20/06/2023 Peshawas

BEFORE THE SERVICE TRIBUNAL KHYBER PAKHTUNKHWA, PESHAWAR

Objection Petition No._____/2023
In E.P No.601/2022
In Service Appeal No.763/2018

Service Tribunal

Diary No

Dated 19/5/2000

- 1. Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat, Peshawar.
- 2. Secretary Establishment Department, Govt: of Khyber Pakhtunkhwa Peshawar.
- 3. Additional Chief Secretary, Planning & Development Department.
- 4. Provincial Selection Board through Secretary Establishment (Secretary of the Board) Government of Khyber Pakhtunkhwa.

..... Petitioners/Objectors

VERSUS

Muhammad Bashir Khan S/O Muhammad Mamor Khan R/O Flat No.33, Deans Complex, University Road Peshawar.

..... Respondent

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Section Officer (Lit)

Planning and Development

Department



Objection Petition No._____/2023

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	Petitioners/Objectors
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VERSUS

Muhammad Bashir Khan S/O Muhammad Mamor Khan R/O Flat No.33, Deans Complex, University Road Peshawar.

 Respondent

OBJECTION PETITION ON BEHALF OF PETITIONERS/RESPONDENTS IN EXECUTION PROCEEDING PENDING IN THIS HON'BLE COURT FILED BY MUHAMMAD BAHIR KHAN (RESPONDENT)

RESPECTFULLY SHEWETH:

The petitioners most humbly submit as under: -

- 1. That the respondent/appellant filed a service appeal No.763/2018 titled Muhammad Bashir Khan Versus Govt: of Khyber Pakhtunkhwa through chief Secretary & others against the petitioners/respondents for setting aside the order/recommendation of the worthy PSB dated: 28/12/2017 and grant notional promotion to the respondent/appellant from the date when the post of Senior Chief of section fall vacant (Copy of Service Appeal is attached as Annex-A).
- 2. That the petitioners/respondents by contesting the service appeal, filed joint parawise comments and rebutted the claim of the respondent/appellant (Copy of joint para-wise comments are attached as Annex-B).
- 3. That counsel for both the parties argued the case and the Hon'ble Tribunal decide the service appeal in favour of the respondent/appellant vide judgment dated: 12/07/2021 (Copy of Judgment Dated 12/07/2021 is attached as Annex-C).
- 4. That the respondent/appellant filed execution petition bearing No. 601/2022 in this Hon; ble Tribunal for implementing the judgment dated: 12/07/2021 which is pending before this hon'ble Tribunal.
- 5. That by feeling aggrieved from the execution proceeding pending in this court, the petitioners/respondents filed the instant objection petition on the following grounds inter-alia: -







GROUNDS:

- A. That the respondent/appellant was deferred in the PSB meeting for not undergone through the SMC training which is mandatory for promotion to the post of Senior Chief of Section BPS-20.
- B. That the respondent/appellant was promoted to the post of Chief of section BPS-19 on 18/10/2016 and remained on probation for one year. The probation was terminated on 17/10/2017 and after termination of the probation period, his service was to be retired on 01/02/2018 and he had not undergone through SMC training.
- C. That exemption from SMC having 58 years of age was withdrawn by the Federal Govt: hence for promotion to the post of BPS-20 Senior Management Course (SMC) training was mandatory. However, as the respondent/appellant was on probation, therefore, he could not nominated for the SMC.
- D. That the respondent/appellant was lacking mandatory training for promotion which is necessary for promotion to the post of Senior Chief of Section BPS-20 and he also admitted that he had not undergone through the said training.
- E. That the petitioners/respondents has also challenged the impugned Judgment dated: 12/07/2021 in the Supreme Court of Pakistan and has great chance of its success as the stance of the petitioners/respondents is very strong.
- F. That if the execution/implementation was done by the department prior to the decision of the Supreme Court of Pakistan and the appeal was accepted in the Supreme Court of Pakistan, then it would be difficult to recover the financial benefit from the already retired Officer.
- G. That if the PSB consider the notional promotion of the respondent/appellant prior to the decision of the Supreme Court of Pakistan in the CPLA filed by this department a Pandora box will open which will difficult for the provincial government to handle.
- H. That execution of the impugned judgment dated: 12/07/2012 prior to the decision of the Hon'ble Supreme Court of Pakistan will set the principle of wrong procedure which may affect the principle of natural justice.
- I. That there is no embargo in the eye of law if this hon'ble Tribunal may suspend the operation of the impugned Judgment dated: 12/07/2021 by considering the grounds of the instant objection petition.



