S.) 685

Removal - compulsory
retirement.

[Punjab Service Tribunal]

Before Justice (Retd.) Rustam Ali Malik, Chairman

MUHAMMAD ASHRAF ZAFAR

Versus

SECRETARY TO GOVERNMENT OF THE PUNJAB, HEALTH DEPARTMENT, LAHORE
and 3 others

Appeal No.226.1 of 2006, decided on 14th February, 2007.

Punjab Removal from Service (Special Powers) Ordinance (IV of 2000)---

---S. 3---Punjab Service Tribunals Act (IX of 1974), S.4---Misconduct---Imposition of penalty of removal from service---Appeal---Long leave for 730 days sanctioned to appellant by Authority was later on cancelled and order of cancellation was conveyed to appellant by the department and in consequence, appellant was directed to resume duties---Appellant, despite said direction to resume duties, having remained absent from duty, was guilty of misconduct---Appellant had even proceeded abroad without getting sanctioned Ex-Pakistan leave from competent Authority---Absence of appellant being wilful, he had been rightly proceeded against on disciplinary grounds---Keeping in view long service of 17 years of appellant, lesser punishment in the form of compulsory retirement, however, could have been imposed on him---Impugned order having been passed by Authority, penalty could be effective from the date impugned order was passed and same could not be effective from back date---Penalty of removal from service as imposed on appellant by Departmental Authority was converted to compulsory retirement with effect from date on which competent Authority had passed order---Intervening period, however would be considered as leave without pay.

Muhammad Khan for Appellant.

Khadim Hussain Sindhu, District Attorney for Respondents.

Dr. Aftab Ahmad Khan, Law Officer to DGHS, Punjab, Departmental Representative.

Date of hearing: 14th February, 2007.

JUDGMENT

JUSTICE (RETD.) RUSTAM ALI MALIK (CHAIRMAN).---The appellant had joined service as Dispenser on 11-2-1989 in the Health Department and had almost 17 years of service when he applied for long leave for 730 days which was sanctioned on 12-10-2004 by respondent No.3. However, long leave sanctioned on 12-10-2004 was later cancelled by respondent No.3 on 5-3-2005 and the order was conveyed to him by respondent No.4 and in consequence the appellant was directed to resume duties on 16-3-2005. He immediately filed an application/ representation before respondent No.3, requesting him not to cancel his leave as the condition of his brother-in-law was deteriorating due to lung cancer and his old and ailing parents also needed his attention. His brother-in-law, later died in Ittefaq Hospital, Lahore. However, respondent No.3 vide his order dated 6-7-2005 imposed major penalty of removal from service on him. Against the said order, dated 6-7-2005 passed by respondent No.3, the appellant filed an appeal on 13-8-2005 before respondent No.2 who rejected the same on

19-8-2006. Hence the appellant has challenged the orders, dated 6-7-2005 and 19-8-2006 by filing the instant appeal before this Tribunal.

