HCJD/C-121

JUDGMENT SHEET

IN THE SLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.1191 of 2021

Naeem-ur-Rehman
Versus
Federation of Pakistan through Secretary, Ministry of Overseas Pakistanis & Human Resource Development/Chairman Governing Body WWF and three others

Petitioner by	**:**	**Rai Azhar Iqbal Kharal, Advocate.**
Respondents by	**:**	**Mr. Farrukh Shahzad Dall, Assistant A-G.** **Barrister Syed Masood Raza for WWF.** **Mr. Faisal Tariq, Deputy Director (legal), W.W.F.** **Mr. Hammad Nazar, M/o OP&HRD.** **Mr. Mohammad Arfan, S.O.(Lit), Estb. Div.**
Date of Decision	**:**	**29.09.2021**

Babar Sattar, J:- The petitioner has challenged the posting order of respondent No.3, BS-19 Officer of Secretariat Group, as Secretary, Workers Welfare Fund **("WWF")** on deputation by notification dated 09.02.2021, for being without lawful authority and in breach of provisions of the Workers Welfare Fund Ordinance, 1971 **("WWF Ordinance")**.

2. Learned counsel for the petitioner submitted that the impugned notification had been issued in breach of Section 8 of the WWF Ordinance according to which the Governing Body of WWF is the competent authority to appoint Secretary WWF. He submitted that the process followed by the Federal Government

was in breach of provisions of the Esta Code and the provisions of Workers Welfare Fund (Employee Service) Rules, 1997 **("Service Rules")**. He submitted that pursuant to Rule 10 (2) read together with Appendix-II the method of appointment prescribed requires that 50% of the time appointment to the position of Secretary is to be made by initial appointment and 50% of the time the appointment is to be made by promotion. He submitted that for the last 7 years instead of making the appointment to the post of Secretary on the basis of either promotion or initial appointment, appointments were being made on deputation basis which was a breach of the Service Rules. He further submitted that the impugned notification was in breach of Rule 23 pursuant to which it was the Governing Body of WWF that could initiate the process for appointment on deputation to the post of Secretary WWF, which was not done in the instant case. And the appointment had been made by the Federal Government and subsequently sent to the Governing Body of WWF for endorsement and consequently such appointment was not backed by legal authority or made in accordance with law. He submitted that respondent No.3 also did not qualify for the position of Secretary WWF, as Rule 10 (2) of the Rules read together with Appendix-II stated that the post of Secretary was a Grade-20 post and respondent No.3 was a Grade-19 officer who could not be appointed to a Grade-20 post in WWF on deputation. He further submitted that pursuant to Rule 13 (5) read together with Appendix-II, in order to be eligible to be appointed as Secretary WWF, the candidate was required to possess a Masters Degree in Commerce or Business

Administration or Public Administration or Law and respondent No.3 did not possess the required educational qualification and was consequently not eligible to hold the post of Secretary WWF.

3. Learned counsel for respondent No.3 submitted that respondent No.3 had been appointed by the Federal Government on deputation basis in exercise of power under Section 10 of the Civil Servants Act, 1973. He submitted that as respondent No.3 was a civil servant, his appointment was regulated by the Civil Servant (Appointment, Promotion and Transfer) Rules, 1973 **("APT Rules")** and not by Service Rules. He submitted that Rule 1 (3)(c) itself stated that the Service Rules were not applicable to persons from the Federal Government serving WWF on deputation. In terms of qualifications learned counsel for respondent No.3 stated that respondent No.3 belong to the Secretariat Group and held a Masters Degree in Economics, which could be treated at par with the educational requirement of holding a Masters Degree in Commerce, and that respondent No.3 had over 17 years of relevant experience as required by Rule 13(5) of the Service Rules. He submitted that it was permissible to post an employee to a position that is meant in ordinarily course for a higher Basic Scale, and respondent No.3 was a Grade-19 officer serving against Grade-20 post in Pakistan Tourism Development Corporation at the time of his appointment as Secretary WWF and was not ineligible to serve at such post merely because he was a BS-19 Officer. He submitted that respondent No.3's appointment had been endorsed by the Governing Body of WWF

in its 148th meeting held on 03.05.2021 and consequently the requirement of the appointment being made by the Governing Body under Section 8 of the WWF Ordinance stood satisfied. He also objected to the maintainability of the petition on the ground that the petition was motivated by malice as the petitioner himself was interested in being appointed as Secretary WWF, and had also filed a petition for such purpose before this Court. He also submitted that it was settled law that posting and transfer orders of civil servants could not be challenged before a High Court and for that reason too the instant petition was not maintainable.

