JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

WRIT PETITION No. 2481 of 2023

Prof. Dr. Shahid Mahmood Baig

VERSUS

Ministry of Science and Technology and others

Petitioners by	:	**M/s Zainab Samantash and Hamza Siddiqui Advocates.**
Respondents by	:	**Barrister Munawar Iqbal Duggal, Additional Attorney General for Respondents No. 1 and 2.** **M/s Afnan Karim Kundi and Adeel Aftab Advocates for PSF/Respondent No. 4.** **M/s Rana Imran Farooq and Asia Batool, AAGs.** **Mr. M. Sultan Rao, S.O. Establishment Division.**
Date of Hearing	:	**06.09.2023**.

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SAMAN RAFAT IMTIAZ, J.-

1. The Petitioner has filed this Writ Petition to assail the Show Cause Notice dated 07.08.2023 **("Impugned Show Cause Notice")** issued to him and the Order dated 07.08.2023 **("Impugned Order")**, whereby he has been sent on forced leave pending disciplinary proceedings against him.

Facts:

2. The brief facts of the instant Petition are that the Respondent No. 4 [Pakistan Science Foundation] (herein after referred to as **"PSF**/Respondent No. 4**"**) is an autonomous body which was established under Section 3 of the Pakistan Science Foundation Act, 1973 **("PSF Act")**. The post of Chairman of PSF/Respondent No. 4 had been lying vacant therefore was advertised on 19.04.2020. After qualifying through a competitive process, the Petitioner, who is an eminent scientist and who has been awarded the Sitara-e-Imtiaz, was appointed as the Chairman of

PSF/Respondent No. 4 on 28.12.2020 on Management Position-1 Scale for a period of three years by Respondent No. 3 [the President of the Islamic Republic of Pakistan] **("President/Respondent No. 3")**.

3. It has been alleged that after the appointment of the Petitioner as Chairman, the Respondent No. 1 [Ministry of Science and Technology] (herein after referred to as the **"Ministry/Respondent No. 1"**) and Respondent No. 2 [the Federation] have been creating hurdles and preventing the Petitioner from performing his official duties as per the PSF Act and the rules and regulations made thereunder by constant interference and encroachment upon his statutory mandate. The Petitioner raised this issue before the President/Respondent No. 3 on two different occasions through emails dated 12.06.2023 and 01.08.2023. The matter was also raised by the Chairman of the Senate Standing Committee for Science and Technology before the Secretary Establishment Division vide his Letter dated 04.08.2023.

4. On 07.08.2023 the Ministry/Respondent No.1 issued the Impugned Show Cause Notice to the Petitioner and the Impugned Order was also issued whereby, *inter alia,* he has been sent on forced leave. This exercise was allegedly done with the ulterior motive to take control of the affairs of PSF/Respondent No.4. It was objected to vide Letter dated 08.08.2023 written by PSF/Respondent No. 4 to the Ministry/Respondent No.1. On the same date i.e. 08.08.2023 the officials of the Ministry/Respondent No. 1 and Respondent No. 2 trespassed into the premises of PSF/Respondent No. 4 and tried to take control of the Petitioner's office using force. A complaint in this regard was made to the Station House Officer, Police Station Secretariat by PSF/Respondent No. 4.

Arguments on behalf of the Petitioner:

5. The legal counsel for the Petitioner emphasized that PSF/Respondent No.4 is admittedly an autonomous body established under the PSF Act**.** The Petitioner was appointed as Chairman of PSF/Respondent No. 4 by the President/Respondent No. 3 pursuant to Sections 5 and 6 of the PSF Act

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vide Notification dated 28.12.2020. She highlighted that it is the President/Respondent No. 3 who may terminate the appointment of the Chairman of PSF/Respondent No. 4 pursuant to sub-section (3) of Section 6 *ibid*. Notwithstanding the foregoing legal position, the Impugned Show Cause Notice dated 07.08.2023 has been issued by the Ministry/Respondents No. 1 and the Respondent No. 2 through Additional Secretary (In charge) and on the same date the Impugned Order has been issued which refers to initiation of disciplinary proceedings under Clause (ix) of paragraph 6 of the Management Position Scales Policy, 2020 dated 22.06.2020 **(" MP Policy")** during which time the Petitioner has been sent on leave initially for a period of sixty days purportedly as per clause (vii) of Office Memorandum **("O.M.")** dated 29.07.2022 issued by the Establishment Division.

