BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

Service Appeal No. 7787/2021

BEFORE: ROZINA REHMAN --- MEMBER(J)
MUHAMMAD AKBAR KHAN--- MEMBER(E)

Mr. Razeem Khan Senior Clinical Technologist (Radiology) BS-18, Government Naseerullah Khan Babar Memorial Hospital, Peshawar..... (*Appellant*)

VERSUS

1. Chief Secretary, Government of Khyber Pakhtunkhwa, Civil Secretariat, Peshawar.
2. Secretary to Government, Khyber Pakhtunkhwa, Health Department Peshawar.
3. Director General Health Services, Khyber Pakhtunkhwa, Peshawar.
4. Medical Superintendent, Government Naseerullah Khan Babar Memorial Hospital, Peshawar.
5. Mr. Jamil Khan S/O Muhammad Khan Senior Clinical Technologist (Radiology) BS-18, Government Naseerullah Khan Babar Memorial Hospital, Peshawar..... (*Respondents*)

Present:

DARIS KHAN,
Advocate --- For Appellant

ASIF MASOOD ALI SHAH,
Deputy District Attorney, --- For official respondents No. 1 to 3

ASHRAF ALI KHATTAK,
Advocate --- For respondent No. 4

Date of Institution.....25.11.2021
Date of Hearing.....05.04.2023
Date of Decision.....05.04.2023

JUDGMENT

MUHAMMAD AKBAR KHAN, MEMBER(E):- The instant service appeal has been instituted under Section 4 of the Khyber Pakhtunkhwa Service Tribunal, Act 1974 with the prayer as copied below;

"That on acceptance of this appeal the impugned Notification No. SOH-III/8-60/2021 dated 28.09.2021 to

the extent of the appellant and letter No. 8068-73/GNKBMH dated 06.10.2021 may kindly be set aside and the appellant may be retained on same post of Senior Clinical Technologist (Radiology) BS-18 at Government Naseerullah Khan Babar Hospital Peshawar with all service benefits. Any other relief which this Hon'ble Court deems appropriate in the circumstance of the case may kindly be granted in favor of petitioners.

02. Brief facts of the case are that the appellant was posted as Clinical Technologist Radiology (BS-17) at Government Naseerullah Khan Babar Memorial Hospital against a vacant post with effect from 01.04.2021 by respondent No. 2 vide Notification dated 24.06.2021. He was promoted to the post of Senior Clinical Technologist BS-18 on regular basis vide Notification dated 11.08.2021 and through subsequent Notification he was again posted at Government Naseerullah Khan Babar Memorial Hospital on 28.09.2021. Through the same Notification respondent No. 5 was also posted in the same hospital against the same post and respondent No. 4 wrote a letter to respondent No. 3 regarding non availability of the post of Senior Clinical Technologist BS-18 in order to adjust the appellant as respondent No. 5 had been adjusted against the said post. Feeling aggrieved the appellant filed departmental representation on 08.10.2021 which was not responded to whereafter he filed service appeal on 25.11.2021. During pendency of his service appeal respondent No. 2 issued two Notifications on 03.12.2021 in partial modification of departmental Notification dated 28.09.2021 the appellant

was transferred to DHO, Peshawar and then further posting of appellant to CD Landi Arbab (Pvt. Center), Peshawar vide order dated 10.01.2022. Feeling aggrieved from the said Notification, the appellant filed departmental representation which was not responded to, hence the appellant approached the Service Tribunal with the request to submit amended service appeal on 27.01.2022.

03. Notices were issued to the respondents, who submitted their comments, wherein they refuted the assertions raised by the appellant in his appeal. We have heard arguments of learned counsel for the parties and have gone through the record with their valuable assistance.

04. Learned counsel for the appellant contended that on promotion, the appellant was posted as Senior Clinical Technologist and he assumed the charge of the said post on 28.09.2021 at Government Naseerullah Khan Babar Memorial Hospital. He was transferred from the said Hospital without completing his normal tenure; that it was incumbent upon respondent No. 3 & 4 to adjust the respondent No. 5 to any other post not on the post of the appellant. He further argued that respondent No. 4 is not legally entitled to lay off the appellant as he has no authority for the purpose; that the impugned Notification/orders and letter are based on favoritism, malafide and pre-mature and issued in violation of law, rule and policy.