ৌ. That other grounds will be raised at the time of arguments with the prior permission of this Hon'ble court.

It is therefore, most humbly prayed that by considering this objection petition the operation of the judgment dated; 12/07/2021 as well as the execution petition pending before this Hon; ble Tribunal may be suspended.

Any other relief, if this Hon'ble court may deem appropriate shall also be awarded in favour of the petitioners/respondents.

PETITIONERS/RESPONDENTS

Through

ADDITIONAL ADVOCATE GENERAL,
Service Tribunal, Khyber Pakhtunkhwa,
Pashawar



BEFORE THE SERVICE TRIBUNAL KHYBER PAKHTUNKHWA, PESHAWAR

Objection Petition No.____

In E.P No.601/2022

In Service Appeal No.763/2018

- 1. Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat, Peshawar.
- 2. Secretary Establishment Department, Govt: of Khyber Pakhtunkhwa Peshawar.
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- 4. Provincial Selection Board through Secretary Establishment (Secretary of the Board) Government of Khyber Pakhtunkhwa.

..... Petitioners/Objectors

VERSUS

Muhammad Bashir Khan S/O Muhammad Mamor Khan R/O Flat No.33, Deans Complex, University Road Peshawar.

..... Respondent

AFFIDAVIT

It is verified upon oath that the contents of the objection petition are true and correct to the best of my knowledge & belief and nothing has been concealed from this hon'ble court intentionally.

ATTESTED

Planning and Development

Department

Service Appeal No_763



Muhammad Bashir Khan S/o Muhammad Mamor Khan R/o Flat No. 33, Deans Complex, University road Peshawar.

Appellant

<u>VERSUS</u>

- 1. Government of Khyber Pakhtunkhwa through Chief Secretary, Civil Secretariat Peshawar.
- 2. Secretary Establishment Department, Government of Khyber Pakhtunkhwa Peshawar.
- √3. Additional Chief Secretary, Planning and Development Department (P&D) Khyber Pakhtunkhwa, Peshawar.
 - 4. Provincial Selection Board through Secretary Establishment (Secretary of the Board) Government of Khyber Pakhtunkhwa.Respondents