4. Learned Assistant Attorney-General submitted that the petitioner was an interested person seeking to be appointed to the post held by respondent No.3 and consequently was disqualified from filing a quo warranto petition. In support of his argument regarding maintainability he relied on ***Mohammad Yasin Saqib Vs. Chairman, Pakistan Telecommunication Corporation, Islamabad*** ***(2003 PLC CS 1105)***, ***Allauddin Abbasey Vs. Province of Sindh through Chief Secretary, New Sindh Secretariat, Karachi*** ***(2010 PLC CS 1415)***, ***Dr. Shazia Khawaja Vs. Chairman and Dean of Sheikh Zayed Post Graduate Medical Institute and Hospital, Lahore*** ***(2012 PLC CS 1057)*** and ***Muddassar Hassan Rana Vs. The Federal Government through Secretary Defence, Islamabad*** ***(2017 PLC CS 1342)***. He then submitted that the petition was not maintainable as the petitioner had an alternate efficacious remedy under Rule 164 of the Service Rules to file an appeal which he has not availed. The learned Assistant

Attorney-General contended that summary for appointment of respondent No.3 was initiated by the Secretary, Ministry of Overseas Pakistanis and Human Resource Development (OSP&HRD) who was the Chairman of the Governing Body and the summary after being routed through the Establishment Division had been approved by the Prime Minister and the Cabinet and consequently the impugned notification was backed by the authority of the Federal Government.

5. The questions before this Court are twofold that: (i) Is the impugned notification backed by legal authority and has it been issued in accordance with law? (ii) Does respondent No.3 possess the qualification prescribed for the post of Secretary WWF.

6. Before we delve into the merits of the petition; let us address the objection to maintainability raised by the learned counsel for respondent No.3 as well as the learned Assistant Attorney General on grounds of malafide of the petitioner. Similar objection was taken before the august Supreme Court in ***Mohammad Yasin vs. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others (PLD 2012 SC 132)*** as the petitioner in the case was also a contender for the office of Chairman, OGRA. The august Supreme Court held that:

> *"Simply because the petitioner may have been a contender for the office of Chairman, OGRA, does not per se translate into mala fides. The petitioner can genuinely consider himself to be a suitable candidate for the position while simultaneously holding the view that the respondent does not meet the eligibility criteria set out in section 3(4) of the Ordinance.*

> *Furthermore, we have already held in the case titled Moulvi Iqbal Haider versus Capital Development Authority and others (2006 SC 394 at 413) that the contents of a petition under Article 184 (3) ibid will override concerns arising on account of the conduct or antecedents of a petitioner. This approach is reflective of the sagacity of wise men such as Maulana Jalaluddin Rumi who have emphasized the importance of the message rather than the messenger."*

Although the finding of the Supreme Court was in relation to Article 184(3) of the Constitution, the principle articulated by the apex Court squarely applies in relation to quo warranto petitions under Article 199 as well. The question before the Court in the instant petition is whether respondent No.3 has been lawfully appointed to the public office he presently holds and whether or not he possesses the requisite qualifications to hold such office as prescribed by law. It is the legality of the order issued by the Federal Government that forms the subject-matter of judicial scrutiny. The fact that the petitioner himself is interested in being appointed to such position is wholly irrelevant for purposes of present petition. The contention of the learned Assistant Attorney-General that the petitioner has an efficacious remedy under rule 164 of the Service Rules is also misconceived. This Court is not adjudicating a grievance of the petitioner regards the terms and conditions of his service, but the legality of an order issued by the Federal Government against which rule 164 of the Service Rules offers no remedy.

