

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR.

Appeal No. 220/2011

Date of Institution ... 02.02.2011

Date of Decision ... 30.01.2014

Muhammad Younas Khan, Lecturer in Physical Education, Govt. Degree College No.2,
D.I. Khan ... (Appellant)

VERSUS

Khyber Pakhtunkhwa through the Secretary Government of Khyber Pakhtunkhwa,
Higher Education Department, Peshawar. ... (Respondent)

APPEAL AGAINST THE RESPONDENT'S RELUCTANCE TO ALLOW THE APPELLANT HIS SENIORITY ALONGWITH OTHER BENEFITS OF SERVICE DUE.

MUHAMMAD ZAFAR TAHIR KHAILI,
Advocate

... For appellant

MR. MUHAMMAD JAN,
Government Pleader

... For respondent.

MR. SULTAN MAHMOOD KHATTAK

... MEMBER

MR. MUHAMMAD AAMIR NAZIR,

... MEMBER

JUDGMENT

SULTAN MAHMOOD KHATTAK, MEMBER.- The instant appeal has been filed by the Muhammad Younas Khan, Lecturer in Physical Education, Government Degree College No.2, D.I. Khan, the appellant against the respondent, reluctant to allow him his due seniority alongwith other benefits of service. It has been prayed that

on acceptance of the appeal, the respondent may please be directed to allow all back benefits of service due to the appellant in line with the equity, justice and fairness.

2. Brief facts of the case as narrated in the memo: of appeal and as appeared from the available record are that the appellant was initially appointed as DPE (BPS-16) and posted in Govt. College, Sherwan (Abbottabad) on 02.05.1993; that he was allowed BPS-17 as personal to him vide order dated 20.06.1995, and being holder of Master Degree in PHE, his services in BPS-17 were regularized as DPE BPS-17 w.e.f 09.10.2007 vide order dated 21.01.2008. Since then he has been serving continuously in various colleges of the Higher Education Department; that the appellant alongwith others was re-designated as Lecturer in Physical Education and absorbed in the general cadre of Lecturers (collegiate branch) of the Education Department vide notification No.SO(T)HE/17-02/2010 dated 18.08.2010; that having put over 17 years of service, he will be reaching the maximum of B-17 on 01.12.2011, and will be due for promotion and appointment as Assistant Professor (BPS-18); that the respondents department has not placed him at an appropriate position in the order of inter-see seniority of lecturers; that the respondent failed to grant him his proper position in order of seniority, the appellant made a representation dated 29.10.2010, which has not been decided so far hence the instant appeal before this Tribunal on 02.02.2011.

3. The appeal was admitted for regular hearing on 21.03.2011 and notice issued to the respondent for submission of written reply who filed the same and contested the appeal. The appellant filed rejoinder and rebutted all the claims of the respondent. The respondent failed to provide copy of Khyber Pakhtunkhwa Civil Servant (Appointment and Conditions of Service) Rules-1974. We heard the arguments of the learned counsels for the parties and perused the record.

4. The learned Counsel for the appellant while arguing before the Tribunal stated that the appellant has not been treated in accordance with law/rules; that re-designation notification could not and in fact did not affect their initial selection made by the Public Service Commission or the Selecting Authority competent to recommend for appointment, nor could it alter or change the actual date of the appellant's joining the

service; that the re-designation was never intended to affect the appellants status and or his date of initial appointment on regular basis, adversely. As is evident from the Supreme Court of Pakistan orders dated 22.10.2003, 24.12.2003 and 07.05.2004 passed in C.P. No.364(P) of 2001, the committee constituted for the purpose did not make any such recommendation which would have deprived the Director Physical Education of the benefits of their long service; that the decision of the NWFP Service Tribunal dated 30.04.2007 passed in Service Appeal No. 148/2006 holds the field; that it is this order which had become final with the disposal of the provincial Government's C.P. 541 & 542 of 2007, having become infructuous vide Supreme Court Order dated 30.03.2009; that the respondent has to comply accordingly. Any design harmful to the appellant's service interest cannot be imposed arbitrarily, in violation of the appellant's vested rights of service; that the appellant did deserve to be treated equitably fairly and in a just manner without losing the benefits of his more then 17 years sincere service and that the respondent was required by law to act in accordance with the well established principles of equity and justice; that the appellant has already allowed BPS-17 regular vide notification dated 20.06.1995; that one of the appellant has been granted BPS-17 w.e.f 04.12.1986 vide order dated 01.04.1987; that the others colleagues of the appellant are more or less in BPS-17 since 20.06.1995; that the appellant has not opted to be placed at the bottom of the seniority list; that the appellant alongwith his other colleagues have asked for their own separate cadre with proper promotion benefits like the other teaching staff in the colleges; that the appellant is entitled seniority according to the length of his service. The reluctance of the respondent i.e not allowing seniority according to the length of service of the appellant justifies interference by this Hon'ble Service Tribunal. He requested that the appeal may be accepted directing the respondent to allow all the benefits of service due to the appellant in line with equity, justice and fairness.