6. The learned counsel firstly argued that the MP Policy does not apply to the Petitioner but that even otherwise the Impugned Show Cause Notice and Impugned Order have not been issued by the officer empowered to do so under the relevant clause of the MP Policy. Moreover, she claims that the Chairman cannot be sent on leave pursuant to the Establishment Division's O.M. referred to in the Impugned Order.

7. The counsel for the Petitioner argued that the instant Writ Petition is maintainable despite the fact that the Petitioner is a contractual employee by relying upon *Pakistan Defence Officers' Housing Authority and others vs. Lt. Col. Syed Jawaid Ahmed*, 2013 SCMR 1707, whereby it was held that statutory bodies performing some of the functions of Federation/State create public employments and as such any action or order passed by them in violation of the statue creating those bodies can be interfered with by the High Court under Article 199 of the Constitution. She also relied upon *Prof. Dr. Qazi Tahir Uddin vs. The Secretary, Pakistan Medical Commission, Islamabad and 3 others*, 2022 PLC(CS) 805, wherein another Single Bench of this Court held that although a contractual employee cannot insist on continuation of his employment by invoking Article 199 of the Constitution, however, such principles do not apply where a statue in

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explicit terms requires appointment to be made for fixed tenure and also prescribes a process and grounds for removal of the appointee. In this regard, she relied upon the terms and conditions of the Petitioner's employment as per the Letter dated 16.06.2021 whereby the Petitioner has been employed for a fixed term of three years subject to termination upon one month's notice by either side or payment of one month's basic pay in lieu thereof without assigning any reason.

8. She further argued that the petition is maintainable against show cause notice despite the ruling in *Commissioner Inland Revenue and others vs. Jahangir Khan Tareen and others*, 2022 SCMR 92 as the Impugned Show Cause notice has been issued without jurisdiction. She also relied upon *Muhammad Ashraf Tiwana and others vs. Pakistan and others*, 2013 SCMR 1159 in this regard. In order to demonstrate how the Impugned Show Cause Notice issued to the Petitioner is without jurisdiction, she firstly submitted that since the President/Respondent No. 3 has the hiring and firing powers there is no question of an officer of the Ministry/Respondent No. 1 initiating disciplinary proceedings against the Chairman of PSF/Respondent No. 4. She further submitted that application of the MP Policy by virtue of mere reference to the same in the Notification dated 28.12.2020, whereby the Petitioner was appointed is misplaced in view of Clauses (xii) and (xiii) under paragraph 6 of the MP Policy, where under only the Petitioner's emoluments can be determined in accordance with MP scale as it specifically states that other provisions of the Policy shall not apply to the positions in statutory bodies in case the MP policy is used only as benchmark. She further submits that even otherwise the President/Respondent No. 3 cannot delegate any of the powers conferred upon him vide Act,1973 in the absence of such authority to delegate expressly provided in the Act and relied upon *Allied Bank Limited vs. The Commissioner of Income Tax, Lahore and others,* 2023 SCMR 1166 in this regard.

9. Additionally, she relied upon the case of *Secretary, Government of the Punjab, through Secretary Health Department, Lahore and others vs.*

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Riaz- ul-Haq, 1997 SCMR 1552 to assert that the principles enshrined in the Civil Servants (Efficiency and Discipline) Rules, 1973 **("E&D Rules")** must also be adhered to even in the case of contractual employees of statutory bodies. She submitted that as such the Impugned Show Cause Notice is also in violation of the E&D Rules as the term "authority" has been defined in Section 2(c) thereof, which expressly provides in its second proviso that where the authority is President/Respondent No. 3 all functions under the said rules, except approval of initiating the disciplinary proceedings, shall be performed by the respective cadre administrator. Whereas according to the learned counsel the terms and conditions of the Petitioner's appointment as Chairman contained in Letter dated 16.06.2021 do not envisage disciplinary proceedings.

