

**KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

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

Service Appeal No.4984/2021

Date of presentation of Appeal.....03.05.2021

Date of Hearing.....02.06.2023

Date of Decision.....02.06.2023

Mumtaz Ali Khan, Ex, Assistant, Khyber Pakhtunkhwa Public Service Commission, 2-Forte Road Peshawar Cantt. Peshawar.

.....*Appellant*

Versus

1. **Khyber Pakhtunkhwa Public Service Commission**, through its Chairman, 2-Forte Road Peshawar Cantt: Peshawar.
2. **The Secretary**, Khyber Pakhtunkhwa Public Service Commission, 2-Forte Road Peshawar Cantt: Peshawar.
3. **Government** of Khyber Pakhtunkhwa through Secretary Establishment Department, Civil Secretariat, Peshawar.

.....(*Respondents*)

Present:

Mr. Mir Zaman Safi, Advocate.....For the appellant

Mr. Fazal Shah Mohmand,
Additional Advocate General.....For respondents.

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APPEAL UNDER SECTION 4 OF THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL ACT, 1974 AGAINST THE LETTER DATED 09.04.2021 WHEREBY DEPARTMENTAL APPEAL OF THE APPELLANT FILED AGAINST THE ORDER DATED 08.03.2021, HAS BEEN REJECTD.

JUDGMENT

KALIM ARSHAD KHAN CHAIRMAN: The appellant challenges the order dated 08.03.2021 and letter dated 09.04.2021 passed by respondents No. 1 and 2.



2. According to the memo and grounds of appeal the appellant was serving as Assistant (BPS-16) in the respondent/department; that the appellant was elected as General Secretary of the All Pakistan Clerks Association (APCA) in the year 2012 and again in the year 2020 he was unanimously elected as the Provincial President of the APCA; that soon after his election as President, the appellant approached respondent No.2 with a request to seek permission for carrying out activities of the Association within the frame work of law and Constitution vide application dated 09.10.2020, where after the Association continued its struggle for the rights of its members within the said frame work, regarding which information, in advance, was duly communicated to respondents; that on 15.1.2020, a charge sheet/statement of allegations were issued to the appellant, which were replied by the appellant; that thereafter an inquiry was conducted, wherein the appellant was not provided opportunity of cross examination; that the appellant was issued show cause notice on 04.02.2021, which was also replied by the appellant in detail; that the appellant was finally awarded penalty of compulsory retirement by respondent No.2, vide impugned order dated 08.03.2021; that the appellant filed departmental appeal before the respondent No.1 on 22.03.2021, which was rejected on 09.04.2021, hence, the instant service appeal.

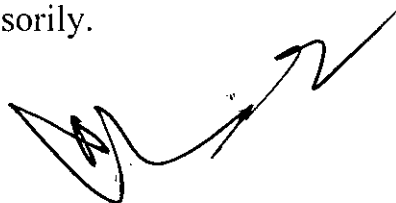
3. On receipt of the appeal and its admission to full hearing, the respondents were summoned. Respondents put appearance and contested the appeal by filing written reply raising therein numerous legal and factual objections. The defense setup was a total denial of the claim of the appellant.



4. We have heard learned counsel for the appellants and learned Additional Advocate General for the respondents.

5. Learned counsel for appellant contended that the impugned orders were illegal and void ab-initio; that the mandatory provisions of law and rules had been violated by the respondents and the appellant had not been treated in accordance with law and rules; that the allegations leveled against the appellant were never substantiated during inquiry. He further contended that the impugned orders were not tenable as there was contradiction regarding absence in the Charge Sheet, Show Cause notice and impugned order dated 08.03.2021. Moreover, no proper inquiry was conducted in the matter, no witness was examined in presence of the appellant nor was the appellant provided opportunity of cross examination. At the end he requested that the instant appeal might be accepted.