Y 757 APPEAL UNDER SECTION 4 OF THE SERVICE 31/5/18

RECOMMENDATION **IMPUGNED** PROVINCIAL SELECTION BOARD IN

MEETING HELD ON 28-12-2017, WHEREBY

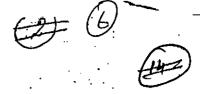
MANDATORY DIFFERED FOR WANT OF

MANAGEMENT

AGAINST

DEPARTMENTAL OF

<u>APPEAL DATED. 31-01-2018.</u>

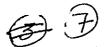


Respectfully Sheweth:-

- That the appellant joined service as a research officer PBS-17 in P&D department having been selected on recommendation of Public Service Commission.
- 2. That the appellant was promoted as Assistant Chief BPS-18 in 1994.
- 3. That the appellant was promoted to BPS-19 on acting charge basis as chief of section in 2007 and ultimately his promotion was regularized in the same basic pay scale on 18-10-2016 while the appellant was to remain on probation for one year. (Copy of the order dated 29-05-2007 and 18-10-2016 are attached as annexure "A" & "B" respectively).
- 4. That it is pertinent to mention here that the appellant was the senior most Assistant Chief in the department and the post of chief of section was lying vacant since long and the appellant had time and again appealed before the competent authority for regularization of his promotion. (Copy of the final seniority list dated 04-08-2016 of Assistant Chief and appeal against delay for regularization of promotion are attached as annexure "C" & "D").
- 5. That on 11-12-2017 the competent authority was pleased to terminate the probation period of the appellant alongwith two other officers with effect from 17-10-2017. (Copy of the order dated. 11-12-2017 is attached as annexure "E").
- 6. That the appellant was placed at serial no.3 of the final seniority list of chief of section BPS-19 vide notification dated 05-12-2017. (Copy of the seniority list dated 05-12-2017 is attached as annexure "F").

That it is worth mentioning here that the notification for retirement of the appellant with effect from 01-02-2018 had

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already been issued on 16-05-2017. (Copy of the notification dated 16-05-2017 is attached as annexure "G").

- 8. That working papers of the appellant along with other officers for promotion against the three vacant posts of senior chief of sections BPS-20 were prepared by the department and placed before the PSB in its meeting on 28-12-2017,
- 9. That to the astonishment of the appellant the worthy PSB was pleased to differ promotion of the appellant for not doing the necessary training. (Copy of the minutes of the PSB is attached as annexure "H").
- regulated by the service rules of the department amended from time to time. (Copy of the service rules of the P&D department is attached as annexure "I").
- 11. That on 17-08-2015 an amendment was introduced by the competent authority vide which the completion of Senior Management Course (SMC) was made mandatory for the purpose of promotion to the post of senior chief of section. (Copy of the notification dated. 27-08-2015 is attached as annexure "J").
- That likewise the promotion policy 2009 was also amended on 05-12-2017 bringing certain provisions regarding undergoing SMC training. (Copy of the 2009 promotion Policy alongwith amendments is attached as annexure "K").
- 13. That the appellant filed departmental appeal against the impugned recommendation of the PSB on 31-01-2018 but the same remained un-responded. (Copy of the departmental appeal is attached as annexure "L").

That the appellant left with no other adequate remedy approaches this Hon'ble tribunal inter alia on the following grounds.

4. The app

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GROUNDS:

- .\. That the impugned deferment order is against the law and facts of the file.
- B. That the probation period of the appellant was terminated on 11-12-2017 while the appellant was due to retire from 01-02-2018 so it was humanly impossible to undergo the four months training in 51 days.
- C. That the appellant was never offered the training nor was ever nominated for the same thus denying the due right to the appellant is against the law and the promotion policy.
- D. That the competent authority and the PSB has exempted many officers from the training who were beyond the age of 58 years and thus was promoted without undergoing the training. (Copy of the premotion order is attached as annexure "M").
- E. That the notification dated 27-08-2015 amending the service rules for SMC has never been published in the Official Gazette, thus its enforcement was not mandatory in case of the appellant.
- F. That the appellant has been discriminated against.
- G. That the appellant is entitled to notional promotion from the date when the seat of Senior Chief of section fell vacant.
- H. That the appellant may please be allowed to adduce additional documents/ arguments at the time of hearing of the instant appeal.

It is, therefore, humbly prayed that on acceptance of the instant appeal, the impugned order/ recommendation of the worthy PSB may kindly be set aside and the appellant may kindly be granted notional promotion from the date when the post of Senior Chief of section fell vacant.

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Any other order/ relief deemed proper and in circumstances of the case may kindly be passed/ granted as well.

Appellant

Through

Naveed Akhtar Advocate Supreme Court Hotel

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Khyber Michimkhwa

Khyber Tribunal

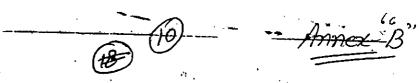
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Peshawar

Date: _

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Service Appeal No. 763/2018

MUHAMMAD BASHIR KH



VERSUS

GOVT: OF KHYBER PAKHTUNKHWA THROUGH CHIEF SECRETARY & OTHERS

.....RESPONDENTS

PARA-WISE COMMENTS ON BEHALF OF RESI ONDENT NO. 03.