5. The learned Government Pleader while relying on the written reply/comments of the official respondent was of the view that the appellant has not come to this Tribunal with clean hands and have concealed material facts from the Tribunal; that the appellant

was appointed initially as DPE in BPS-16 and not in BPS-17. He never remain Lecturer during the last 15 to 17 years of his service. He was allowed BPS-17 as personal to him vide order dated 20.06.1995, and being holder of Master degree in PHE, his service in BPS-17 was regularized as DPE, BPS-17 w.e.f 09.10.2007 vide order dated 21.01.2008; that one Mr. Gul Razeem, DPE was placed in BPS-17 w.e.f 04.12.1986 under the pay revision Rules-1978 and remained as DPE (BPS-17) till 18.08.2010; that in the year 2000, one Mr. Farooq Hussain, DPE alongwith his other colleagues filed Writ Petition NO. 379/2000 in the Peshawar High Court, Peshawar which was disposed off vide judgment dated 06.06.2001 wherein it was held that the Provincial Government should appoint a committee to examine the entire case of the petitioners and, if possible, to give them adequate relief by making suitable changes in the service structure of the petitioners. After waiting for certain period, the petitioners approached the august Supreme Court of Pakistan through C.P No. 364-P/2001 which was disposed off as not pressed by the petitioner on the statement of the learned Advocate General, Khyber Pakhtunkhwa before the court that a summary for suitable changes in the service structure of the petitioners has been moved to the Chief Minister, Khyber Pakhtunkhwa and its finalization would take some time. As per undertaking of the afore said, the Higher Education Department after approval by the competent authority allowed placement of 25% of the sanctioned posts of the Director Physical Education (BPS-16) in BPS.17 and 25% of BPS-17 posts in BPS-18. The personal BPS-17 availed by the Director Physical Education was protected and that the share of male and female DPE would be worked out on the basis of sanctioned strength vide notification bearing No. SO(TRG:) HE/17-1/2003KC-5/PART-II dated 10.05.2005. Feeling aggrieved the petitioners filed departmental appeal and then filed Service Appeal No. 148/2006 before the Service Tribunal on 28.02.2006; that the Service Appeal was remanded back to the respondent-department on 30.04.2007 to consider the framing of service structure for the DPE's holding MA/MSc degree on the analogy/pattern of either of the Governments of Punjab, Balochistan, AJ&K and Federal Government and further that the inter-see seniority of the petitioners and private respondents with the Lecturer of the other subjects should also be fixed on the analogy/pattern of the same Government whose

service structure followed/adopted. It was under these circumstances that the appellant alongwith his other colleagues were given the status of Lecturer in Physical Education (BPS-17) by re-designating and absorbing them in the General Cadre of Lecturers(Collegiate Branch) of the Education Department w.e.f 18.08.2010. The learned Government Pleader was further of the view that the appellant has no cause of action; that there is neither any final order/final seniority list challenged nor any departmental appeal filed by the appellant against the said order. The application/representation is barred by time before the appellate authority; that as reported in the judgment 1995 SCMR 1505, "when an appeal before appellate authority is time barred, the appeal before the Service Tribunal is also incompetent on that account"; that the appeal is time barred before this Tribunal and no application for condonation of delay has been filed nor explanation for delay given in the appeal; that the appeal is bad by non-joinder and mis-joinder of necessary parties; that the appellant has only impleaded the Khyber Pakhtunkhwa through the Secretary to Government of KPK, Higher Education ignoring the other necessary parties like the Chief Secretary Khyber Pakhtunkhwa, Secretary Finance, Director Colleges and all others Lecturers of the General Cadre working regularly as such in various subjects since and after 02.05.1993 till 18.08.2010. The Chief Secretary, Khyber Pakhtunkhwa is the appointing authority of the Lecturer BPS-17 and the appellate authority for BPS-16 Officers in the Higher Education Department; that the so called Departmental Appeal filed on 29.10.2010 is simply an application before the Secretary, Higher Education Department for fixation of the appellant seniority w.e.f 02.05.1993; that the appellant has not challenged the order dated 18.08.2010 which clearly stipulates the following three conditions that:-