10. Without prejudice to the foregoing, she relied upon Rule 9 of the E&D Rules whereby disciplinary proceedings are to be carried out by an officer senior in rank to the accused. She contends that the Impugned Show Cause Notice dated 07.08.2023 has been issued by an officer who is the Petitioner's junior and as such is in violation of the principles of the E&D Rules. In answer to a question she submitted that it is only the Secretary who is of equivalent rank to the Petitioner. She highlighted that not only is the Additional Secretary (In charge) who has issued the Impugned Show Cause Notice, the Petitioner's junior but he is also merely in charge of the post. She submitted that an officer exercising look after charge cannot initiate disciplinary proceedings by relying on O.M. dated 09.04.2021 whereby the practice of assigning look after charge of a higher post to an officer of lower rank has been deprecated by observing that there is no provision of look after charge in the Civil Servants Act, 1973 or the rules made thereunder. It is further stated therein that as a matter of principle it is the senior most officer who is normally asked by the head of the Division/Department to look after the work of a post when its incumbent is temporarily away but that issues which are of quasi-judicial nature cannot be taken by an officer not formally designated to exercise those powers and essentially only day-to-day decisions can be taken by such officer.

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Therefore, according to the learned counsel for the Petitioner the Impugned Show Cause notice to initiate disciplinary proceedings could not be issued by an Additional Secretary and that too someone who only had look after charge of the position. Similarly, the Hearing Notice dated 18.08.2023 has been issued by an officer junior to the Petitioner despite the fact that the "Hearing Officer" cannot be one who is junior in rank to the accused" as per definition provided in Section 2(g) of the E&D Rules.

11. Coming to the Impugned Order dated 07.08.2023, whereby the Petitioner has been sent on forced leave the Petitioner's learned counsel relied upon *Federation of Pakistan vs. Saeed Ahmed Khan and others*, 2016 PLC (C.S.) 48, *Irfan Ahmed and others vs. Federation of Pakistan and others*, 2016 PLC (C.S.) 491 and an unreported judgment of this Court passed in W.P No.4846/2018 titled *Haider Zaman Khattak vs. Federation of Pakistan and 2 others* to argue that the Respondents are not authorized to send the Petitioner on forced leave. She referred to Clause (vii) of OM dated 29.07.2022 issued by the Establishment Division referred to in the Impugned Order, which provides for leave of officials working in MP-1 Scale but does not envisage forced leave. She also refers to Rule 5 of the E&D Rules whereby only the "authority" can send the Petitioner on leave, which in this case is the President/Respondent No. 3.

12. She further submitted that the Impugned Order also granted "look after charge" to the Joint Secretary in spite of the fact that no such authority vests with the Ministry/Respondent No. 1 and that it is also in violation of Section 6(1) of the PSF Act where under Chairman of PSF/Respondent No. 4 is required to be a scientist as well as Clause (vi) of paragraph 6 of the MP Policy whereby additional charge in the case of heads of autonomous body may only be granted to a civil/government servant of equivalent grade and that too with the approval of the appointing authority and for not more than 3 months. According to Schedule III of the MP Policy, the equivalent of MP-I is BPS-22 whereas the Joint Secretary belongs to BPS-20. Moreover, the said Order has been issued without the approval of the President/Respondent No. 3 and also indefinitely till further orders.

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13. Lastly she submitted that the Impugned Orders are tainted with mala fide as one day after issuance of the Impugned Show Cause Notice the officer, who issued the Hearing Notice, registered FIR No.299/2023 dated 08.08.2023 under Sections 352, 353, 186, 342, 506(ii), 148, 149 PPC, Police Station Secretariat, Islamabad against the Petitioner and as such he cannot be permitted to carry out disciplinary proceedings against the Petitioner. She also referred to correspondence by the Petitioner to the President/Respondent No.3, whereby the former had informed the latter about the undue interference by the Ministry/Respondent No.1 in the matters of Respondent No.4, which culminated in issuance of Displeasure Notice dated 10.08.2023 by the Ministry/Respondent No.1, in view of which it is clear according to the learned counsel for the Petitioner that issuance of the Impugned Show Cause Notice is with mala fide intentions.

Arguments on behalf of the Respondents:

14. At the very outset, the learned Additional Attorney General on behalf of Respondents No. 1 and 2 and the learned counsel for PSF/Respondent No. 4 challenged the maintainability of the instant Petition by pointing out that the Petitioner is admittedly a contractual employee and further that the PSF/Respondent No. 4 does not have statutory rules of service nor is the MP Policy statutory in nature.