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2. Arguments have been heard and record perused. In their parawise comments, respondents Nos.3 and 4 have taken the plea that long leave of 730 days had been sanctioned in favour of the appellant by the District Health Officer, Sahiwal vide order, dated 12-10-2004. The administrative control of all Basic Health Units in District Sahiwal was later handed over to Punjab Rural Support Programme under the Chief Minister's initiative on Primary Health Care. The District Support Manager, PRSP recommended to the Executive District Officer (Health), Sahiwal that long leave sanctioned in favour of the appellant may be cancelled so that he may be appointed at Basic Health Unit 128/9L. But the Executive District Officer (Health), Sahiwal in return advised the District Health Officer, Sahiwal to cancel the remaining leave of the appellant. Consequently, the D.H.O. Sahiwal cancelled his leave vide his letter, dated 9-3-2005 with effect from 15-3-2005. Thereafter the appellant submitted a representation before the E.D.O. (Health), Sahiwal. He was called for personal hearing twice to decide his appeal. He was heard on 30-5-2005 and as a result his appeal was rejected and the E.D.O. (Health), Sahiwal decided to proceed against him under the provisions of Punjab Removal from Service (Special Powers) Ordinance, 2000 as he had failed to join duty in spite of the letter issued to him regarding cancellation of leave. He was again directed to join duty by the District Health Officer, Sahiwal vide letter, dated 31-5-2005 and the said letter was delivered at his home address by one Mr. Jamshed Sarwar Gill, Junior Clerk of the Office of District Health Officer, Sahiwal personally but his parents told him that he had proceeded for "Umra". He had never obtained ex-Pakistan leave nor had he ever tried to serve his old parents for whom he had obtained leave. In fact he had made the lathe excuse for serving his old parents during the period of two years leave just to go abroad and in fact his purpose was not to look after his' old parents or his ailing brother-in-law and even after the decision of Executive District Officer (Health), Sahiwal he did not join his duties. The respondents have also taken the plea that the Programme Director, District Health Development Centre had acted as Inquiry Officer and after consideration of the allegations and findings recorded during the inquiry, had reported to the E.D.O. (Health), Sahiwal that the appellant had proceeded abroad. So a letter of personal hearing was issued to him by the Executive District Officer (Health), Sahiwal vide his letter dated 22-6-2006, after receiving the inquiry report and the appellant was directed to appear before him on 27-6-2005. Meanwhile an advertisement was also published in the newspaper directing the appellant to appear before the Executive District Officer (Health), Sahiwal but he never appeared before him in spite of issuance of letters and advertisements published in the newspapers and hence the orders were issued for his removal from service.

3. I have carefully considered the arguments advanced from both sides and have also perused the record. It appears that the appellant had failed to join duty after cancellation of leave and had remained absent from duty even thereafter and was thus, clearly guilty of misconduct. He had even proceeded abroad without getting sanctioned the ex-Pakistan leave from the competent authority. As his absence was wilful, he had been rightly proceeded against on disciplinary grounds. At the time of arguments, the learned counsel for the appellant has pointed out that the appellant had a long service record and hence a lesser punishment could have been awarded to him keeping in view the length of his service. He has further pointed out that the competent authority had imposed on the appellant the penalty of removal from service with effect from 9-3-2005 i.e. the date of his alleged absence from Government duty whereas no executive order can be passed with retrospective effect. After going through the record and hearing the arguments from both sides and considering all aspects of the matter, I agree with the learned counsel for the appellant that keeping in view the length of service of the appellant, a lesser punishment in the form of compulsory retirement could have been imposed on him. I also agree with him that the penalty of removal from service could not be imposed on him from a back date i.e. from 9-3-2005. As the impugned order was passed by the Executive District Officer (Health), Sahiwal on 6-7-2005, the penalty could be effective only from the said date.

4. In view of what has been stated above, the penalty of removal from service as imposed on the appellant by the departmental authorities is converted to compulsory retirement with effect from 6-7-2005 i.e. the date on which the competent authority had passed the order and not from 9-3-2005.

However, the intervening period shall be considered as leave without pay.

5. Under the circumstances, the parties are left to bear their own costs.

H.B.T./11/PST

Order accordingly.

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2007 P L C (C.S.) 678

Dismissal converted into
compulsory retirement.

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[Supreme Court of Pakistan]

Present: Faqir Muhammad Khokhar and Karamat Nazir Bhandari, JJ

Syed FIDA HUSSAIN KAZMI

Versus

INSPECTOR-GENERAL OF POLICE, PUNJAB and others

Civil Petition No.3583/L of 2002, decided on 29th November, 2005.

Railways Servants (Efficiency and Discipline) Rules, 1975---

---R. 4(1)(b)(ii) & (iv)---Constitution of Pakistan (1973), Art.212(3)---Penalty of dismissal from service---Conversion into compulsory retirement---Petitioner did not press his petition on merits, but had sought indulgence of Supreme Court for conversion of extreme penalty of dismissal from service into compulsory retirement from service---Extreme penalty of dismissal of petitioner from service did not commensurate with the nature of his misconduct in peculiar facts and circumstances of the case---Petition for leave to appeal was converted into appeal and same was partly allowed---Impugned orders of dismissal from service, were modified to the extent that penalty of dismissal of petitioner from service was converted into compulsory retirement from service.

