

**KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

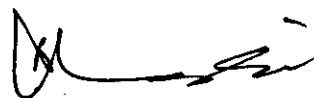
BEFORE: **KALIM ARSHAD KHAN, CHAIRMAN**
M. AKBAR KHAN, MEMBER (Executive)

Service Appeal No.1006/2016-Neem

Engineer Nasir Zaman Khan, son of Muhammad Zaman Khan, Section Officer Technical (BPS-17) Public Health Engineering Department, Khyber Pakhtunkhwa, Peshawar.....(*Appellant*).

Versus

1. **Government of Khyber Pakhtunkhwa**, through Chief Secretary, Civil Secretariat Peshawar.
2. **Secretary to Government of Khyber Pakhtunkhwa**, Public Health Engineering Department, Peshawar.
3. **Chairman**, Khyber Pakhtunkhwa Public Service Commission, Fort Road, Peshawar Cantonment.
4. **Secretary**, Khyber Pakhtunkhwa Public Service Commission, Fort Road, Peshawar.
5. **Ijaz ul Haq, SDO (BPS-17)**, Public Health Engineering Department, Dir Upper.
6. **Noorullah, SDO (BPS-17)**, Public Health Engineering Department, FATA, Mohmand Agency.
7. **Faisal Noman, SDO (BPS-17)**, Public Health Engineering Department, Charsadda.
8. **Rizwanullah, Section Officer Technical, (BPS-17)**, Public Health Engineering Department, Khyber Pakhtunkhwa, Peshawar.
9. **Arsalan Khan, SDO (BPS-17)**, Public Health Engineering Department, DIKhan.
10. **Arshad Iqbal, SDO (BPS-17)**, Public Health Engineering Department, Dargai Malakand Agency.
11. **Jamshaid Hussain Bangash, SDO (BPS-17)**, Public Health Engineering Department, FATA FR Kohat.



12.Sardar Sameer Asmat Gandapur, SDO (BPS-17), Public Health Engineering Department, Shangla.

13.Miss Taskeen Ahmed, SDO (BPS-17), Public Health Engineering Department, Abbottabad.

14.Miss Sania Mehtab, SDO (BPS-17), Public Health Engineering Department, Peshawar.

15.Miss Faiza Sana, SDO (BPS-17), Public Health Engineering Department, Mardan.....(Respondents).

Mr. Abdul Raheem Jadoon, Advocate.....For appellant.
Mr. Fazal Shah Mohmand,For official respondents.
Mr. Akhtar Ilyas advocate.....For private respondents 13 to 15.
Nemo.....For other private respondents.

Date of Institution.....09.09.2016
Date of Hearing.....31.05.2023
Date of Decision.....31.05.2023

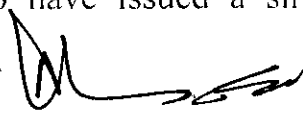
Appeal under Section 4 of the Khyber Pakhtunkhwa Service Tribunal Act, 1974.

JUDGEMENT

KALIM ARSHAD KHAN CHAIRMAN: The subject of controversy in this appeal is legality of the seniority list(s) of Assistant Engineer/SDO (BPS-17) in the Public Health Engineering Department (PHED), Khyber Pakhtunkhwa.

2. The grievance of the appellant as set forth in the memorandum and grounds of his appeal is primarily that after the process of selection, for appointment against the post of Assistant Engineer/SDO (BPS-17) in the Khyber Pakhtunkhwa Public Health Engineering Department, was initiated by issuance of two advertisements by the Khyber Pakhtunkhwa Public