15. On merits, the learned counsel for PSF/Respondent No. 4 firstly clarified that the Petitioner's employment has not been terminated, which right admittedly belongs to the President/Respondent No. 3. Question was raised as to what authority, if any, the Ministry/Respondent No.1 has to initiate disciplinary proceedings against the Chairman of PSF/Respondent No.4. The learned counsel for PSF/Respondent No.4 submitted that the employment of the Petitioner is governed by the MP Policy by virtue of the Notification of his appointment dated 28.12.2020. The learned Additional Attorney General referred to the Gazette Notification dated 01.01.2021 of the Petitioner's appointment which categorically states that the said appointment is on the terms and conditions of the MP Policy dated 22.06.2020. They explained that the entire process of appointment was

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carried out according to the MP Policy and in this regard referred to the advertisement issued by the Ministry/Respondent No.1 for the position of Chairman of PSF/Respondent No. 4 dated 19.04.2020 which refers to MP-I but that the Petitioner never objected to it.

16. In this regard they also referred to the case of the predecessor of the Petitioner who was required to resign from his service as Associate Professor in the University of Punjab, Lahore as per the MP Policy despite the fact that the said person had also contended that his resignation from existing service shall not form part of his terms and conditions by relying upon Clauses (xii) and (xiii) under paragraph 6 of the MP Policy. The learned counsel argued that the foregoing treatment meted out to the predecessor of the Petitioner is clearly indicative of the fact that the President/Respondent No.3 has consciously applied the MP Policy to the appointment of the Chairman of PSF/Respondent No. 4 in toto and as such there is no merit in the contention raised on behalf of the Petitioner that reference to the MP Policy in the Notification of appointment merely implies application thereof to the extent of emoluments.

17. They further alleged that the present challenge by the Petitioner to the application of MP Policy is malafide given that he was at all material times aware of its applicability and accepted the position subject thereto and is only challenging its application at the fag end of his term. It was also highlighted that the Petitioner has himself relied upon a Letter dated 04.08.2023 written by Senator Sardar M. Shafiq Tareen whereby the summary for the removal of the Petitioner as Chairman of PSF/Respondent No. 4 has been described as illegal on account of not following the MP Policy and therefore, the present challenge to the MP Policy by the Petitioner is a classic case of blowing hot and cold at the same time.

18. Referring to the MP Policy the learned Additional Attorney General read out the introductory paragraph whereby it is stated that the policy is for making appointments of highly skilled/qualified professionals from open market on tenure basis (contract) against MP Scale positions in Ministries/Divisions, Attached Departments, Sub-ordinate Offices,

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Autonomous or Semi-Autonomous Bodies (either statutory or otherwise), Regulatory Authorities, etc. He submitted that the introductory paragraph makes it clear that it applies to MP scale positions in its entirety. Therefore, according to him the reference to "other positions" in clause (xiii) of paragraph 6 of the MP Policy is for positions other than MP scale positions which therefore does not apply to the Petitioner who has been appointed as per MP-I scale. The learned counsel for PSF/Respondent No. 4 submitted that a comprehensive read of the MP Policy makes it clear and apparent that clauses (xii) and (xiii) of paragraph 6 of the MP Policy do not apply to the position of Chairman or any other officer appointed by the President/Respondent No. 3 under the PSF Act and are only relevant for the appointment of such officers, servants, consultants or experts that may be appointed by the PSF/Respondent No. 4 meaning thereby its Board of Trustees pursuant to Section 16 of the PSF Act and as such he too was of the opinion that the exception contained in clause (xiii) does not apply to the Petitioner's case and the MP Policy applies to the Petitioner as Chairman of PSF/Respondent No.4 in its entirety.

19. The learned counsel for PSF/Respondent No. 4 argued that clause (ix) of Paragraph 6 of the said Policy authorizes the concerned Secretary to initiate disciplinary proceedings if he is satisfied with valid reasons described thereunder. He relied upon the definition of "Secretary" given in the Rules of Business, 1973 to submit that the Additional Secretary is included therein and as such the Impugned Show Cause Notice dated 07.08.2023 is not without jurisdiction. He clarified that the said clause only requires approval from the concerned authority in case of termination however no termination has been carried out in case of the Petitioner thus far.