Muhammad Iqbal Khan, Advocate Supreme Court and Muhammad Ozair Chughtai, Advocate-on-Record for Petitioner.

Zubair Khalid., A.A.-G., Punjab and Asif Riaz Inspector Legal, Sahiwal for Respondents.

ORDER

The learned counsel for the petitioner on the last date of hearing, frankly stated that he did not press the petition on merits and sought indulgence of this Court for conversion of the extreme penalty of dismissal into compulsory retirement from service. It was also brought to our notice that in the meantime the petitioner had completely 'lost his eye-sight and had children of marriageable age.

2. Even today the learned counsel for the petitioner has repeated the same request. The learned Assistant Advocate-General, Punjab as well as the Inspector (Legal), Sahiwal have also been heard. We have carefully gone through the orders passed by the departmental authority as well as by the Tribunal. In our view, the extreme penalty of dismissal of the petitioner from service did not commensurate with the nature of his misconduct in the peculiar facts and circumstances of the case.

3. Therefore, this petition is converted into appeal and the same is partly allowed. Consequently, the impugned judgment, dated 15-8-2002 passed by the Punjab Service. Tribunal in Appeal No.641 of 2001 as well as the order, dated 12-10-2000 passed by the Deputy Inspector-General of Police, Multan Range, are modified to the extent that the penalty of dismissal of the petitioner from service is converted into compulsory retirement from service. However, there shall be no order as to costs.

H.B.T./F-44/SC

Order accordingly.

1985 P L C (C. S.) 928

[Service Tribunal Sind]

Before Muhammad Ibrahim Lakhiar and Tasneem Ahmad Siddiqui, Members

DR. BASHIR AHMED

versus

SECRETARY TO GOVERNMENT OF SIND, HEALTH DEPARTMENT AND ANOTHER

Appeal No. 73 of 1984, decided on 24th April, 1985.

Sind Revised Leave Rules, 1979-

-- R. 13-Sind Service Tribunals Act (XV of 1973), S. 4 - Leave on medical grounds - Cannot be refused Competent authority may secure second medical opinion by referring civil servant concerned to Civil Surgeon/Medical Board Appellant applying leave on medical grounds supported by certificate from Professor, Dow Medical College and then proceeding to his native village on advice of same medical authority wherefrom sending further application supported by Private Medical Practitioner-Medical certificates never contested by competent authority and appellant never directed to appear before Medical Board Disciplinary proceedings initiated on grounds of failure to resume duty in response to letter to that effect-Penalty of withholding of two increments with cumulative effect imposed treating period of absence as leave extraordinary without pay-Contention that appellant could be-regarded to be insubordinate civil servant not amenable to discipline and ethics of Service because he persisted in continuing to thwart assertions of Department to resume duty Contention repelled-Appropriate course for competent authority in the event of any doubt about genuineness car otherwise of medical certificate, in circumstances, held, was to have directed appellant to appear before Medical Board-Impugned penalty order, in circumstances, held, not validly and lawfully passed hence set aside by Tribunal and period involved treated as leave of kind due.

1984 P L C 739 and 1983 P L C 782 rel.

Arbab Khan Ghoto for Appellant.

A.A. Mohommadally, A.A.-G. for the State.

Date of hearing : 20th April, 1985.

JUDGMENT

MUHAMMAD IBRAHIM LAKHIAR (MEMBER).--This appeal is directed against the order, passed by Secretary, Health Department, Government of Sind, withholding two annual increments with cumulative effect of the appellant Dr. Bashir Ahmad Ghoto, Medical Officer, Taluka Hospital, Ghotki. After exhausting the remedies, available to him departmentally, the appellant has preferred this appeal under section 4 of the Sind Service Tribunals Act, 1973 praying for restoration of increments and

Very - Important.

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Medical Leave

payment of salary for the period, he remained absent from the duties.

