

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No. 437/2015

BEFORE: MRS. RASHIDA BANO ... MEMBER (J)
MR. MUHAMMAD AKBAR KHAN ... MEMBER (E)

Sajid Khan S/O AkhterZaman R/O Village Jhansa P.O KalabaghNathiagali
Abbottabad. ... (Appellant)

VERSUS

1. Superintendent Engineer PBMC C&W Department Peshawar Bacha Khan Chowk, Peshawar.
2. Executive Engineer PBMC C&W Department Peshawar Bacha Khan Chowk Peshawar.
3. Assistant Director, IV C&W Department Peshawar Provincial Building Maintenance Cell Bacha Khan Chowk, Peshawar.
4. SecretaryC&W Khyber Pakhtunkhwa, Peshawar.
5. Section Officer (Establishment) Secretariat Khyber Pakhtunkhwa, Peshawar.

... (Respondents)

Syed Noman Ali Bukhari
Advocate

... For Appellant

Mr. Muhammad Jan
District Attorney

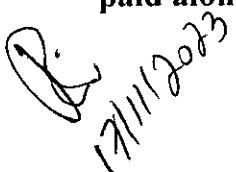
... For Respondents

Date of Institution..... 22.04.2015
Date of Hearing.....17.11.2023
Date of Decision.....17.11.2023

CONSOLIDATED JUDGMENT

RASHIDA BANO, MEMBER (J):The instant service appeal has been instituted under section 4 of the Khyber Pakhtunkhwa Service Tribunal, Act 1974, with the prayer copied as below:

“On acceptance of this appeal, the office order dated 24.03.2015 be set aside and the withheld salaries of the appellants since appointment and arrival report for duties be paid alongwith all back benefits.


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2. Through this single judgment we intend to dispose of instant service appeal as well as connected1. Service Appeal No. 438/2015 titled “Wareed Ullah Vs. C&W Department and others” 2. Service Appeal No. 439/2015 titled “Hussain Khan Vs. C&W Department and others” 3. Service Appeal No. 440/2015 titled “Asad Ali Vs. C&W Department and others” 4. Service Appeal No. 441/2015 titled “Habib Ullah Vs. C&W Department and others” 5. Service Appeal No. 442/2015 titled “Raees Khan Vs. C&W Department and others” 6. Service Appeal No. 443/2015 titled “Muhammad Tahir Vs. C&W Department and others” 7. Service Appeal No. 444/2015 titled “Muhammad Alamgir Vs. C&W Department and others” 8. Service Appeal No. 445/2015 titled “Muhammad Imran Vs. C&W Department and others” 9. Service Appeal No. 446/2015 titled “Naveed Ur Rehman Vs. C&W Department and others” 10. Service Appeal No. 447/2015 titled “Muhammad IsmailVs. C&W Department and others” 11. Service Appeal No. 448/2015 titled “Muzzafar Vs. C&W Department and others” 12. Service Appeal No. 449/2015 titled “Khurram Shehzad Vs. C&W Department and others” 13. Service Appeal No. 450/2015 titled “Ruhullah Vs. C&W Department and others” 14. Service Appeal No. 451/2015 titled “Yasir Mubarak Vs. C&W Department and others” 15. Service Appeal No. 452/2015 titled “Asfandyar Vs. C&W Department and others” 16. Service Appeal No. 453/2015 titled “Hasan Dad Vs. C&W Department and others” 17. Service Appeal No. 454/2015 titled “Muhammad Tanveer Vs. C&W Department and others” 18. Service Appeal No. 455/2015 titled “Shahb Uddin Vs. C&W Department and others” and 19. Service Appeal No. 456/2015 titled “Aftab Vs. C&W Department and others”as in all these appeals common question of law and facts are involved.


3. Brief facts of the case are that appellants were appointed in the respondent department vide order dated 23.01.2013. They submitted arrival reports, after


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formality of being medically examined necessary entries in their service books have also been made. They were performing their duties from the date of their arrival but the respondent department has denied to them their salary, feeling aggrieved, they filed writ petition No. 1301-P/2013 before Worthy Peshawar High Court, Peshawar which was dismissed vide order dated 27.01.2014 being not pressed but the petitioner are left at liberty to approach the proper forum for redressal of their grievance. All the appellants filed service appeals, which was remitted back to the appellate authority who was directed to decide the appeals within one month of its receipt failing which these appeals shall be deemed to have accepted by this Tribunal. Appellate authority rejected appeal of the appellants vide order dated 24.03.2015, hence the instant service appeal.