20. He explained that the Impugned Show Cause Notice was issued by the Additional Secretary (Incharge) as the position of Secretary was vacant, however, the same has now been filled vide Notification dated 18.08.2023 and that the disciplinary proceedings will henceforth be carried out by the Secretary. He further submitted that the Hearing Notice referred to by the

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learned counsel for the Petitioner has been issued by the Joint Secretary only to communicate the date of hearing however it has been issued with the approval of the competent authority which clearly signifies that the hearing will be conducted by the competent authority itself. The learned Additional Attorney General submitted that no officer higher in rank than the position of the Chairman is available as the said position is of BPS-22 while the Secretary of the Ministry/Respondent No. 1 is of the same rank. He argued that as such going by the Petitioner's argument no disciplinary proceedings can ever be carried out against the Chairman in which case he can get off Scot-free despite transgressions. Similarly, it was submitted that there is no civil/government servant currently available of equivalent grade to that of the Chairman PSF/Respondent No. 4 hence the assignment of look after charge to Joint Secretary of BPS 20 grade.

21. The learned counsel for PSF/Respondent No. 4 has vehemently objected to the interpretation of the O.M. dated 09.04.2020. With regard to the Impugned Order the learned counsel submitted that the case of *Federation of Pakistan vs. Saeed Ahmed Khan and others*, 2016 PLC (C.S.) 48 is not relevant for the said purposes. He also submitted that mala fide cannot be established in Constitutional jurisdiction.

22. The learned Additional Attorney General relies upon *Syed Asghar Ali Shah vs. Province of Sindh through Secretary Local Government Department Govt. of Sindh at Karachi and 6 others***,** 2022 CLC 442 and *Abdul Latif Mughal vs. Govt of Sindh and others,* 2020 PLC (CS) Note 9 wherein it has been held that suspension is not a punishment as it does not decide the matter finally and that suspension is interim in nature with the object of restraining the officer concerned from influencing the outcome of inquiry proceedings.

23. Additionally, the learned counsel for PSF/Respondent No. 4 has relied upon *Pakistan Electric Power Company vs. Syed Salahuddin and others,* 2022 SCMR 991 and on unreported judgments passed in *Commissioner Inland Revenue vs. M/s RYK Mills, Civil Petitions No. 1842-*

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L and 1843-L of 2022 and Muhammad Ayub Khan Sanjrani vs. Sindh Health Care Commission & others, Suit No. 379/2019.

Arguments in rebuttal on behalf of the Petitioner:

24. While exercising her right of rebuttal the learned counsel for the Petitioner referred to the advertisement issued by the Respondents for the post of Chairman of PSF/Respondent No. 4 and highlighted that nowhere does it mention that the position will be governed by the MP Policy. She highlighted that MP-1 has been mentioned only in the box pertaining to Pay and Allowances. She further submitted that in case the appointing authority changed its mind about the governing terms and conditions then the entire process of recruitment including issuance of the advertisement would have to be repeated. She submitted that no such change of mind is reflected from the Notification dated 28.12.2020 as it too does not provide for application of the MP Policy rather only mentions that appointment is as per MP-I scale which according to the learned counsel clearly signifies that the MP Scales are being used as benchmark for the emoluments to be granted for the position of Chairman of PSF/Respondent No. 4 and no other provision of the MP Policy can be applied thereto by virtue of clause (xiii) of paragraph 6 of the MP Policy without prejudice to her argument that the policy does not apply to the Chairman PSF/Respondent No. 4 at all. She submitted that Gazette Notification dated 28.12.2020 being prior in time governs the relationship between PSF/Respondent No. 4 and the Petitioner. Whereas, the Gazette Notification dated 01-01-2021 is merely a notification of appointment to inform the public. She also referred to the terms and conditions of the Petitioner's appointment as per Letter dated 16.06.2021, which do not refer to the MP Policy.