05. Mr. Ashraf Ali Khan Khattak, Legal Advisor for respondent No. 4 contended that the charge assumption report of the appellant is bogus and fabricated for which the appellant is liable to be proceeded under Section 195 Cr.P.C. That the appellant has no vested right to be

posted against the post of Senior Clinical Technologist at Naseerullah Khan Babar Memorial Hospital Peshawar. That according to Section 10 of the Khyber Pakhtunkhwa Civil Servant Act, 1973 no one has the right to be posted at the station of his own choice. He further contended that the impugned Notification has been issued by the competent authority and not by respondent No. 4. That the appellant and private respondent No. 5 both are civil servants and under legal duty to adhere to the commands of the competent authority. He submitted that respondent No. 5 had already assumed the charge against the vacant post of Senior Clinical Technologist, therefore, there was no room for appellant to be adjusted.

06. Learned Deputy District Attorney for respondents No. 1 to 3 has relied upon the arguments advanced by learned counsel for the respondent No. 4.

07. Available record reveals that one post of Senior Clinical Technologist (BS-18) in Naseerullah Khan Babar Memorial Hospital Peshawar was lying vacant. The appellant was working in the said hospital as Clinical Technologist (BS-17) since 26.06.2021. After issuance of his promotion order to BS-18 he was assigned responsibilities of the In-charge of Radiology Unit by the management of the hospital vide order dated 07.09.2021. On promotion of the appellant to the post of Senior Clinical Technologist (BS-18) he was posted in the same hospital vide Notification dated 28.09.2021. Vide the same Notification another Senior Technologist (BS-18) Mr. Jamil Khan, who is respondent No. 5 in the instant appeal, was also posted in the same hospital. Since there was one post of Senior Clinical Technologist (BS-18) in the hospital, posting

of two officers created an anomaly for the hospital. The MS of the hospital (respondent No.4) gave charge of the post of Senior Clinical Technologist to Mr. Jamil Khan and reported the matter to the Director General Health Services (respondent No.3). After lapse of more than two months the respondent No. 2 addressed the anomaly by posting out the appellant from Naseerullah Khan Babar Memorial Hospital and placed his services at the disposal of DHO Peshawar.

08. The respondents have relied on the ground that the charge assumption report on part of the appellant is tempered and bogus. The question before the Tribunal is not who assumed the charge of the vacant post first. The question is who was entitled and deserved to be given charge of the post in accordance with the spirit of law and rules. The MS of the Hospital had no powers under the rules to utilize his discretion by allowing the respondent No. 5 to assume charge and repatriating the appellant. He was required to immediately bring the matter into the notice of competent authority (respondent No. 2) for rectification of the posting order. Likewise the respondent No. 2 while resolving the issued did not take into consideration the fact that the appellant was already serving in the hospital for the last five months. He was senior to the respondent No. 5 and had already been assigned responsibilities as In-charge of Radiology Unit. As such the appellant deserved preferential treatment. The appellant being senior to the respondent No. 5 had the preferential right to be adjusted against the original post of Senior Clinical Technologist (BS-18) in the Naseerullah Khan Babar Memorial Hospital where he was already working for the last five months against a lower post. The dictum of preferential treatment of a senior civil servant

in such like circumstances has been established by Peshawar High Court, in its judgment in Writ Petition No. 810-P dated 02.06.2015.

09. In view of what has been discussed above we accept the instant appeal as prayed for and set aside the letter of MS Naseerullah Khan Babar Hospital dated 06.10.2021 and subsequent Notification of respondent No. 2 dated 28.09.2021. Consign.

10. Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal this 05th day of April, 2023.

(ROZINA REHMAN)
MEMBER (J)

(MUHAMMAD AKBAR KHAN)
MEMBER (E)

Kamranullah