4. Learned counsel for the appellant argued that non-payment of the salaries to the appellants have not be treated in accordance with law and his right secured and guaranteed under the law have been violated by not releasing his salaries and issuance of appointment letters have created valuable rights in favour of the appellants and those rights cannot be taken away in the manner respondents are adopting. He further argued that discrimination was observed by the respondents with appellant is unlawful, unconstitutional, without authority and against the norms of natural justice and equity, hence liable to be set aside. He further argued that no proper inquiry, show cause notice, charge sheet and statement of allegation were served upon the appellants and even no opportunity of personal hearing were afforded to him. Lastly he submitted that appointment order of the appellants neither cancelled nor withdrawn till date. He, therefore, requested for acceptance of instant appeals.

5. Conversely, learned District Attorney contended that Appointments of appellant is not covered under Rule 10(4) of Khyber Pakhtunkhwa Civil Servant (Appointment, Promotion and Transfer) Rules, 1989, hence illegal, void ab initio


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and not warranted by law. He further contended that no order have been passed by respondent No. 5 as he was not an authority for appointments in the PBMC. As no official record exists to show that any such appointments were made through DSC. He further contended no one become entitled for duty and salary on the basis of void, illegal offer of appointment and appellants are not entitled for salary as he has not been appointed in accordance with prescribe manner and rules.

6. Appellant in the instant appeal requested for release of salaries with request to set aside office order dated 24.03.2015, wherein departmental appeal of the appellant was rejected by the appellant authority as proper procedure was not followed in their appointments, therefore, this Tribunal first will have to determine that whether appellants were appointed in accordance with law by adopting proper rules on the subject or not. If appointments of the appellant were in accordance with settled rules then they will be entitled for withheld salaries

7. Perusal of record reveals that appellants were appointed in respondent department by respondent No 5 vide order dated 23.01.2013 after approval of DSC given in meeting held on 14.01.2013. The appellant assumed charge of his post on 23.01.2013 and started performing his duties regularly but he was not paid salary by the respondent, despite the fact that his service book alongwith medical certificate were duly certified by the Superintending Engineer and Executive Engineer. Appellant for redressal of his grievance approached Worthy Peshawar High Court Peshawar by filing writ Petition due to which respondent become biased resultantly appellant and his colleagues were not allowed to perform their duties. Writ Petition was withdrawn on 27.01.2014 as matter falls in the definition of terms and conditions of the service. Appellant then filed service appeal bearing No 183/2014 which was remitted back to the respondents vide order dated 19.02.2015 by treating service appeal as departmental appeal and to decide it

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within one month, failing which appeal shall be deemed to have been accepted by the Tribunal. Respondent rejected departmental appeal without following procedure vide impugned order dated 24.03.2015, hence appeal in hand.

8. Appellants alleged that they were validly appointed by the competent authority respondent No. 1 in response of which, they after conducting their medicals submitted arrival to the department. While respondents termed their appointment illegal without adopting proper procedure and void ab initio. Perusal of offer of appointment reveals that DSC in its meeting held on 14.01.2013 approved appointment of the appellants minutes of the said meeting is placed on file, wherein it is mentioned that "the committee was informed that appointments on vacant post of different cadre will be filled up against employee's Son quota and against class iv Establishment in PBMC & C&W Department": 26 candidates including 20 appellants were recommended for appointment against different Posts of BPS 1 to 9. It is initial fresh recruitment, procedure for which is provided in Section 10 of (Appointment, Promotion & Transfer) Rules, 1989 which read as:

(a) if the post falls within the purview of the Commission, on the basis of Examination or test to be conducted by the Commission; or

(b) if the post does not fall within the purview of the Commission, in the manner as may be determined by Government.