Facts, constituting background of the appeal, shortly stated, are that the appellant, who initially joined as Medical Officer in Liaquat Medical Hospital, Hyderabad on 24th October, 1972, proceeded on medical leave for 4 weeks from 21st February, 1983, while he stood posted at Taluka Hospital, Ghotki. In support of his request for leave, he produced medical certificate, issued by Dr. Abdul Karim Siddiqui, Professor Dow Medical College, Karachi. Thereafter, he applied for extension of leave on the same ground for another 4 weeks from 21st March to 21st April, 1983. He again produced the Medical Certificate of the same Dr. Siddiqui who also advised him to shift to his native place Ghotki on the reasons of his health. He accordingly moved to Ghotki and remained under the medical treatment of local Doctor Mr. Ghulam Hussain Quresbi from 22nd April to 22nd November, 1983.

On 8th August, 1983, a show-cause notice was served on the appellant. He was called upon by Secretary, Health Department to explain, why major penalty of the dismissal from service may not be imposed upon him for want of his positive response to resume duties forthwith and to remain absent unauthorisedly from duty from 22nd March, 1983. In his reply dated 6th August, 1983, the appellant denied the allegations that he had ever remained absent unauthorisedly and that he merely requested extension in the sanctioned leave on medical grounds. He also submitted that if his leave applied for could not be sanctioned further then he may be allowed to retire prematurely as a last resort as the circumstances/problems, warranting his retirement, remained unaltered.

On 22nd November, 1983, the appellant offered to resume duties and requested for withdrawal of his proposal for premature retirement. He submitted that on his being declared physically fit by a local Doctor Mr. Ghulam Hussain Qureshi, he was ready to resume duties on clinical advice. In the meanwhile an order, dated 29th December, 1983 was passed by Secretary, Health Department withholding two annual increments of the appellant with cumulative effect and treating the period of his absence from 22nd March to 29th December, 1983 as extraordinary leave (without pay).

Mr. Arbab Khan Ghoto, learned counsel for the appellant initiated his arguments by putting reliance on rule 13 of Revised Leave Rules, 1979 and said that the leave applied by Civil Servant on medical grounds cannot be refused to him. He, however, contended that if the competent authority had any reservations, it could have, at the most, directed the appellant to be examined by a Medical Board, constituted for the purpose. On the other hand, the counsel said that neither a reference was made to the Medical Board nor was the genuineness or otherwise of the Medical certificate questioned/communicated to the appellant. The counsel also rebutted the surmise that the appellant, being 42 years of age, wanted to avail the leave to seek lucrative employment abroad and that he sought to resume duties on the aborting of his endeavours to attain this objective.

In support of his contention, the counsel re-counted a number of case laws which go forth to strengthen the appellant's request for grant of leave on medical grounds. He cited 1984 P L C 739, wherein Punjab Service Tribunal held that leave sought on medical grounds and duly supported by relevant certificate cannot be refused. The counsel drew our attention to another case disposed of by Sind Labour Appellate Tribunal Karachi, wherein it was held that a medical certificate filed later could be validly accepted for the purpose of sanctioning leave sought on medical grounds 1983 P L C 782. In support of appellant's decision to withdraw request for premature retirement, the counsel relied on 1984 P L C 1192 in which it was held that appellant was entitled to retrieve his request for premature retirement if the decision on the same was not finally taken by the competent authority.

Mr. A. A. Mohommedally, A. A.-G. for the Government preface his arguments with the production that

the appellant could be regarded to be an insubordinate civil servant, not amenable to discipline and ethics of service as he persisted in continuing to thwart the assertions of the Department for 9 months or so to resume duties forthwith. He, however, conceded on the basis of law and rules on the subject that leave sought on medical grounds and duly supported by a relevant certificate cannot be refused to a civil servant. Considering facts of the instant case and the unblemished record of the appellant, duly attested by the Director, Health Services, Hyderabad in his letter, dated 26th October, 1983, stating therein nothing adverse against the appellant as verified from the appellants' personal file and Annual Confidential Reports, the A.A.-G. conceded that the withholding of two annual increments was too harsh a penalty to be imposed upon the appellant.