Service Commission(**the Commission**); that the appellant had applied against both the advertisements. According to the appellant, the Commission conducted **single written test** for selection against both the advertisements, wherein the appellant qualified by securing 78 out of 100 marks; that the appellant and other successful candidates appeared in interview on 02.12.2013 and 12.12.2013 against both the advertisements; that the appellant passed/qualified the prescribed interview and was accordingly recommended to be successful candidate in the second advertisement (04/2012) vide letter dated 10.01.2014; that after issuance of transfer/posting order by the department on 21.04.2014 and completion of codal formalities, the appellant joined the service and submitted arrival report; that joint seniority lists dated 17.03.2015 and 29.02.2016 were communicated by respondent No.2, wherein, relegating in seniority, the appellant was placed at serial No.52 in the first seniority list and at serial No.50 of the second seniority list; that the appellant applied to the Commission and obtained merit lists of both the advertisements, wherein it was stated that inter-se seniority had already been communicated to the PHED; that the merit list provided by the Commission showed the appellant at serial No.1 of the second advertisement (04/2012), in which he was appointed; but he was placed at serial No.50 of the seniority list (29.02.2016) of the PHED; that aggrieved of the same, the appellant preferred departmental representation on 24.05.2016 for rectification of the seniority list and awaiting 90 days' statutory period when no response was received from the department, he filed this appeal on the grounds that the Commission ought to have issued a single/joint merit list of both the




advertisements i.e. of 02/2012 and 04/2012 as per the Khyber Pakhtunkhwa Public Service Commission Regulations, 2003 because single scrutiny/written test was conducted; that the appellant was at serial No.1 of the merit list and he ought to have been given seniority accordingly; that the appellant secured equal marks with respondent No.5 (Muhammad Ijaz) but the appellant was older in age, therefore, under rule 33(3) part-XI of the Commission Rules, 2003, the appellant was entitled to be placed above respondent No.5 and that the PHED had also not acted in accordance with law by not adhering to the merit list issued by the Commission.

3. On receipt of the appeal, notices were issued to the respondents to file their reply. Official Respondents No. 1 & 2 filed separate reply while Official Respondents 3 & 4 separate reply. Similarly some of the private respondents filed separate replies but they were placed exparte but private respondents No.13 to 15 not only filed application for setting aside exparte proceedings but their counsel also joined the final arguments.

4. We have heard arguments of learned counsel for the parties and perused the record with their assistance.

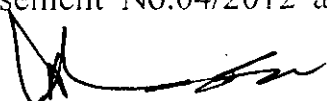
5. The learned counsel for the appellant reiterated the grounds urged in the memorandum and grounds of appeal and submitted that there was a single written test conducted for selection of the posts of Assistant Engineer/SDO (BPS-17) by the Khyber Pakhtunkhwa Public Service Commission but making two separate recommendations was not justified



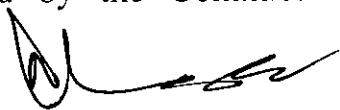
because such an act on the part of the Commission has infringed the right of seniority of the appellant. On the other side the learned law officer refuted the arguments and prayed for dismissal of the appeal.

6. There is no denying the fact that the Commission issued two advertisements in the year 2012 for inviting applications for recruitment of different posts including the posts of Assistant Engineers/SDOs (BPS-17) in the PHED Khyber Pakhtunkhwa. The appellant was admittedly candidate of both the advertisements. He claims that a single written test was held for selection to the posts advertised through two advertisements. He admits that he qualified the (**single**) written test but was interviewed twice (on 02.12.2013 and 12.12.2013) separately for the post advertised in two different advertisements. He has two claims thereafter, one that he was at serial No.1 of the merit list, therefore, he ought to have, accordingly, been placed senior in the seniority list prepared by the department and secondly that he, and private respondent No.5, secured equal marks and that the appellant being older in age, was thus to rank senior to private respondent No.5.