PRELIMINARY OBJECTIONS:

- 1. That the appellant has no locus standi.
- 2. That the appellant does not come to the court with clean hands.
- 3. That the appeal is not maintainable in its present shape.
- 4. That the appellant is estopped by his own conduct.
- 5. That the appeal is badly time barred hence not maintainable.
- 6. That this Hon'ble Tribunal has got no Jurisdiction to entertain the present appeal.

RESPECTFULLY SHEWETH:

PARA-WISE REPLY:

Para -1 & 2 are correct, hence need no comments.

Para - 3 to 8 are based on record and found correct, hence need no comments.

Para - 9 is correct that the Provincial Selection Board (PSB) deferred the promotion of the appellant for not doing the mandatory training i.e. Senior Management Course (SMC) which is mandatory under the prescribed rules for promotion to the post of Senior Chief of Section (BPS-20).

Para - 10 to 12 are correct and referred to updated rules and policies of the government which describes mandatory provision for training of Senior Management Course (SMQ), for getting promotion to the post of Senior Chief of Section (BPS-20).

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Para - 13 Correct, the departmental appeal (F/A) of the appellant was processed in detail vide Paras-644-718 and after approval contained in Para-718, the same was regretted and field (F/B) due to his retirement from Government Service. CONTRACTOR SENSORS ASSESSMENT

Para - 14 needs no reply/comments. & King of Fight up and Freehouse

Ground A & B are incorrect, hence expressly denied. The appellant himself admitted that he had not undergone through the four months Senior Management Course (SMC) which was mandatory under the prevailing rules and policies of the government.

Ground C Correct, the officer concerned was on probation when the exemption in SMC mandatory training was waived off and after expire of probation period, there was less time left to his retirement, therefore, ether appellant could not offered/recommended for SMC Mandatory Training no some

Ground D needs no comments. Pertains to Establishment department.

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Ground E is incorrect and referred the legal technicalities. However, the appellant never challenged the same.

processor para this beautiful by the being Ground F & G are incorrect. The appellant was treated under the prescribed rules and policies of the government and no right of the appellant has been violated.

Ground H Respondent also seeks permission to put additional grounds at the time of arguments/hearing. CONTRACTORS CONFERENCE CONTRACTORS

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<u>PRAYER:</u>

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It is therefore, humbly prayed that the service appeal filed by the appellant may It is therefore, humbly prayed that the solving array graciously be dismissed with cost. The solving array of the

> ADDL: CHIEF SECRETARY, KHYBER PAKHTUNKHWA C ** (RESPONDENT NO. 03).

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Annex-"

SEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 763/2018

Date of Institution
Date of Decision

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31.05.201

12.07.202

Muhammad Bashir Khan S/O Muhammad Mamor Khan R/O Flat No.33, Deans Complex, University Road, Peshawar.

(Appellant)

VERSUS

The Government of Khyber Pakhtunkhwa, through Chief Secretary Civil Secretariat Peshawar and three others.

(Respondents)

Naveed Akhtar, Advocate

For appellant.

Muhammad Adeel Butt, Additional Advocate General

For respondents.

AHMAD SULTAN TAREEN ROZINA REHMAN

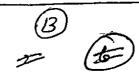
.. CHAIRMAN

MEMBER (J)

JUDGMENT

AHMAD SULTAN TAREEN CHAIRMAN: The question for determination in this judgment is whether deferment of promotion of the appellant by Provincial Selection Board (PSB) for want of Mandatory Senior Management Course (SMC) was justified when he was unable to overcome this barrier because of time factor linked with his soon reaching retirement by superannuation?