6. As against that learned Additional Advocate General argued that the appellant had been treated in accordance with law and rules. The appellant did not take any permission from the Competent Authority while joining Association and violated Rule 32 of the Khyber Pakhtunkhwa Government Servants (Conduct) Rules 1987. Furthermore, the appellant was provided with each and every opportunity with respect to inquiry proceedings and all codal formalities were fulfilled. He further contended that all the allegations and charges were proved against the appellant and he deserved exemplary punishment but the Competent Authority took lenient view by ordering his retirement from service compulsorily.



7. Disciplinary action was initiated against the appellant by serving him with charge sheet and statement of allegation vide No. KP/PSC/Admn/010482 dated 15.10.2020. Following is the statement of allegations:-

“ a). He violated Khyber Pakhtunkhwa Government Servants (Conduct) Rules as adopted by the Khyber Pakhtunkhwa Public Service Commission and participated in APCA activities/demonstration without permission of the competent authority.

b). He participated in APCA meeting/procession in Abbottabad and left station on 03.10.2020 without approval of competent authority.

c). His attendance record through the biometric machine indicates that he remained absent during the year 2017, 2018, 2019 whereas in the year 2020 (till March when the biometric attendance was discontinued due to Corona lockdown) he marked his attendance only ten times.”

8. An enquiry committee, comprising Mr. Ghulam Dastagir, Director Examination, Khyber Pakhtunkhwa Public Service Commission and Mr. Abdul Latif, Controller Examination, now Accounts Officer, Khyber Pakhtunkhwa Public Service Commission, was constituted to conduct inquiry under the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules, 2011. The Committee conducted the enquiry and submitted its report. After receipt of the enquiry report, show cause notice was issued on 04.01.2021, suggesting imposition of penalty of removal from service under Rule 4(1)(b)(iii) of the Khyber Pakhtunkhwa Government Servants (Efficiency & Discipline) Rules, 2011. The appellant submitted reply, was heard in person and vide the impugned order dated 08.03.2021, he was compulsorily retired. He submitted representation to the Chairman, Khyber Pakhtunkhwa Public Service Commission, which was rejected on 09.04.2021, hence, this appeal.



9. The allegations against the appellant were that he had violated the Khyber Pakhtunkhwa Government Servants (Conduct) Rules, 1987, adopted by the Khyber Pakhtunkhwa Public Service Commission and participated in the APCA activities/demonstration without permission of the competent authority. One particular incident of 03.10.2020 was cited in the second charge/allegation that the appellant participated in the All Pakistan Clerks Association (APKA) meeting/ procession in Abbottabad and left the station on 03.10.2020 without approval of competent authority. The appellant has contended in the appeal and has annexed with the same an application for seeking permission for participation in the activities of the APCA being its President so the allegation that he had not sought any permission is repelled, however, it seems that the permission was not granted as nothing was annexed with the appeal by the appellant in that respect. This application seeking permission was not considered in the enquiry report as there is no mention of it anywhere in the enquiry report rather the report mentions that the appellant could not provide any proof about getting permission of the competent authority for participation in the APCA activities/demonstration. The enquiry committee held that the charge was proved whereas we find that the charge was not entirely proved because submission of the application to seek permission of the competent authority to participate in the activities of APCA was admitted in para-3 of the reply of the respondents wherein it was categorically stated that the application was not entertainable as per law, therefore, the permission sought stood regretted but that would not entail

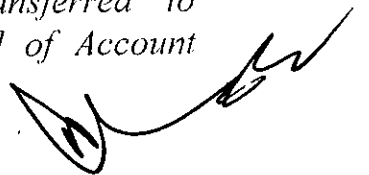


such a harsh punishment rather the punishment should commensurate with the quantum of guilt.