7. Let us start with who possesses the legal authority to appoint Secretary WWF. WWF is a statutory fund created under the WWF Ordinance. The management and administration of WWF has been entrusted under Section 7 of the WWF Ordinance

to a Governing Body the composition of which is provided under Section 7(2) of the WWF Ordinance. The Governing Body is a collegiate body to be chaired by the Secretary of the Ministry dealing with matters relating to the workers' welfare. Prior to the 18th Constitutional Amendment the Chairman of WWF was the Secretary of Labour Division. Subsequent to the 18th Constitutional Amendment, pursuant to Entry 25 of Schedule II of the Rules of Business, 1973, the relevant division is Overseas Pakistanis and Human Resource Development (OP&HRD). Thus while the statute still requires that the Chairman of the Governing Body is to be Secretary Labour Division, the Labour Division having been devolved to the Provinces, WWF has been placed under the supervision of Ministry of OP&HRD.

8. Section 8(1) of the WWF Ordinance provides the following:

> ***"8. Appointment of Secretary and other employees of the Fund***
>
> *(1) The Governing Body may, with the previous approval of the (Federal Government), appoint a Secretary who shall be the executive officer of the Fund."*

The said provision unambiguously provides that the Governing Body is the competent authority to appoint Secretary WWF, and is required to make such appointment with the previous approval of the Federal Government. Section 15 of the WWF Ordinance vests in the Federal Government the power to make rules for carrying out the purposes of the WWF Ordinance. In exercise the power the Federal Government has enacted the Service Rules. Rule 11 of the Service Rules provides that

appointment to post in BS-20 and above, which includes the post of Secretary WWF, may be made according to the procedure specified in Establishment Divisions O.M.No.6/4/96-R.3 dated 10.05.1997. Rule 10 provides that appointments to posts within WWF shall be made by one of three methods: by initial appointment; by promotion; or by transfer. Appendix-II read with Rule 10 provides that the ratio of appointment to the post of Secretary WWF, by initial appointment and by promotion shall reach be 50% each. In other words, the said rule envisaged that appointment to the post of Secretary WWF to be made by initial appointment and by promotion at alternate times.

9. Rule 13 prescribed requirements for initial appointment and the said rule read together with Appendix-II states that the post of Secretary WWF, is a Grade-20 post and the educational requirement prescribed for a candidate includes holding a Masters Degree in Commerce or Business Administration or Public Administration or Law. Rule 23 deals with appointments on deputation and states that such appointment can be made by the appointing authority in the interest of the WWF and the pool from which deputationist can be drawn is provided in Rule 23(2) and includes civil servants working with the Federal Government who may be appointed with the consent of the Federal Government.

10. The august Supreme Court in ***M/s Mustafa Impex, Karachi and others Vs. The Government of Pakistan through Secretary Finance, Islamabad and other*** ***(2016***

PTD 2269) had defined the Federal Government as the Prime Minister and the Federal Cabinet. Under Article 99 of the Constitution the Federal Government is empowered to frame rules for the allocation of business. In exercise of such powers the Rules of Business, 1973, were framed, which provide for the functioning of the Federal Government and its attached departments. The legislature in its wisdom has then created independent entities one step removed from the Federal Government through statutory enactments. Such statutory bodies do not constitute a part of the Federal Government, even though the Federal Government is often provided control over such bodies to varying extent. The WWF is one such statutory body created under the WWF Ordinance in relation to which the Federal Government is vested with various powers provided within the WWF Ordinance. But WWF is not part of the Federal Government or liable to be administered as an attached department according to provisions of the Rules of Business, 1973 or provisions of Civil Servants Act, 1973. The scheme of the WWF Ordinance has already been enumerated above. While the Federal Government has been provided a key role in constituting the Governing Body and determining its constitution, it is not the Federal Government that manages and administers WWF but the Governing Body constituted under Section 7 of the WWF Ordinance. This Governing Body includes representatives appointed by the Federal Government and representatives appointed by the Provinces, including those who represent workers and others who represent employers. The constitution of the Governing Body reflects that the legislature