25. While addressing the treatment meted out to the predecessor of the Petitioner she submitted that it was not a correct decision and as such cannot be made binding upon the Petitioner who cannot be penalized nor saddled with the burden of an incorrect decision simply because the predecessor chose not to challenge the same. She emphasized that the President’s failure to exercise jurisdiction vested in him is also a violation

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of the law and that the Petitioner would not challenge a termination *simpliciter* by the President/Respondent No. 3 but is challenging the initiation of disciplinary proceedings instituted against him without jurisdiction and pursuant to a policy which does not apply to him. The learned counsel explained that there is no question of the Petitioner getting away with anything Scot-free as his appointment can be terminated by the President/Respondent No. 3. She submitted that in this case malafide is apparent from the documentary evidence which shows that a displeasure notice was sent to the Petitioner on account of his complaints to the President/Respondent No.3 in respect of the Ministry/Respondent No. 1's interference in the matter of PSF/Respondent No.4. She also submitted that the person who has been given look after charge while the Petitioner has been sent on forced leave is not a scientist and the fact that no other person of requisite ranking is available for appointment is not sufficient to entrust the affairs of an autonomous body such as PSF/Respondent No.4 in the hands of an ineligible person. Lastly, she challenged the appointment of the purported learned counsel for PSF/Respondent No.4 as there is no authority letter available on record to support his Vakalatnama.

26. I have heard the learned counsels for the parties and have also perused the record.

Maintainability:

27. The learned counsel for PSF/Respondent No. 4 vehemently objected to the maintainability of the instant petition on the ground that the Petitioner is merely a contractual employee who is not entitled to invoke the Constitutional jurisdiction of this Court and that too to challenge a show cause notice that does not constitute an adverse action as held by the apex Court in *Jahangir Khan Tareen (Supra)*.

28. He submitted that it is settled law that contractual employee does not have any vested right in employment which is liable to termination upon notice or salary in lieu thereof but that the case of the Petitioner is on an even lower footing as the Chairman, PSF/Respondent No. 4 is not even

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entitled to notice because according to Section 6(3) of the PSF Act the President/Respondent No.3 can terminate his appointment without notice and without assigning cause.

29. There lies the rub - the President/Respondent No. 3 has taken no step towards termination of the Petitioner's appointment nor is the Petitioner seeking any vested right in the post of Chairman, PSF/Respondent No. 4. The learned counsel for the Petitioner candidly stated that the Petitioner would not be in Court if it was a case of termination *simpliciter* by the President/Respondent No. 3. However, what has compelled the Petitioner to invoke the Constitutional jurisdiction of this Court is that the Ministry/Respondent No. 1 through the Additional Secretary (In charge) has issued the Impugned Show Cause Notice. Therefore, essentially the issue is regarding initiation of disciplinary proceedings by an unauthorized person allegedly in violation of the statute and forced leave during such proceedings.

30. Insofar as Impugned Show Cause notice is concerned, the apex Court in its recent ruling i.e., *Jahangir Khan Tareen (Supra)* held that a show cause notice does not constitute an adverse action. Be that as it may, there is a string of judgments wherein it has been held that a High Court can intervene under Article 199 of the Constitution where the show cause notice has been issued without jurisdiction and this principle has not been disturbed by *Jahangir Khan Tareen (Supra)*. Reference may be made to *Messrs Pakistan Oilfields through Managing Director vs. Federation of Pakistan through Ministry of Finance, Islamabad and 4 others,* 2023 PTD 505 Islamabad; *Dr. Seema Irfan and 5 others vs. Federation of Pakistan through Secretary and 2 others,* 2019 PTD 1678 Sindh and Zaver *Petroleum Corporation Limited through Director Islamabad vs. Federal Board of Revenue through Chairman FBR, Islamabad and another,* 2016 PTD 2332 Islamabad.

31. Since the issue is regarding issuance of show cause notice to an incumbent of a statutory position allegedly without jurisdiction in violation of the statute therefore, I find the instant petition maintainable. Reliance is

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placed upon *Saleem Wazir Professor Community Medicine and 6 others vs. Government of Khyber Pakhtunkhwa through Secretary Health, Peshawar and 2 others,* 2019 PLC (C.S.) 224 and *Dr. Fatima Arshad vs. Government of Punjab,* 2020 PLC (C.S) 688.

32. I will first consider the Impugned Show Cause Notice.

MP Policy:

33. The Respondents have defended the issuance of the Impugned Show Cause Notice by the Additional Secretary (In charge) by relying upon the MP Policy, which the Petitioner denies is applicable upon the post of Chairman of PSF/Respondent No. 4. In view thereof, the preliminary question that needs to be answered in order to decide the controversy between the parties hereto is whether the MP Policy governs the appointment of the Petitioner as Chairman of PSF/Respondent No. 4 or not.