We have accorded our anxious thought to the arguments advanced on both sides. It has been made amply evident before us that the Health Department was in no circumstances obliged to deny leave sought on medical grounds which was duly supported by two medical certificates issued by the same Doctor Abdul Karim Siddiqui, Professor Dow Medical College, Karachi under whom the appellant was reported to have received medical treatment in the first instance. This was followed by and there certificate issued by a private practitioner Dr. Ghulam Hussain Qureshi at Ghotki, the native place of the appellant where he was advised by his first medical counsel to shift. In the face of rule 13. of Revised Leave Rules, 1979 (reproduced below) there does not appear any cogent ground for refusing medical leave sought on the basis of a certificate by a Professor of the Medical College whose certificate, to the same effect does not seem to have been contested for the purpose of granting leave from 22nd February, 1983 to 2,1st March, 1983.

"It shall not be necessary to specify the reasons for which as that leave has been applied, so long as that leave is due and admissible to a civil servant, Leave applied for on medical certificate shall not be refused. The authority competent to sanction leave may, however, at its discretion secure a second medical opinion by requesting the Civil Surgeon/Medical Board to have the applicant medically examined."

In the event of any doubt about the genuineness or otherwise of the medical certificate, appropriate course for the authorities was to have directed the appellant to appear before the Medical Board, constituted for the purpose.

Keeping the aforesaid analysis in view, we are constrained to hold that the impugned Order No. SOI (H) 2-635/81, dated 27th December, 1983 has not been validly and lawfully passed and is accordingly set aside allowing the drawal of two annual increments to the appellant. The nature of the intervening period from the date of refusal of leave to him to the resumption of duties by the appellant will be treated as leave of the kind due. There will be no order as to costs.

A. E.

Appeal accepted.

[Supreme Court of Pakistan]

Present: Javed Iqbal, Nasir-ul-Mulk and Sayed Zahid Hussain, JJ

AKHTAR ALI----Petitioner

Versus

DIRECTOR, FEDERAL GOVERNMENT; EDUCATIONAL INSTITUTION PGET DTA, RAWALPINDI and others----Respondents

Civil Petition No.704 of 2008, decided on 21st April, 2009.

(On appeal from the judgment, dated 19-3-2009 of the Federal Service Tribunal, Islamabad passed in Appeal No.23(P)(C.S.) of 2003).

Removal from Service (Special Powers) Ordinance (XVII of 2000)---

---S. 3---Service Tribunals Act (LXX of 1973), S:5---Modifying of order---Compulsory retirement---Absence from duty---Acquittal from criminal charge---Civil servant was removed from service on the allegation of his wilful absence from duty---Plea raised by civil servant was that his absence from duty was due to circumstances beyond his control as he had been involved in murder case---Validity---Service Tribunal while dealing with appeal, had power under S.5 of Service Tribunals Act, 1973, to vary and modify order of departmental authority---Supreme Court while sitting in appeal over judgment of Service Tribunal could also exercise such power to meet the ends of justice---Civil servant, who had long unblemished service record of about 17 years and he, by force of circumstances (involvement in case in which he was later on acquitted), was prevented from performing his duty---Civil servant was absent from duty entailing some penalty under law and his removal from service was too harsh penalty for him--Supreme Court converted petition for leave to appeal into appeal and converted penalty of removal from service into compulsory retirement---Appeal was allowed.

Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60; Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P. and 3 others 2008 PLC (C.S.) 77; Shamim Ahmed Kazmi v. Pakistan International Airlines Corporation and another 2005 SCMR 638; Agriculture Development Bank of Pakistan through Chairman and another v. Akif Javed 2005 SCMR 752; Javed Akhtar and others v. Chief Engineer, Highway Department and others 2006 SCMR 1018; Islamic Republic of Pakistan v. Dr. Safdar Mahmood PLD 1983 SC 100; Water and Power Development Authority, Lahore and 2 others v. Muhammad Yousaf, Test Inspector PLD 1996 SC 840; Mian Shafiuddin, Deputy Director and 4 others v. Surat Khan Marri, Director Regional Information Office, Islamabad and 41 others 1991 SCMR 2216; Aijaz Nabi Abbasi v. Water and Power Development Authority and another 1992 SCMR 774; Inspector General (Prisons) N.-W.F.P Peshawar and another v. Syed Jaffar Shah, Ex-Assistant Superintendent Jail and others 2006 SCMR 815; Abdul Sattar and another v. Director Food, Punjab and others 2007 PLC (C.S.) 319 and Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others 2008 PLC (C.S.) 428 ref.