intended for the federating units and various stake holders within them to have a say in how WWF is to be managed and administered and not the Federal Government alone. Section 8 of the WWF Ordinance then vests in this Governing Body the authority to appoint Secretary WWF, but with the prior approval of the Federal Government. Secretary WWF then acts as the Chief Executive Officer of WWF. Section 8 read together with Rule 23 of the Service Rules provides that it is for the Governing Body to determine whether a post within WWF is to be filled on deputation basis. Rule 10 of the Service Rules clarify that appointment through deputation is not one of the regular methods of appointment prescribed by the Service Rules which is why Appendix-II does not make any allowance for appointment to the position of Secretary WWF, on a deputation basis. The Service Rules thus reflect that appointment to the position of Secretary is to be made by initial appointment and by promotion, and only in the event that the Governing Body comes to the conclusion that such appointment must be made by deputation due to any exigency, the Governing Body, as an extraordinary measure, can appoint the Secretary on deputation basis. But such appointment remains extra ordinary and ad-hoc and cannot be treated as a routine mode for appointing Secretary WWF.

11. In the instant case, the Governing Body admittedly did not file any opinion for purpose of Rule 23 that appointment to the post of Secretary WWF, is to be made on deputation basis in the interest of fund. From the summary produced before this court it emerges that it was the Secretary OP&HRD who initiated

a summary for appointment of a civil servant to the post of Secretary WWF, as the term of the previous civil servant appointed to the said post, also on deputation basis, was about to expire. The initial summary for the Prime Minister dated 29.08.2019 included the names of three civil servants who were BS-21 Officers. The Establishment Division objected to the said summary on 20.09.2019 on the basis that no justification has been provided as to why the post is not to be filled through initial appointment or through promotion as required by Rule 13 of the Service Rules. The Establishment Division also observed that the Secretary WWF, was a BS-20 post, whereas the proposed panel included Grade-21 officers. Ministry of OP&HRD then revised the summary on 21.12.2020 proposing the names of three civil servants, two of whom were BS-20 Officers and one was BS-19 Officer. The summary stated that since the creation of the post of Secretary WWF, the said position had been filled seven times by transfer and only one time by promotion and never by initial appointment. And further that the appointment at the present time was meant to be made through direct recruitment. However, the Prime Minister's Office by letter dated 03.01.2020 had directed that fresh recruitment against posts related to devolved subjects may not be undertaken. And as the subject of labour was a devolved subject, the post of WWF could not be filled by direct recruitment. The Establishment Division on 20.01.2021 once again objected to the explanation provided by Ministry of OP&HRD regarding the need to fill the post by deputation by stating that the Council of Common Interest ("CCI") had already

decided in its 41st meeting dated 23.12.2019 that WWF shall remain with the Federal Government till such time that an agreed mechanism can be developed with the Provinces. The summary was put up before the Prime Minister who approved respondent No.3 for appointment to the post of Secretary WWF, through deputation and such approval was subsequently confirmed by the Cabinet in the meeting held on 26.01.2021. What emerges on the above is the following:

I. Despite being fully aware that Rule 13 of the Service Rules required that appointment to the post of Secretary WWF is to be made by initial appointment or by promotion, the Federal Government approved the appointment of a deputationist in breach of such rule.

II. The explanation provided for such breach i.e. that WWF is a devolved subject and fresh appointments through posts related to devolved subject had been barred by Prime Minister was contracted by the Establishment Division by clarifying that Council of Common Interests had already decided that WWF is to stay with the Federal Government for the foreseeable future.

III. Even if CCI had not reached a decision regarding keeping WWF with the Federal Government, the Prime Minster was vested with no legal authority to suspend any provisions of a statute or a sub-statutory instrument such as the Service Rules. Neither the Prime Minister nor the Federal Cabinet could authorize an appointment in breach of provisions of the Service Rules when the Establishment Division in its summary had brought to the attention of Prime Minister and the Federal Cabinet that appointment to the post of Secretary WWF, was to be made by promotion initial appointment and not through deputation.