34. The MP Policy contained in the O.M. dated 22.06.2020 issued by the Establishment Division was approved by the then Prime Minister for making appointments of highly skilled/qualified professionals from open market on tenure basis (contract) against MP Scale positions in *inter alia* autonomous or semi-autonomous bodies (either statutory or otherwise). The learned counsel for PSF/Respondent No. 4 explained that the MP Policy is essentially the policy applied by the Federal Government in making appointments within statutory bodies wherein, the law requires the Federal Government to make such appointments however, the same was extended to the appointment of the Petitioner to the post of Chairman of PSF/Respondent No. 4 by the President/Respondent No.3 by way of the notification of the Petitioner's appointment.

Intention of the President/Respondent No. 3:

35. On the other hand, the learned counsel for the Petitioner highlighted that the Gazette Notification dated 28.12.2020 only refers to MP-1 Scale in relation to Pay and Allowances, which according to her indicates the scale for purposes of emoluments but by itself does not signify the application of

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the entire MP Policy. The Gazette Notification dated 28.12.2020 is reproduced herein below for ready reference:

> *"In terms of Section 5 & 6 of PSF Act, 1973, the President of Pakistan is pleased to appoint Dr. Shahid Mahmood Baig as Chairman, Pakistan Science Foundation (PSF), under Ministry of Science & Technology,* ***(MP-I) Scale*** *on contract basis for a period of three (03) years with immediate effect and until further orders."* [Emphasis added].

36. I do not disagree with the interpretation of the learned counsel for the Petitioner with regard to the reference to MP-I Scale in the Gazette Notification dated 28.12.2020. However, this notification was followed by another Notification which was gazetted on 01.01.2021 and which clearly states that the appointment of the Petitioner is on the terms and conditions of the MP Policy and is reproduced herein below:

> *"In pursuance of the Establishment Division's Notification No. 1/43/2019-E-6 dated 28th December, 2020 Dr. Shahid Mahmood Baig has assumed the charge for the post of Chairman (MP-1) Scale, Pakistan Science Foundation under administrative control of Ministry of Science & Technology, Islamabad on contract basis for a period of three (03) years w.e.f. December, 28th 2020* ***on the terms and conditions of the Management Position Scale Policy of Federal Government dated 22.06.2020****".* [Emphasis added].

37. The learned counsel argued that the Petitioner's appointment was vide Gazette Notification dated 28.12.2020 which as such is the one which is applicable to the appointment of the Petitioner as Chairman of PSF/Respondent No. 4 whereas the Gazette Notification dated 01.01.2021 is only for purposes of information to the public at large subsequent to the assumption of charge by the Petitioner.

38. Such position is untenable as both the Notifications were published in the Official Gazette and as such the appointment was already in the public knowledge by way of the first notification. The only change between the two is that the subsequent notification expressly made the terms and conditions of the MP Policy applicable to the appointment of the Petitioner as Chairman of PSF/Respondent No. 4.

39. Therefore, it appears that although the MP Policy may not apply to the post of Chairman of PSF/Respondent No. 4 *per se* but the appointing authority i.e., the President/Respondent No. 3 chose to apply its terms and

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conditions to the appointment of the Petitioner to the said post by way of the Gazette Notification dated 01.01.2021.

Advertisement not in consonance with the Gazette Notification dated 01.01.2021:

40. Next the learned counsel for the Petitioner argued that the Gazette Notification dated 01.01.2021 is not in consonance with the advertisement issued for the appointment of Chairman of PSF/Respondent No. 4 as the advertisement does not state that the position shall be governed by the terms and conditions of the MP Policy. It only refers to MP-I Scale in the box describing Pay and Allowances.

41. The learned counsel for PSF/Respondent No. 4 and the learned Additional Attorney General argued that reference to MP-I Scale is sufficient to infer that the MP Policy would apply to the advertised position in toto. In my view that is like saying that an employee whose pay is benchmarked to Basic Pay Scales ("BPS") shall be subjected to Civil Servants Act and its rules despite not being a civil servant.