[(2) Initial recruitment to posts which does not fall within the purview of the Commission shall be made on the recommendation of the Departmental Selection Committee, after vacancies have been advertised in newspaper;]

[provided that nothing contained in this sub-rule shall apply to the household staff of the Chief Minister's House Peshawar, Frontier House Islamabad, Frontier Rest House Bannu, Swat and Abbottabad, Frontier House Nathiagali and Shahi MehmanKhana, Peshawar and any other House to be established by the Government]

[provided further that the appointment in BPS 3 to 5 shall be made on the recommendation of the DPC through the District Employment Exchange concerned, or where in District, the office of the Employment Exchange does not exist, after advertising the posts in the leading newspapers]

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(3) A candidate for initial appointment to a post must possess the educational qualification or technical qualification and experience and except as within the age limit as laid down for the post.

So, publication in newspaper for announcement of vacancy is essential condition for initial recruitments. Appellants submitted booklet wherein publication in newspaper Mashriq Peshawar dated 13.08.2011 is available which read;

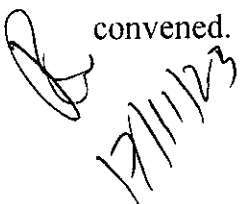
اشتہار عام

بی بی ایم سی محکمہ سی اینڈ ڈبلیو حکومت خیبر پختونخواہ میں دوران نوکری وفات شدہ اور ساٹھ سالہ ریٹائرڈ شدہ ملازمین کے بچوں کے لئے درست سینارٹی لسٹ ترتیب کرنا چاہتی ہے۔ تاکہ ان کو مروجہ قانونی کے مطابق حاصل شدہ ملازمت کے مواقع اور فوائد کے لئے غور کیا جا سکے اور کسی کی حق تلفی نہ ہو۔ التماس ہے کہ دوران دفتری اوقات کار میں 15 دن کے اندر دفتر بی بی ایم سی باچا خان چوک پشاور میں اپنے کوائف جمع کرائیں تاکہ سینارٹی لسٹ میں شامل کی جائے۔
نوٹ:

جن فوت شدہ اور ریٹائرڈ شدہ ملازمین کے بچے پہلے سے بھرتی ہو چکے ہیں ان کے کاغذات پر غور نہیں کیا جائے گا۔


ایگزیکٹیو انجینئر بی بی ایم سی پشاور فون نمبر 091-9211373

9. Similarly one notice in shape of Eshtihar is affixed in all the offices and Rest houses of PBMC on 16th November 2012, wherein it is mentioned that in response of publication dated 13.08.2011 which was for deceased and Retired Employees Quota, many applications received and if someone else is interested, he can also file application for inclusion of his name in it. So firstly for filling up vacancies upon which appellants were appointed publication in newspaper is given in deceased and retired employees son/ daughter/wife quota in continuation of which notice on 26.11.2013 was affixed in the office and Rest houses of PBMC. Similarly in the minutes of meeting it is also mentioned that to fill up vacant posts against deceased/retired employees S/D/W quota meeting was convened. Rule 10(4) is the only provision in which there is no need of publication

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in newspaper otherwise as is clear from Section 10 of (Appointment, Promotion & Transfer) Rules, 1989 publication in newspaper is essential condition for initial recruitments. Appellants who were appointed under section 10/4 deceased employees S/D/W quota are not the deceased/Retired employees son. That's why later on by realizing his blunder, appointing authority issued corrigendum dated 08.12.2014 just to give legal cover to offer of appointment which is not in accordance with law.

10. Moreover, appellants contended that recruitments for household staff is exempted from publication in newspaper but their contention is against the section 10(2) under which they claim their appointments, wherein Eshtihar is requisite condition for appointments. There is proper procedure of recruitment provided in section 10, which is mentioned above. Posts from BPS-1 to BPS-9 were filed in which there are technical post of Electrician, Carpenter which require a special technical assistance and marks calculation to prepare merit list. There is no merit list etc from where it could be ascertain that in fact appellants were appointed on merit and not otherwise. There is yet another lacuna in the offer of appointment of all the appellants that is no specific place of appointment i.e Governor, Chief Minister House. Khyber Pakhtunkhwa House at Islamabad, Abbottabad, Nathia Gali or Shahi Mehmankhana is mentioned which according to the section 10(2) second proviso must be mentioned in their offer of appointment. Proper procedure for appointment on merit for respondent/appointing authority that they will have to enter application of all the candidates in proper register after scrutiny, call all the eligible candidates for interview, then prepare merit list by giving marks to all the candidates appeared for interview of the subject post and declared successful candidates who obtain high marks and position in order of merit. On record no such exercise is available from which it could be established that merit was followed. Record is also silent about even applications filed by any other


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candidates for subject post which means that only appellants were informed for appointment against the said posts and no one else had its knowledge, in other words these posts were offered to the appellant only for the reason best known to the appointing authority. They applied and appointed by DSC which also speak about the interest of DSC to appoint only appellants upon the said posts. All the appointment offers are in general and in air which must be place specific.