12. What is more fundamental than the fact that the impugned notification has been issued in breach of Rule 13 of the Service Rules is that the Federal Government is vested with

no authority under the WWF Ordinance to initiate appointments to any post within WWF in view of Section 8 read together with the Service Rules. It is for the Governing Body of WWF to initiate appointment to the post of Secretary WWF. In the event that there is no employee of WWF qualified to be promoted to the position of Secretary WWF, and it is also not possible to fill the post on the basis of initial appointment, it is for the Governing Body to determine in view of Rule 23 of the Service Rules that the post is to be filled by appointing someone on deputation. In the instant case the Governing Body made no such determination. As appointment by deputation is an ad-hoc and extraordinary appointment it can only be made as a measure of last resort and cannot be treated as a regular mode of appointment in breach of Rule 10 of the Service Rules read together with Appendix-II. Even where an appointment is to be made on deputation basis, which is justifiable in view of the exigency that leads the Governing Body to such conclusion, such appointment is to be made on a transparent basis and it would be for the Governing Body to invite applications from eligible candidates that belong to the pool of deputationist prescribed in Rule 23 of the Service Rules. After adopting a transparent process the Governing Body would then come up with an eligible candidate that it could appoint in exercise of its powers under Section 8 of the WWF Ordinance, after seeking the consent of the Federal Government. None of this was done in the instant case.

13. Respondent No.3 after being appointed by the Federal Government in purported exercise of its powers under Section

10 of the Civil Servants Act, 1973, was presented as fait-accompli to the Governing Body of WWF by virtue of the impugned notification. The Governing Body then in disregard of its responsibility under Section 8 of the WWF Ordinance and the Service Rules rubber stamped the appointment in its 148th meeting held on 03.05.2021 almost three months after respondent No.3 had been appointed and assumed the office of Secretary WWF.

14. It has already been enumerated above that WWF is an independent statutory body that does not form part on the Federal Government per se. It can, therefore, not be treated as a ministry or an attached department and human resource affairs of WWF do not fall within the domain of the Federal Government. The Federal Government under the WWF Ordinance is vested with no authority to initiate and approve appointments within WWF including the appointment of Secretary WWF. In relation to the appointment of Secretary WWF, the Federal Government is vested with authority in two contexts. The first is where the Governing Body purposes to make an appointment to the post of Secretary WWF, on a regular basis i.e. by initial appointment or promotion and seeks the consent of the Federal Government for such appointment under Section 8(1) of WWF Ordinance. In the event that Federal Government is not convinced by the merit of the proposed nominee of the Governing Body, a reasonable basis, the Federal Governments can invite the Governing Body to propose a fresh nominee. The second context in which the Federal Government is vested with authority in relation to the appointment of

Secretary WWF, is where the Governing Body seeks to fill the position through appointment on deputation in accordance with Rule 23 of the Service Rules and after running a transparent selection process selects a nominee who is a civil servant within the Federal Government. In such case the Federal Government has authority under Rule 20A(2) of the APT Rules to determine whether or not the Federal Government wishes to allow such civil servant to proceed on deputation. What the Federal Government cannot do is to reduce WWF to being an attached department and fill the post of Secretary WWF in its own discretion on its own whims. In view of Article 4 of the Constitution, it is a settled principle that Federal Government is bound by law and can only do what it is authorized by law to do. In ***Syed Mohammad Akhtar Naqvi and others Vs. Federal of Pakistan (PLD 2013 SC 195)***, the august Supreme Court held that, *"where there are statutory provisions or rules or regulations which governs the matter of appointments, the same must be followed."*