Amjad Ali, Advocate Supreme Court for Petitioner.

Agha Tariq Mehmood, D.A.-G. for Respondents.

Date of hearing: 21st April, 2009.

JUDGMENT

SAYED ZAHID HUSSAIN, J.--- Akhtar Ali petitioner was Trained Under Graduate Teacher (TUGT) F.G. High School (PRC), Mardan who on 19-8-2000 absented from duty. He was, suspended on 27-9-2000 which suspension was extended latter on and was issued notice dated 19-4-2001 for being absent from duty. Since no reply was received show-cause-notice dated 6-7-2001 was issued calling for reply thereto within 15 days. As this notice also remained unresponded, a final show-cause notice dated 4-9-2001 was issued in terms of section 3(i)(b) of Removal From Service (Special Powers) Ordinance, 2000.. He was eventually removed from service on 23-10-2001. Departmental appeal for reinstatement in service was made by him on 18-11-2002. Having no response to the same, he approached the Federal Service Tribunal through an appeal dated 6-2-2003, which was dismissed by the learned Federal Service Tribunal, Islamabad on 19-3-2008. Aggrieved thereby he has invoked the jurisdiction of this Court under Article 212(3) of the Constitution of Islamic Republic of Pakistan. In that notice to respondents was ordered to be issued by this Court to consider the quantum of punishment in the matter.

2. The learned counsel for the petitioner and the learned Deputy Attorney-General have been heard primarily to consider as to whether the penalty of removal from service was justified in the facts and circumstances of the case. The contention of the learned counsel for the petitioner is that the absence of the petitioner from duty was due to the circumstances beyond his control as he had been involved in a murder case in case F.I.R. No.511, dated 19-8-2000 registered under section 302/34, P.P.C., which fact was brought to the notice of the Headmaster of the School informing that due to threat to his life it had become impossible for him to attend the school and he may be granted leave with effect from 21-8-2000. It is contended that he was acquitted in that case on 13-11-2002 by the Trial Court on the basis of compromise. Whereafter, he approached his school when he learnt of his removal from service and agitated the matter, departmentally and thereafter before the learned Tribunal. According to him the view taken by the learned Tribunal in the case was not based on correct appreciation of the matter. He places reliance upon Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60 and Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P and 3 others 2008 PLC (C.S.) 77 to contend that harsh penalty of removal from service deserved to be reduced to some minor penalty.

3. The learned Deputy Attorney General, Pakistan, however, supports the order made by the departmental authority and the judgment of the Federal Service Tribunal and seeks dismissal of the petition.

4. The factual background is not in dispute. We have considered the matter from various angles and find that the petitioner who got employment as Teacher in the year, 1984, had unblemished service record but due to involvement in the case he absented from duty with effect from 19-8-2000 due to threat to his life. He had made an application to the Headmaster of the school also to this effect. The notices dated 19-4-2001, 6-7-2001 and 4-9-2001 remained unresponded having not been received by him. These were the circumstances preventing him from continuing to perform his duty as a teacher. As soon as he was acquitted by the Court on 13-11-2002 he approached the authorities and agitated the matter for his reinstatement within the Department and before the Tribunal. No doubt he remained absent but the punishment he has been awarded i.e. removal from service, appears to be too harsh and disproportionate. It may be observed that while proceeding against a person under section 3 of the Removal From Service (Special powers) Ordinance, 2000, the competent authority had the discretion to dismiss or remove from service or compulsorily retire from service, or reduce the person concerned to lower post or pay scale or impose one or more minor penalties. It may be observed that Clause (a) of section 3(1) of the Ordinance deals with the inefficiency of a person in Government service or being habitually absent from duty without prior approval of leave. But a person guilty of misconduct (clause b) or a person who is corrupt (clause c) etc. have been dealt with separately. While imposing penalty the competent authority is thus expected to keep in mind the gravity and severity of the allegations and past conduct of the person concerned. The petitioner's removal from service was not the only option for the competent authority. He could be awarded other penalty of lesser implications. When he filed appeal before Federal Service Tribunal even the learned Tribunal did not advert to this aspect of the matter although under section 5 of the Service Tribunals Act, 1973, the Tribunal had power on appeal to "confirm, set aside, vary or modify the order appealed against". There is no dearth of precedents where the Tribunal modified the orders of the departmental authority by converting the penalties and substituting order in place of removal from service. For instance in Abdul Hassan v. Secretary, Education (S&L) N.-W.F.P and 3 others 2008 PLC (C.S.) 77, the N.-W.F.P Service Tribunal ordered the conversion of dismissal order from