- i. the D.P.E's BPS-17 regular have been re-designated as Lecturer in Physical Education;
- ii. in relaxation of Rule-3 of the Khyber Pakhtunkhwa, Civil Servants (Appointment and Conditions of Service) Rules-1974, the newly re-designated Lecturers in Physical Education have been absorbed in the General Cadre of

Lecturers (Collegiate Branch) in the Higher Education Department with effect from 18.08.2010; and

- iii. that they shall be placed at the bottom of the existing seniority list of Lecturers of General Cadre.

The learned GP further added that none of the above points have been challenged at an appropriate time before an appropriate authority; that the appellant has been treated in accordance with law and true spirit of the notification dated 18.08.2010; that according to Section-8 (2) of the Khyber Pakhtunkhwa, Civil Servants Act, 1973 read with Rules-17 of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfers) Rules-1989, seniority of a civil servant shall be determined with reference to the dates of his *regular* appointment in his cadre. The cadre of DPE's was originally in BPS-16. The DPE's holding Master Degree in PHE were awarded BPS-17 and regularized as such w.e.f 09.10.2007. They were re-designated as Lecturer in Physical Education and absorbed in the General Cadre of Lecturers, (Collegiate Branch) of the Education Department w.e.f 18.08.2010. The newly re-designated Lecturer in Physical Education (BPS-17) will gain their seniority with effect from 18.08.2010, the date when they were re-designated and regularly absorbed in the new cadre. Moreover the order dated 18.08.2010 clearly provides that in the new cadre, the Lecturer in Physical Education shall be placed at the bottom of the seniority. The appellant has not challenged the same. Having pleased with the aforesaid notification dated 18.08.2010, the appellant accepted the same and as such took over charge as Lecturer in Physical Education w.e.f 18.08.2010. The appellant filed the application/representation that his seniority be fixed/anti-dated in the new cadre w.e.f. 02.05.1993 i.e the date of his initial appointment as DPE's which at that time was in BPS-16 and the notification dated 18.08.2010 does not provides any relief to them. The fixing/anti-dating of seniority is not possible without properly amending/modifying the aforesaid provisions of the notification dated 18.08.2010. The appellant has a self made interpretation of the notification dated 18.08.2010, without looking into the vires of the said notification. He failed to recognize as to how seniority in BPS-16 can be fixed with officers in BPS-17. The appellant has properly been treated equitably and in just manner and one of his out

standing demands has been fulfilled; that the respondent has acted in accordance with law and justice and true spirit of the notification dated. 18.08.2010. The learned Government Pleader prayed that the appeal being not maintainable and devoid of merits may please be dismissed with cost.

6. In view of the foregoing discussions, this Tribunal is of the opinion that the learned counsel for the appellant could not controvert certain objections raised by the learned Government Pleader that the appellant has got no cause of action; the order dated 18.08.2010 has not been challenged and no Departmental Appeal lies against the said order; that the appellant has simply filed an application dated 29.10.2010 for fixing of his seniority w.e.f 02.05.1993 in his new cadre as Lecturer in Physical Education (BPS-17); that the application/representation dated 29.10.2010 is barred by time before the appellate authority, hence incompetent before this Tribunal on this account; that the appeal is also time barred before this Tribunal and neither any application for condonation of delay filed nor explanation given in the appeal; and that the appeal is bad by mis-joinder and non-joinder of necessary parties. Therefore, the appeal is dismissed being not maintainable in its present form with no order as to cost. File be consigned to the record.

7. This judgment will also decide 13 other cases in Service Appeal No. 221/2011, Gulshan Ara; # 222/2011, Abdur Rashid; # 223/2011, Asad Jan; # 224/2011, Muhammad Abdul Latif; # 225/2011, Gul Razim; # 226/2011, Aziz Ullah; # 259/2011, Noor-UI-Amin; # 356/2011, Sanaullah; # 357/2011, Abdul Qayum; # 358/2011, Shakeela Khanum; # 829/2011, Muhsin Shah; # 830/2011, Bashir Ahmad and # 831/2011, Hakim Khan, in the same manner, having similar facts, circumstances and common question of Law.

ANNOUNCED
30.01.2014

(MUHAMMAD AAMIR NAZIR)

MEMBER

(SULTAN MAHMOOD KHATTAK)

MEMBER