15. To the extent that Rule 11 of the Service Rules states that the competent authority for purposes of appointment of Secretary WWF is the one identified under the Office Memorandum issued by the Establishment Division dated 10.05.1997, such rule is in breach of the Section 8 of the WWF Ordinance. The Office Memorandum dated 10.05.1997 states that the competent authority for purposes of appointment of a government servant in Grade-20 or above in any autonomous body is the Prime Minister in falls foul of Section 8 of the WWF Ordinance. It has already been explained above that WWF is a

statutory body that does not form part of the Federal Government as defined in ***M/s Mustafa Impex*** and appointments within WWF cannot be regulated by Federal Government in exercise of its powers under the Rules of Business, 1973. The issue of high level appointments in statutory bodies and corporation came before the august Supreme Court in ***Ghulam Rasool Vs. Government of Pakistan (PLD 2015 SC 6)*** and it was held that in making such appointments the Federal Government was bound to abide by the procedure, criteria and qualifications prescribed in the relevant Act or Ordinance under which the statutory body or entity was created. Further the legislature in Section 8 of the WWF Ordinance has clearly provided that it is the Governing Body of WWF that is the competent authority to appoint Secretary WWF. The Federal Government in exercise of its power to frame rules under Section 15 of the WWF Ordinance cannot exercise such powers in a manner that is conflict with provision of the WWF Ordinance itself in view of the law settled the doctrine of ultra-vires. Thus to the extent that Rule 11 of the Service Rules purports to create a competent authority for purposes of appointing Secretary WWF other than that prescribed by Section 8 of the WWF Ordinance, such rule is ultra-vires Section 8 of the WWF Ordinance to the extent of the conflict.

16. In relation to the second question i.e. the eligibility of respondent No.3 to service as Secretary WWF, it also appears that the incumbent does not satisfy the qualifications prescribed under Rule 13(5) read together with Appendix-II. The first

disqualification appears to be that respondent No.3 is a BS-19 Officer and the post of Secretary WWF, is a BS-20 post. This becomes all the more relevant in the context that while there are no BS-20 Officers serving within WWF on a regular basis, there are BS-19 Officers serving within WWF on a regular basis. Thus if a BS-19 Officer were to be appointed to the post of Secretary WWF, a regular employee of WWF could have been appointed to such position instead of a deputationist. The second disqualification of respondent No.3 appears to be that he does not hold the requisite educational qualification: while respondent No.3 is an engineer and holds a Masters Degree in Economics, such degree cannot be treated at par with Masters Degree in Commerce. If the Federal Government wished for the requisite educational qualification for the post of Secretary WWF, to include a Masters Degree in Economics, it could exercise its powers under Section 15 of the WWF Ordinance and amend the Service Rules accordingly.

17. It is for the above reasons that after hearing the parties this Court come to the conclusion that the impugned notification was without lawful authority and had not been passed in accordance with provision of the WWF Ordinance and that respondent No.3 was not qualified to serve on the post that he presently holds. Thus, the following order was passed on 29.09.2021:

> "This short order is being passed in the instant petition, after hearing the learned counsel for the parties and perusing the record with their able assistance, wherein the appointment of respondent No.3 has been challenged by the petitioner. For the reasons to be

recorded later, the instant petition is allowed and it is held that:

I. The notification dated 09.02.2021 is set aside being *ultra vires* Section 8(1) of the Workers Welfare Fund Ordinance, 1971 **("Ordinance")** having been issued by an authority not vested with legal authority under the Ordinance to appoint Secretary Workers Welfare Fund;

II. The appointing authority for the position of the Secretary is the Governing Body of Workers Welfare Fund not the Federal Government, and it is the Governing Body constituted under Section 7 of the Ordinance, who is to appoint Secretary Workers Welfare Fund in consultation with the Federal Government.

III. To the extent that Rule 11 of Workers Welfare Fund Rules, 1997 **("Rules")** purports to create an appointing authority for the post of Secretary Workers Welfare Fund other than the Governing Body, Workers Welfare Fund, such rule is *ultra vires* Section 8(1) of the Ordinance, and no rules can be framed in exercise of authority under Section 15 of the Ordinance in breach of explicit provisions of the Ordinance.

IV. Respondent No.3 is directed to relinquish the charge of Secretary Workers Welfare Fund forthwith and report back to the Federal Government and the Governing Body shall appoint a new Secretary in accordance with provisions of the Ordinance and the Rules with due dispatch.

(BABAR SATTAR)
JUDGE

Approved for reporting.

M.A. Raza