

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR

Service Appeal No. 2215/2023

BEFORE: RASHIDA BANO --- MEMBER (J)
MUHAMMAD AKBAR KHAN --- MEMBER (E)

Gohar Khan, Deputy Director Establishment (BPS-18), Directorate of Higher Education, Khyber Pakhtunkhwa, Peshawar.....(*Appellant*)

VERSUS

1. Govt. of Khyber Pakhtunkhwa, through Chief Secretary, Civil Secretariat, Peshawar.
2. Government of Khyber Pakhtunkhwa through Secretary, Higher Education, Archives & Libraries, Department, Peshawar.
3. Fayaz Ahmad, Assistant Professor of History (BPS-18), Govt. College, Peshawar.....(*Respondents*)

Present:-

FAZAL SHAH MOHMAND,
Advocate

--- For Appellant

MUHAMMAD JAN,
District Attorney

--- For official respondents No. 1 & 2

ZIA UR REHMAN TAJIK
Advocate

--- For private respondent No. 3

Date of Institution.....26.10.2023

Date of Hearing.....28.11.2023

Date of Decision..... 28.11.2023

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 copied as under;

“That on acceptance of this appeal the impugned Notification dated 24.07.2023, may kindly be set aside and the appellant may kindly be allowed to perform his duties as Deputy Director

*(Establishment), at the Directorate of Higher Education,
Khyber Pakhtunkhwa, Peshawar.”*

02. Brief facts of the case are that the appellant was performing his duty as Assistant Professor (BS-18) in the Higher Education Department Khyber Pakhtunkhwa, Peshawar. He was transferred from Government Degree College, Wadpagga, Peshawar and posted as Deputy Director (Establishment) Directorate of Higher Education vide order dated 23.02.2022; that according to the rules notified vide Notification dated 18.09.2019, the post of Deputy Director, at the Directorate of Higher Education is to be filled 25% by promotion on the basis of seniority cum-fitness from amongst the Assistant Directors (BS-17) and 75% by transfer from amongst the Assistant Professor from Government Post Graduate College for a period of three (03) years; that a proposal was moved regarding the Transfer/Posting of the various incumbents including the appellant on 28.04.2023, which was not approved by the Minister as well as respondent No. 2 vide Note dated 03.05.2023 on the ground that the tenure of the appellant was not completed on the said post; that on 29.05.2023 the Chief Minister of the Province of Khyber Pakhtunkhwa was pleased to impose complete ban on transfer; that on 13.07.2023 again a note was processed for the transfer of the appellant wherein it was mentioned that the appellant has completed his tenure of two years and the Election Commission of Pakistan was also approached for the NOC/Approval vide letter dated 14.07.2023 which was responded vide letter dated 20.07.2023 that the NOC has already been granted vide letter dated 31.05.2023. Thereafter the appellant was transferred and posted as Assistant Professor of

Law at Government College Peshawar vide impugned Notification dated 24.07.2023. Feeling aggrieved from the impugned Notification dated 24.07.2023, the appellant filed departmental appeal on 25.07.2023 which was not responded within the statutory period, hence preferred the instant service appeal on 26.10.2023.

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 appellant, learned District Attorney for official respondents and learned counsel for private respondent No. 4 and have gone through the record with their valuable assistance.

04. Learned counsel for the appellant contended that the impugned Notification dated 24.07.2023 is illegal and void ab-inito; that the appellant has not been treated in accordance with law and rules and as such respondent violated Article 4, 10 & 25 of the Constitution of Islamic Republic of Pakistan, 1973; that the post against which the appellant was transferred is tenure post and the appellant could not be transferred before completion of three years tenure; that the impugned Notification dated 24.07.2023 has been issued during ban period, hence not tenable in the eyes of law; that the impugned Notification dated 24.07.2023 is in violation of Transfer/Posting policy of the Provincial Government; that the impugned Notification dated 24.07.2023 is based on malafide as the Election Commission of Pakistan has held the same as contrary to its directions vide letter dated 03.08.2023, therefore, the impugned Notification is liable to be set aside.