7. As to the first claim of the appellant, we refer to the comments and documents filed by the Commission. Wherein the Commission contends that in response to the first advertisement No.02/2012, 489 applications were received; that subsequently another requisition for ten additional posts was received from the PHED and applications were invited vide advertisement No.04/2012 and in response thereto 422 applications were



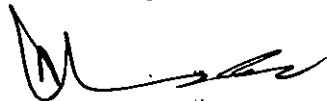
received; that the appellant belonged to zone 3 and applied for the post of Assistant Engineer/SDO (BPS-17) against the first advertisement, vide diary No.144. He appeared in the **Ability Test** and obtained 78 marks out of 100 under roll No.331/274; that his name was at merit list No.22 out of 316 candidates; that subsequently interviews were conducted with effect from 02.12.2013 to 11.12.2013 for selection against the first advertisement, wherein the candidates, including the appellant, were interviewed during which he obtained 40 marks; that on the basis of (final) merit list he was at serial No.10 of the merit order and had 3rd position in his own zone-3; that there were total 12 vacancies and only two reserved for zone-3, two candidates at serial No.2 & 8, belonging to zone 3, were above the appellant on the merit list and thus recommended for appointment against the two vacancies reserved for zone-3 (in the first advertisement) and the appellant was not recommended due to non-availability of 3rd vacancy in zone-3. That, subsequently interviews were conducted for selection against the second advertisement No.4/2012, from 12.12.2013 to 19.12.2013; that during the second interview the appellant performed better than the earlier interview and obtained 43 marks in the interview; that ten candidates including the appellant were selected and accordingly recommended for appointment; that the appellant was on the top of the second merit list; that as the appellant was selected and recommended for appointment on the basis of second interview conducted for selection for the posts advertised in the second advertisement, therefore, he had rightly been declared junior to the candidates selected and recommended against the first advertisement. It was contended by the Commission that its Regulations nowhere make it



incumbent upon it to issue a joint/single merit list of two or more than two advertisements even if a single scrutiny/written test was conducted; however, under Regulation 6(u) if additional posts were received from the Government before completion of preliminaries in an earlier requisition, the same were advertised, notifying the addition in the press by way of corrigendum or through fresh advertisement at the **discretion** of the Commission; that in the case in hand, second requisition was received after lapse of more than seven months of the 1st advertisement, therefore, the Commission decided to float a fresh advertisement; that a single ability test was conducted for both the advertisements as per general practice in the Commission for convenience of the candidates as well as the administration.

8. Be that as it may, the Commission terms the two recommendations made against two different advertisements to have been the outcome of two different selections process, one earlier and the other latter. According to the Commission, the appellant is selectee and recommendee of the latter selection process made in response to advertisement No.04/2012. This recommendation, of the appellant against the second advertisement, has been admitted by himself.

9. It is not disputed that the appellant was not recommended in the first merit list, prepared as a result of the interview conducted earlier, for selection against earlier/first advertisement, as his merit position was 10, while there were two posts of zone three, he was at 3rd position in his own

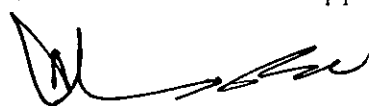


zone-3 and the two candidates, of zone 3, at serial No.2 & 8 on the merit list, were recommended while appellant was not. From the above it is clear that the appellant was not selected in the earlier selection, made in response to the first advertisement, being low on merit. The appellant admits that he was part of both the advertisements and had appeared in two interviews conducted separately for the posts advertised in two different advertisements, therefore too, the contention of the Commission, that the appellant was selectee of the latter selection, appears to us to be sound and well founded.

10. Besides, regulation 29 (o) of the Commission Regulations, 2003, the ability marks are counted only for shortlisting purpose and thus in no way can be counted or added to the interview marks to prepare the final merit list. The relevant provision is reproduced below:

"(o) The marks obtained in screening test / ability test shall be counted only for shortlisting purpose."

Thus contention of the appellant that he had appeared in one (single) written test, conducted for selection against both the advertisements; that the selection was one and the same, which could not be segregated or termed to be two different selections for the purposes of recommendations, appointment and seniority, has no force because admittedly there was ability test conducted for shortlisting the candidates before conducting interviews and after such shortlisting of the candidates, separate interviews were conducted one after the other, for selection of candidates/applicants in two different advertisements. The appellant, being selectee of the latter selection



was recommended against the second advertisement and was rightly assigned seniority according to the merit order prepared by the Commission as a result of the second selection process.