Nutshell of the factual account given in the memorandum of 02. appeal is that the appellant after his appointment as Research Officer (BPS-17) in Planning & Development (P&D) Department was promoted in BPS-18 in due course of time and then on Acting Charge Basis in BPS-19 followed by regularization of his promotion in the said scale on 18.10.2016 with condition of probation period for one year. The promotion of the appellant after termination of probation period on 11.12.2017 was due in BPS-20 as the post was vacant and the appellant in terms of his seniority position was entitled to be considered for promotion to the said post. However, his promotion for technical reason of lacking of SMC was deferred when his name was included in the Working Paper with other officers for promotion against 03 vacant posts of Senior Chief of Sections (BPS-20). The appellant on grievance from deferment of his promotion on recommendation of P.S.B, preferred departmental appeal and after its presumptive rejection on expiry of 90 days waiting period, he approached this Tribunal by the Service Appeal at hand. The respondents were put on notice who joined the proceedings and have contested the appeal by refuting the claim of appellant in their written statement as well as at the bar, as far Altotal as relief is concerned.

03. We have heard the arguments and have perused record.

04. Learned counsel for appellant argued that the impugned deferment order is against law and facts. He submitted that the

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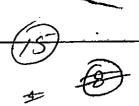
probation period of the appellant was terminated on 11.12.2017 while the appellant was to be retired on 01.02.2018 so it was humanly impossible to undergo the found months training in 51 days. Further submitted that the respondents never offered the training to appellant nor was ever nominated for the same and they denied the due right to the appellant illegally and against the promotion policy; and that the competent authority promoted many officers by exempting from the training who were beyond the age of 58 years, thus, the appellant has been dealt with discrimination by the competent authority and requested for notional promotion from the date when the seat of Senior Chief of Sections fell vacant.

- DS. As against that learned A.A.G argued that appellant has rightly been deferred from promotion as the mandatory training i.e. Senior Management Course (SMC) is necessary for promotion to the post of Senior Chief of Section (BPS-20) and the appellant himself admitted that he had not undergone through the said training. Further submitted that appellant was on probation when the exemption in SMC mandatory training was waived off and on expiry of probation period, there was less time left to his retirement, therefore, appellant could not offered/recommended for SMC mandatory training. Lastly, he submitted that appellant was treated under the prescribed rules and policies of the Government and no right of the appellant has been violated.
- 06. Coming to the question for determination as indicated in beginning of this judgment, needless to say that the appellant has

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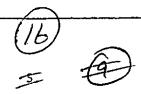
impugned the deferment of his promotion on grounds among others that his period of probation was terminated on 11.12.2017 while his retirement from service was due on 01.02.2018. So, it was humanly Impossible for him to undergo the four months training in 51 days. It was added that he was never offered the training nor was ever nominated for the same. Parawise comments were submitted only on behalf of respondent No.3 i.e. Additional Chief Secretary, P&D Department. According to comments of the said respondent, facts narrated in the memorandum of appeal from Para-01 to 13 were not refuted with admission of their correctness. Ground-C of the memorandum of appeal relates to the point that appellant was never offered training nor was ever nominated for the same. Thus, denying the due right to him is against law and promotion policy. Ground-D relates to the exemption granted by the competent authority and P.S.B from the training to those whose age was about 58 years. The Ground-C was admitted as correct with the clarification that officer concerned was on probation when exemption in SMC mandatory training was waived off and after expiry of probation period, there was less time left to his retirement. Therefore, he could not be offered/recommended for SMC mandatory training. Ground-D was not commented upon by respondent No.3 because of its pertinence to the Establishment Department. However, the said Department being respondent No.2 in the memorandum of appeal did not file reply/comments despite last opportunity given as reflected in order dated 27.08.2019 of the proceedings of this appeal. Thus, in absence of rebuttal of the said

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ground by the respondents, presumption in favor of the appellant becomes absolute that he was discriminated in the matter of exemption from mandatory training due to his closeness to superannuation on account of age factor and it is an admitted position that he was unable to undergo the mandatory training because of his soon reaching retirement from service.

