

BEFORE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

Service Appeal No.1451/2022

BEFORE: MR. KALIM ARSHAD KHAN ... CHAIRMAN
MRS. RASHIDA BANO ... MEMBER (J)

Mr. Adnan S/o Gohar Nosh, R/o Mardan, Ex-Constable No.1628, FRP, Kohat Range Kohat.

.... (Appellant)

VERSUS

1. Superintendent of Police, FRP, Kohat Range, Kohat.
2. Commandant FRP, Khyber Pakhtunkhwa, Peshawar.

.... (Respondents)

Arbab Saiful Kamal
Advocate

... For appellant

Mr. Asif Masood Ali Shah
Deputy District Attorney

... For respondents

Date of Institution.....27.09.2022
Date of Hearing.....30.07.2024
Date of Decision.....30.07.2024

JUDGMENT

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

“On acceptance of this appeal, the orders dated 07.07.2022 and 29.08.2022 of the respondents be set aside and appellant be reinstated in service with all consequential benefits.”



2. Brief facts of the case are that on 12.10.2017, appellant was dismissed from service on the score of absence from duty against which appellant filed service appeal bearing No. 180/2018 before this Tribunal on 23.01.2019 which was decided on 14.01.2022; that on 18.09.2022, the appellant was reinstated in service for the purpose of de-novo inquiry; that on 20.04.2022, he was issued charge sheet alongwith statement of allegation to which he submitted reply by denying the allegations.; that on 07.07.2022, major penalty of removal from service was again awarded and period of absence was treated as leave without pay; feeling aggrieved, appellant filed departmental appeal, which was rejected on 29.08.2022, 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 Deputy District Attorney for the respondents.

5. The learned counsel for the appellant reiterated the facts and grounds detailed in the memo and grounds of the appeal while the learned Deputy District Attorney controverted the same by supporting the impugned order(s).

6. Perusal of record reveals that this is second round of litigation as earlier, thus appellant had challenged his dismissal from service on the ground of absence against order dated 12.10.2017 in service appeal No.180/2019 which was partially accepted vide order dated 01.04.2022 in these terms;



“Learned counsel for the appellant has contended that the appellant was enlisted in service in the year 2004 and served the department with zeal and enthusiasm till the date of dismissal from service; that absence of the appellant was not willful but due to compelling reason of his illness and the appellant has taken the same stance in his departmental appeal alongwith medical prescriptions; that absence period of the appellant was treated as leave without pay, hence there remains no other ground to penalize the appellant for absence; that absence on medical ground does not constitute gross misconduct as the same was not willful but due to compelling reason, which was beyond control of the appellant; that while proceeding the appellant, codal formalities were not fulfilled, hence the impugned order is against law, facts and norms of natural justice.”

De-novo Inquiry was conducted wherein statement of appellant and his father was recorded by the inquiry officer. Both appellant and his father categorically mentioned in their statement that appellant was ill due to which he had not reported for duty at FRP Line, Kohat, which fact is not denied by the inquiry as same was not rebutted by the respondent during the course of inquiry.

7. No doubt leave is always subject of approval but when appellant was ill, he remained absent without obtaining proper leave/sanction which is not such a grave misconduct due to which he was awarded major penalty of


removal from service, guidance is taken from 2008 SCMR 214, wherein it is held that;

“Availing of medical leave without permission could not be considered an act of gross misconduct entailing major penalty of dismissal from service---Charge against civil servant was not so grave as to propose any of such two penalties---Major penalty of compulsory retirement was harsh and did not commensurate with nature of charge---Supreme Court converted penalty of compulsory retirement into reduction of two steps in time scale for a period of two years in consequence to which civil servant would be deemed to have earned two increments for a period of two years.”

In the instant case appellant total absence period is of 44 days and that too on the ground of illness, therefore, award of major penalty of removal from service does not commensurate with the nature of misconduct committed.

8. It is also pertinent to mention here that the appellant absence period was treated as leave without pay by the respondent, when respondent treated the said absence period from duty as leave without pay then the allegation of misconduct would not remain in the field. In this respect, we relied upon the judgment of Supreme Court delivered in Civil Appeal No.549-P of 2014 dated 09.10.2020, which reads as;

“The only allegation of misconduct against the respondent, as reflected in the statement of allegations, was his absence from

 **duty without valid permission. And, when the competent**

authority treats the said absence from duty as leave without pay, then, the allegation of misconduct would not remain in the field.”

9. We in the above circulation are of the view that penalty awarded to the appellant is harsh, therefore, we convert penalty of dismissal from service into minor penalty of stoppage of annual increment for period of three years and period of absence and intervening is treated as leave without pay with direction to reinstate the appellant into service. Costs shall follow the event. Consign.

10. *Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal on this 30th day of July, 2024.*


(KALIM ARSHAD KHAN)
CHAIRMAN


(RASHIDA BANO)
MEMBER (J)

*M.Khan

ORDER

30.07.20241 Learned counsel for the appellant present. Mr. Asif Masood Ali Shah, learned Deputy District for respondents present.

2. For what has been discussed above, we convert penalty of dismissal from service into minor penalty of stoppage of annual increment for period of three years and period of absence and intervening is treated as leave without pay with direction to reinstate the appellant into service. Costs shall follow the event. Consign.

3. *Pronounced in open court at Peshawar and given under our hands and seal of the Tribunal on this 30th day of July, 2024.*


(KALIM ARSHAD KHAN)
CHAIRMAN


(RASHIDA BANO)
MEMBER (J)

*M.Khan