11. Similarly, Regulation 35(3)(b) of the Commission Regulations, 2003 guides us that the combined merit list shall be against a particular advertisement. The relevant part is as under:

"(b) The combined merit list shall be against a particular advertisement where the posts were advertised collectively but recommendations were staggered due to interview schedule or any other reason."

Therefore, the two merit lists, of two selections, made against the two advertisements appear to be in accordance with the above regulation and the appellant is admittedly selectee and recommendee of the latter/selection.

12. What the Commission has done while preparation of merit list or for that matter making two recommendations saying that there were two selection processes against the two advertisements or that the commission ought to have sent the single recommendation, are the questions which are, is outside the jurisdiction of this Tribunal as those cannot be challenged here. The only point which this Tribunal has to see for deciding this seniority appeal, is that the Commission has issued two recommendations against two different advertisements by saying that the recommendees were the selectees of two selection processes, one earlier and the other latter,



while the appellant is admittedly the selectee and recommendee of the latter selection. Thus the inter se merit order assigned to the same batch by the Commission is to hold good at the time of preparation/determination of seniority while the seniority between the two batches i.e. not of a single combined selection process rather of two different selection processes, was to be determined in the light of rule 17 (a) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989, which requires that the persons selected in an earlier selection shall rank senior to the persons selected in latter selection.

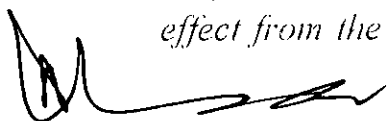
13. Seniority is determined under section 8 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 read with the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989. The above provisions are reproduced below:

“8. Seniority:- (1) *For proper administration of a service, cadre or [post], the appointing authority shall cause a seniority list of the members for the time being of such service, cadre or [post] to be prepared, but nothing herein contained shall be construed to confer any vested right to a particular seniority in such service, cadre or [post] as the case may be.*

(2) *Subject to the provisions of sub-section (1), the seniority of a civil servant shall be reckoned in relation to other civil servants belonging to the same service or 6 [cadre] whether serving the same department or office or not, as may be prescribed.*

(3) *Seniority on initial appointment to a service, [cadre] or post shall be determined as may be prescribed.*

(4) *Seniority in a post, service or cadre to which a civil servant is promoted shall take effect from the date of regular appointment*



to that post; Provided that civil servants who are selected for promotion to a higher post in one batch shall, on their promotion to the higher post, retain their inter-se seniority as in the lower post.

(5) The seniority lists prepared under sub-section(1), shall be revised and notified in the official Gazette at least once in a calendar year, preferably in the month of January."

"17. Seniority :-(1) the seniority inter se of civil servants (appointed to a service, cadre or post) shall be determined:-

(a) in the case of persons appointed by initial recruitment, in accordance with the order of merit assigned by the Commission [or as the case may be, the Departmental Selection Committee;] provided that persons selected for appointment to post in an earlier selection shall rank senior to the persons selected in a later selection; and

(b)

Explanation-I:-.....

Explanation-II:-.....

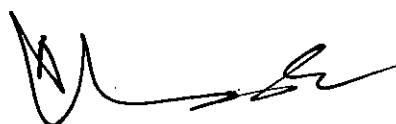
Explanation-III:-.....

(2)

(3)

(4)

14. Rules 17 of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989 requires that the persons selected in an earlier selection shall rank senior to the persons selected in a latter selection. The issue has consistently been discussed and settled by the



honourable superior courts. Reliance can safely be placed on the following pronouncements of the honourable courts/tribunals of the country:

- i. *2002 SCMR 889 titled "Government of NWFP through Secretary Irrigation and 4 others", wherein the august Supreme Court of Pakistan was pleased to have observed that Appointments made as a result of selection in one combined competitive examination would be deemed to be belonging to the same batch and notwithstanding recommendation made by the Public Service Commission in parts, the seniority inter se. the appointees, of the same batch, would be determined in the light of merit assigned to them by the Public Service Commission.*
- ii. *2002 PLC(CS) 780 titled "Shafiq Ahmad and others versus the Registrar Lahore High Court and others" wherein it was found that the If the civil servants despite having been declared successful earlier by the Commission, were not appointed at relevant time they could not be made to suffer-- Appointment and seniority were entirely two different things and delayed appointment of the civil servants could not affect their right to seniority in accordance with the rules."*
- iii. *The above judgment was affirmed by the august Supreme Court of Pakistan in PLJ 2002 SC 234 titled "Muhammad Anjid Ali and others versus Shafiq Ahmad and others" by holding that "Seniority. The seniority inter se of the members of the Service in the various grades thereof shall be determined-*