service with that of compulsory retirement. Incidentally, in that case also the appellant had been involved in a murder case who had been sentenced to imprisonment for life and after undergoing the sentence, years after his dismissal from service he filed appeal before the Service Tribunal and the Tribunal altered the penalty. The petition for leave C.P.No.249-P of 2007 filed by the Government of N.-W.F.P. against the order of the Tribunal was dismissed by this Court on 24-12-2008. In Shamim Ahmed Kazmi v. Pakistan International Airlines Corporation and another, 2005 SCMR 638, the Federal Service Tribunal had ordered the conversion of dismissal from service into compulsory retirement which was maintained by this Court by dismissing the petition thereagainst. In Agriculture Development Bank of Pakistan through Chairman and another v. Akif Javed 2005 SCMR 752, the penalty of dismissal from service was modified by the Federal Service Tribunal to compulsory retirement whereagainst the petition was dismissed by this Court. In Auditor-General of Pakistan and others v. Muhammad Ali and others 2006 SCMR 60, removal from service order was converted into reduction in time scale by the Federal Service Tribunal whereagainst the appeal of the Department was dismissed by this Court. Reference may also be made to Javed Akhtar and others v. Chief Engineer, Highway Department and others 2006 SCMR 1018. As to the scope of powers of the Tribunal under the Service Tribunals Act and of this Court under Article 212 reference may be made to Islamic Republic of Pakistan v. Dr. Safdar Mahmood PLD 1983 SC 100, Water and Power Development Authority, Lahore and 2 others v. Muhammad Yousaf, Test Inspector PLD 1996 SC 840, Mian Shafiuddin, Deputy Director and 4 others v. Surat Khan Marri, Director Regional Information Office, Islamabad and 41 others 1991 SCMR 2216 and Aijaz Nabi Abbasi v. Water and Power Development Authority and another 1992 SCMR 774.

5. Even this Court while hearing petition under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, had been exercising its jurisdiction in appropriate cases of converting the penalty found not commensurate to the nature of the charges. In Inspector General (Prisons) N.-W.F.P Peshawar and another v. Syed Jaffar Shah, Ex-Assistant Superintendent Jail and others 2006-SCMR 815, the judgment of the Tribunal was modified to convert the penalties imposed by the departmental authority. In Abdul Sattar and another v. Director Food, Punjab and others 2007 PLC (C.S.) 319, this Court ordered the conversion of penalty of dismissal from service into compulsory retirement from service. In Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others 2008 PLC (C.S.) 428, modifying the judgment of the learned Tribunal this Court ordered the conversion of penalty of compulsory retirement into reduction of two steps in time scale for a period of two years.

6. The object of making reference to the above cited precedents is that not only the Tribunal while dealing with an appeal under section 5 of the Act has the power to vary and modify the order of departmental authority; this Court while sitting in appeal over the judgment of the learned Tribunal can also exercise such a power to meet the ends of justice dependent upon of course the facts and circumstances of each case.

7. In the instant case as noted above the petitioner who had a long unblemished service of about 17 years had by force of circumstances (involvement in a case in which he was latter on acquitted) been prevented from performing his duty as teacher. He was absent from duty entailing some penalty under the law. His removal from service in the circumstances was too harsh a penalty for him. We had therefore, on conclusion of hearing passed the following short order:--

"For the reasons to be recorded separately, after having heard the learned counsel for the parties at length, we are inclined to convert this petition into appeal which is accepted and penalty of removal from service is converted to that of compulsory retirement."

These are the reasons for the above order accepting the appeal partially with no order as to costs.

M.H./A-36/SC

Appeal allowed.