10. As to the allegation that the attendance record through the biometric machine showed the appellant absent during the year 2017, 2018 and 2019 and the fourth (4th) allegation of misconduct, the inquiry committee found as under:-

"c. Regarding attendance of the accused official in Recruitment Wing the immediate Supervisors/Officers of the accused gave positive report. They provided attendance record of the accused for the period i.e. from August 2018 to July 2019 wherein he marked attendance. Photo copies of attendance for the said period are at Page-45-63. They also provided two attendance register maintained by the section under the Supervision of Deputy Director I and II. The attendance register maintained under supervision of DD-II indicated his attendance from 29th October 2019 to 21st January 2020. The attendance register maintained under supervision of DD-I indicating his attendance from 22nd January 2020 to 18th March 2020 and thereafter the Offices were closed due to corona lock down. The Recruitment Wing could not provide the remaining attendance record of the accused for the year 2017 to July 2018 and August 2019 to 28th October 2019. The attendance of Mr. Mumtaz Ali Assistant, Khyber Pakhtunkhwa Public Service Commission was verified by the Director Recruitment KP PSC stating that he almost remained present during the year i.e 2017, January 2018 to July 2018 and August 2019 to October 2019 However, he could not provide documentary proof of his attendance.

Moreover, in the statement the accused has stated that he marked 60% attendance through bio metric machine, but he failed to provide any proof about his attendance through bio metric machine. As per report of the bio metric machine provided by the Administration Wing he made attendance through bio metric machine only on 27.01.2020, 28.01.2020, 29.01.2020 06, 07, 10, 11, 13, 14 and 17.02.2020. As per attendance record and statement of the accused he relinquished the charge of his duties of the Recruitment Wing on 24.08.2020 and taken over the charge in Accounts Section KP PSC on 04.09.2020. He has not marked his attendance from 25.08.2020 to 03.09.2020. In the attendance record of 2020 to 14th October 2020 regularly and after that he was transferred to Administration Wing. As per attendance record of Account



Section Mr. Mumtaz Ali Assistant KP PSC was on leave on 11th, 25th September 2020, 2nd, 6th and 7th October 2020. There is no complaint or report about absence of the accused on the record.

Through the Recruitment Wing Officers gave positive statement regarding attendance of the accused in Recruitment Wing, however, they failed to produce attendance register for the period i.e 2017, January 2018 to July 2018 and August 2019 to 28th October 2019. Therefore, attendance of the accused of that period could not be verified. Moreover, the bio metric attendance record shows that the accused has not marked his attendance through bio metric machine for a long period. Therefore, the charge is partially proved to the extent that he did not mark his attendance through bio metric machine and attendance registers for the entire period could not be produced before the enquiry committee.

11. The finding of the enquiry committee shows that allegation contained in para-C was partially proved because of the details given in the findings, so when the charge of absence was partially proved, the appellant ought to have been penalized accordingly. Because of uncertain alleged period of absence, the punishment awarded to the appellant appears to us to be inappropriate. Also because the details mentioned in the findings are neither conclusive nor substantiated by any supporting, authentic and concrete material, therefore, the findings and consequent punishment require modification in the manner that the known period of absence of the appellant should be treated as leave of the kind due.

12. Regarding the misconduct, the enquiry committee has found that as the charges at (a) and (b) had been proved and (c) partially proved, therefore, the charge of misconduct also stood proved but we differ with the finding of the inquiry committee on the charge of misconduct and find that nothing was said and explained regarding the misconduct which became the reason of compulsory retirement of the appellant. We also found that



allegations/charges (a), (b) and (c) had not been so proved as has been found by the enquiry committee.

13. As a resultant consequence, we allow this appeal, convert the major penalty of compulsory retirement of the appellant into minor penalty of withholding of two annual increments for three years (non cumulative) while direct that the known period of absence of the appellant shall be treated as leave of the kind due/subject to his entitlement. Cost shall follow the events. Consign.

14. *Pronounced in open Court at Peshawar and given under our hands and the seal of the Tribunal on this 2nd day of June, 2023.*



KALIM ARSHAD KHAN
Chairman



MUHAMMAD AKBAR KHAN
Member (Executive)

Adnan Shah, P.A.