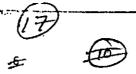
According to final seniority list of Chief of Sections (BPS-19) as 07. stood on 30.11.2017, copy whereof is available on file as Annexure-F, the appellant is shown at Serial No.3. The Minutes of Meeting of P.S.B held on 28.12.2017 relating Item No.7, as available on file, would reveal that the P.S.B in the said Meeting was apprised about the availability of three posts of Senior Chief of Sections (BPS-20) lying vacant. It was noted in the said Minutes that the post was required to be filled by promotion on the basis of seniority-cum-fitness from amongst Chief of Sections fulfilling the conditions enumerated for said promotion. Accordingly, the appellant was not lacking in any of the conditions. One of his seniors Mr. Ali Raza Khan was recommended for promotion while the promotion of his other senior was deferred on two counts i.e. due to pendency of an inquiry against him and his having not undergone mandatory training. The promotion of appellant was deferred simply for the reason of his having not undergone the training.

John Services

08. If we take into account the admitted and un-rebutted facts and grounds as discussed before, the appellant has suffered because of denial of promotion to him firstly for the reason beyond his control as

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that he was not granted exemption because of his age factor when he was bound to retire from service on 01.02.2018 hardly after 34 days from the date of the Meeting of P.S.B i.e. 28.12.2017, wherein, the Board recommended to defer his promotion for want of Training. Thus, no room was left for the training. The factual account and grounds advanced by the appellant having remained un-rebutted by the respondents very safely attract the doctrine of impossibility. Accordingly, where the law creates a duty or charge and the party is disabled to perform it, without any fault in him, and has no remedy over, the law will in general excuse him. The said doctrine finds its place in the Latin Maxim: "Lex non cogit ad impossibilities."

O9. Though applied in different context of the law and facts but there are reported judgments which make scope for application of this principle in the administration of justice. The august Supreme Court of Pakistan applied this maxim in the case of "Muhammad Yar through Legal Heirs Vs. Muhammad" (2003 SCMR 1772). It was held: "In the case in hand the provisions as contained in section 4 of the Limitation Act, 1908 which revolves around two maxims i.e. "Lex non cogit ad impossibilia" (the law does not compel a man to do that which he cannot possibly perform) and "Actus curiae neminem gravabit" (an act of the Court shall prejudice no man) can safely be made applicable as no fault could be attributed to the respondent."

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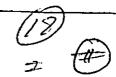
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The Lahore High Court in the case "Messrs Akhtar Brothers & 10. Co. Lahore. Vs. Commissioner Income Tax, Lahore (1973 PTD 527) while applying the doctrine of impossibility held as follows: "Reference may in this connection be made to the maxim-"Lex non cogit ad impossibilia" which when rendered into English means " the law does not compel a man to do that which he cannot possibly perform". Sir W. Scott has been quoted by Broom to his classic book "The Legal Maxims", 10th Edn., p. 162, as having said- "the law itself and the administration of it, with reference to an alleged Infraction of the revenue laws, must yield to them to which everything must bend, to necessity, the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception for the consideration of all particular cases."

got a fit case where principle of "Lex non cogit ad impossibilia" would apply. Since the appellant could not surmount the obstacle of SMC in the way of his promotion simply for the reason that it was not possible for him in span of his service left to his retirement after appearance of the said necessity of SMC on his part. Therefore, we hold him entitled for notional promotion with all accruable benefits from the date when his promotion was recommended to be deferred for want of SMC. The appeal stands disposed of accordingly in favor

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of the appellant and against the respondents. Parties are left to bear their own costs. File be consigned to the record room.

ANNOUNCED. 12.07.2021

> (Røzina Rehman) Member (J)

(Ahmad Sultan Tareen) Chairman

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EXAMPLER

Rhyber P. Tribunal

Service Tribunal

Peshawar

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