11. Although in notice dated 26.11.2013 it is mentioned that on merit application can also be given but for merit no procedure was adopted, thus the appointments made in violation of admitted rules and procedure again have no legal effect and are illegal creating no right in favor of appointees. Appellant contended that till date the offer of appointment/appointment letter issued to the appellant were not withdrawn or cancelled by the respondent in this respect it is pertinent to mention here that respondent department does not own it and otherwise too any order passed in violation of settled rules have no legal effect. Moreover, in a consequence to the said order, no salary was withdrawn by the appellant, therefore, said order is just a piece of paper having no legal weightage and value, therefore, question of its cancellation by the authority is irrelevant.

12. It pertinent to mentioned here that in accordance with second proviso to Section 10 of Civil Servant (Appointment Promotion & Transfer) Rules, 1989, appointment in basic pay scale 3 to 5 may made on the recommendation of DSC through district employment exchange concerned or wherein district office of employment exchange does not existed after advertising the post in leading newspaper. In the instant case, there is no proof that whether the appellants being unemployed citizen submitted their application in district employment exchange and same was requisitioned by the respondent the then appointing authority or not. Its non availability means that same was not requisitioned by the appointing authority and appellant who was appointed by the authority against the said post


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had not applied to employment exchange. It is also mentioned in above proviso of rule 10(2) that if no employment exchange exist in the district then post of even BPS 3 to BPS 5 may also be advertised in newspaper. In the instant case neither any record of application filed by the appellant to employment exchange and requisitioned by DSC nor any publication of these posts in newspaper available. So appointing authority recommended appellant for the post of BPS-03 to BPS-5 in violation of this second proviso of rule 10(2). Hence it is held that DSC recommended the appellant for appointment against the post without fulfilling codal formalities which is against the rules on the subject.

13. Appellants contended that appointing authority was proceeded against on the charges of irregularities and illegalities in their appointments in PBMC C&W Peshawar and was exonerated by the competent authority which means that their appointments were in accordance with law, Rules and procedures. Perusal of recommendation of inquiry officer dated 30.04.2015 who was appointing by the authority against the appointing authority of the appellant namely (Shams Uz Zaman) reveals that;

“the candidates appointed by the selection committee in January 2013 were not allowed to join the service, against which candidate filed appeal to the competent authority, secretary C&W rejected the appeal on the ground that proper procedure was not followed in their appointments”

28 “It is observed that defense of the accused officers/official are convincing as appointees recommended by the Selection Committee were not allowed to join the service and no loss therefore, occurred to the Provincial exchequer”

The main reason of exoneration of the appointing authority of the appellant is that appellants were not allowed to join service and loss to government exchequer was caused due to misconduct committed by their appointing authority


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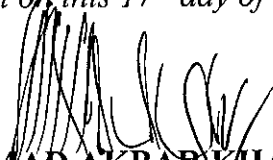
and not that appointments orders issued by him are in accordance with rules on the subject and are legal. So in such a situation, exoneration of their appointing authority will not be helpful to the appellants to hold their appointment legal.


14. From above discussion it is established that proper procedure provided in the rules was not followed by the appointing authority/DSC in the appointment of the appellant, therefore, their appeals for release of withheld salaries has rightly been rejected by the appellate authority.

15. For what has been discussed above, the appeal in hand as well as connected service appeals are dismissed being devoid of merits. Costs shall follow the event.

Consign.

16. *Pronounced in open court in Peshawar and given under our hands and seal of the Tribunal on this 17th day of November, 2023.*


(MUHAMMAD AKBAR KHAN)
Member (E)


(RASHIDA BANO)
Member (J)