(a) in the case of members appointed by initial recruitment, in accordance with the order of merit assigned by the Commission provided that persons selected for the Service in an earlier selection shall rank senior to the persons selected in a later selection;"

13. Respondents Nos. 1 to 5 were candidates in the Competitive Examinations held in 1988 and 1989 and were taken from the merit list prepared as a result of competitive examination, 1987, therefore, there can be no cavil with the proposition that they belong to 1988 batch and their seniority is to be determined accordingly. It will be pertinent to mention here that the appeal before the Tribunal was not seriously contested by the Appointing Authority, namely, the Lahore High Court in view of its stance taken at the stage of preparation of the seniority list of the parties by the Government of the Punjab that the contesting respondents apparently belonged to 1988 batch.

14. Acceptance of the offer of appointment against future vacancies by the respondents being traceable to the observations made in the judgment passed in the Intra-Court Appeal can have no bearing on the question of their seniority. Similarly the matter had become past and closed only to the extent of appointment of the respondents as Civil Judges against future posts and the question of their seniority remained open.

iv. PLC 1993 (CS) 116 titled M. Tahir Rasheed versus Secretary Establishment Division, Islamabad and others, wherein the Federal Service Tribunal held that Inter se seniority of candidates at one selection was to be determined on the basis of merit assigned to the candidates by the Public Service Commission/Selection Committee in pursuance of general principles of seniority and not the dates of joining duty.

v. 1993 P L C (C.S.) 52 titled "Muhammad Jafar Hussain versus Chairman, Central Board of Revenue, Islamabad and 4 other", wherein it was held that Seniority of candidates selected in one batch was to



be determined in accordance with the merit assigned by Public Service Commission and not on basis of joining assignments---Appellant's claim of seniority that although respondent had acquired higher position in merit list prepared by selection authority, yet he having joined assignment earlier, in time was to rank senior, was not sustainable.

- vi. *1998 SCMR 633 titled "Zahid Arif versus Government of NWFP through Secretary S&GAD Peshawar and 9 others", wherein it was held that ---R. 17(a)---Constitution of Pakistan (1973), Art. 212(3)---Seniority-- Appointment of civil servant to post in later selection---Petitioner's name had been placed next to respondents although he had been placed higher on merit list than respondents---Civil servant's appeal against seniority list had been dismissed mainly on the ground that respondents being nominees for first batch were to rank higher than civil servant on account of their initial selection---Rule 17(a), North-West Frontier Province (Appointment, Promotion and Transfer) Rules, 1989, provided that person selected for appointment to post in earlier selection would rank senior to person selected in later selection.*

15. Regarding the contention of the appellant that he and private respondent No.5 had secured equal marks, therefore, he being older in age was to rank senior to respondent No.5, it is observed that private respondent No.5 Ijaz ul Haq, (wrongly named in ground-C as Muhammad Ijaz), is selectee and recommendee of the first advertisement while the appellant is, as discussed above, selectee of the second selection process, so the contention is misconceived and private respondent has rightly been assigned seniority above the appellant.



16. Besides the appellant has not challenged the list of 2015 admittedly communicated to him, as per his own assertion in the memorandum of the appeal, thereby he principally accepted the same as such his claim would also be barred by principle of acquiescence.

17. The upshot of the above discussion is that this appeal has no merits and is, accordingly, dismissed with costs. Consign.

18. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 31st day of May, 2023.*



KALIM ARSHAD KHAN
Chairman



MUHAMMAD AKBAR KHAN
Member (Executive)