05. Learned District Attorney on behalf of official respondents No. 1 & 2 contended that a Note for Minister Higher Education Department Khyber Pakhtunkhwa was routed which was returned with certain observations to the Department, however it was resubmitted after removal of observations and was accordingly approved/notified; that proper NOC was granted by the Election Commission of Pakistan prior to transfer/posting of the appellant; that the Administrative Department exercises its authority conferred upon it under Section 10 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 and after observing all the codal formalities and proper NOC from the Election Commission of Pakistan, the appellant was transferred and posted within the same district. Learned counsel for the appellant relied on 2013 SCMR Supreme Court 195, 2017 SCMR 798 & 2021 SCMR 1064.

06. Learned counsel for private respondent No. 3 relied on the arguments advanced by learned District Attorney for official respondents.

07. Legal scrutiny of record reveals that the post of Deputy Director is a tenure post to be filled by way of transfer from amongst Assistant Professors (BS-18). The Service Rules in vogue provide the following mechanism for filling the post of Deputy Director in the Directorate of Higher Education, Libraries & Archives Department:

(a) Twenty-five (25%) by promotion on the basis of seniority-cum-fitness from amongst the Assistant Directors (BS-17) with at least five (05) years service in BS-17; &

(b) Seventy-five (75%) by transfer from amongst the Assistant Professor from Govt. Post Graduate College for a period of three (03) years.

08. It is admitted fact that the appellant was posted as Deputy Director in the Directorate of Higher Education vide order dated 23.02.2022 and much

before completion of his tenure a proposal for his transfer from the said post was moved through a Note for Minister Higher Education which was not approved by the Minister on the ground of non-completion of tenure and good performance of the appellant. However, the department through a letter dated 08.05.2023 took up case of Posting/transfer of 9 Assistant Professor and lecturers including the appellant with the Election Commission of Pakistan. Election Commission granted NOC and the respondent department issued order excluding the appellant. After lapse of two months the respondent department again initiated proposal for transfer of the appellant. The official Note submitted to the Minister Higher Education in this respect is misleading which states that the appellant has completed tenure of two years. Infact two years tenure is provided in the General Posting/Transfer Policy of Government Servants devised and followed by the Provincial Government whereas the post of Deputy Director in the Directorate of Higher Education is tenure post for the period of 3 years specified in the Service Rules. Moreover, the NOC from the Election Commission of Pakistan regarding transfer of the appellant is also not clear. In the first instance NOC for posting of the appellant to Government Degree College Ring Road, Peshawar was obtained which was not materialized. When the respondent department took up case for NOC with the Commission for transfer/posting, of the appellant to Government College Peshawar in the month of July, 2023, the Commission referred back to the earlier NOC dated 31.05.2023 regarding transfer of the appellant to Government Degree College Ring Road, Peshawar and advised the respondent department to approach the Commission for NOC through the Chief Secretary/Establishment Department. Against this observation and advice of

the Commission the respondent department issued the impugned order dated 24.07.2023 which the commission took cognizance and asked the respondent department through letter dated 03.08.2023 to comply strictly with the NOC granted by the Commission.

09. Another ground advanced by the respondent department in their reply is the case of disciplinary proceedings against the appellant. Record available transpires that a fact finding inquiry against the Director Higher Education and the appellant was conducted and report submitted to the respondent No. 2 in the month of August, 2023 whereas the process of Posting/Transfer of the appellant was initiated in the month of May, 2023 and as such this cannot be made an administrative ground retrospectively for the transfer of the appellant.

10. In view of above findings of legal scrutiny we are constrained to intervene in the matter of Posting/Transfer of the appellant. The appeal in hand is accepted as prayer for and the impugned order dated 24.07.2023 stand set aside. Costs shall follow the event. Consign.

11. *Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal on this 28th day of November, 2023.*



(Rashida Bano)
Member (J)



(Muhammad Akbar Khan)
Member (E)

ORDER

28.11.2023

01. Learned counsel for the appellant present. Mr. Muhammad Jan, District Attorney for official respondents present. Learned counsel for private respondent No. 3 also present. Arguments heard and record perused.

02. Vide our detailed judgment of today separately placed on file, consisting of (06) pages, we are constrained to intervene in the matter of Posting/Transfer of the appellant. The appeal in hand is accepted as prayer for and the impugned order dated 24.07.2023 stand set aside. Costs shall follow the event. Consign.

03: *Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal on this 28th day of November, 2023.*



(Rashida Bano)
Member (J)



(Muhammad Akbar Khan)
Member (E)