42. Moreover, if the reference to MP-1 Scale was sufficient to apply the MP Policy to the position of the Chairman of PSF/Respondent No. 4 then there was no need for the Gazette Notification dated 01.01.2021 as the only difference between the first and the second notification is the addition of the words, *"on the terms and conditions of Management Position Scales Policy of Federal Government dated 22.06.2020"* that were not mentioned in the first Gazette Notification dated 28.12.2020.

Effect of not mentioning application of MP Policy in the Advertisement:

43. I shall now consider the effect of not mentioning the applicability of the terms and conditions of the MP Policy in the Advertisement for the post of Chairman of PSF/Respondent No. 4. The learned counsel for the Petitioner argued that in case the President/Respondent No. 3 changed his mind and wished to apply the MP Policy after the issuance of the initial Advertisement the post would have to be re-advertised. She relied upon *Usmat Batool vs. Bahauddin Zakariya University, Multan through*

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Registrar and 5 others, 2013 P L C (C.S.) 484 in which the criteria adopted by the respondent University in shortlisting the candidates was not the criteria that was advertised. Amongst other discrepancies it was noted that while no experience was required by way of the advertisement, certain marks were added for experienced candidates. The Honorable Lahore High Court reflected that an advertisement in relation to filling up of vacancies is a promise stating all the rules which the authority indicates to observe while considering giving employment to the most suitable candidates. It was held that any deviation from the advertisement to overcome any short fall or lacuna would have to be advertised in the same manner as the original advertisement. The judgment rendered in *Muhammad Intizar-ul-Hassan vs. University of Agriculture, Faisalabad*, 1997 PLC (C.S.) 855 was quoted whereby it was held that the purpose of making advertisement for recruitment is to give fair opportunity to all eligible candidates and on the other hand to the employer an opportunity to select the best candidate.

44. The learned counsel also cited the case of *Muhammad Shafeeq vs. Federal of Pakistan, through Secretary, Ministry of Petroleum and Natural Resources and 5 others,* 2023 PLC (C.S.) 205 wherein the term of appointment as given in the advertisement was subsequently enhanced from two to three years by way of notification. This Court held that an appointment for a period of more than the one explicitly mentioned in the advertisement is *ipso facto* unlawful. It was further observed that if the authority wanted to make the appointment for three years and not two, it should have issued a corrigendum. The reason given for such holding was that it cannot be presumed that the number of candidates for appointment for a period of two years would have been the same had it been known before applying that appointment would be for the period of three years.

45. In both the cases cited by the learned counsel for the Petitioner, the reason that appears to have prevailed over the Courts was that the deviation from the terms advertised was such that it impacted the ability of the eligible candidates to appropriately respond and consequently affected the number of applications received by the authority in response to the

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advertisement. Thus the chief objective of an advertisement could not be achieved i.e., to give fair opportunity to all eligible candidates and an opportunity to the employer to select the best candidate.

46. An advertisement is an invitation to an offer which eligible candidates can respond to by offering their services for appointment. Unless the invitation clearly sets out the criteria for evaluation of the offers/applications for appointment received in response and the employment terms which may be material for the decision to apply for the advertised post it cannot solicit suitable offers of services for appointment from eligible candidates and the authority may be deprived of the best candidate. It may be clarified that the terms which are necessary to be mentioned for the purpose of giving fair opportunity to all eligible candidates and an opportunity to the employer to select the best candidate may vary from case to case.

47. In the instant case, the issue is regarding the policy which was to govern the employment relationship in case of appointment. The learned counsel for the Petitioner has not shown how the Petitioner's application for the post of Chairman of PSF/Respondent No. 4 and/or its evaluation has been affected by the failure to mention in the advertisement that the MP Policy would govern the appointment or that his response would have been different especially considering he did not object after coming to know of the application of the MP Policy to his appointment (more on that below). In short, I am unable to see how any prejudice was caused to the appointment process in general or to the Petitioner in particular by the failure to mention the applicability of the MP Policy in clear and uncertain words in the advertisement for the post of Chairman of PSF/Respondent No. 4.

Petitioner's Acquiescence:

48. Even otherwise, it is relevant to note the conduct of the Petitioner upon coming to know that his appointment would be governed by the MP Policy. The Gazette Notification dated 01.01.2021 very clearly and

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explicitly provides that the Petitioner's appointment as Chairman of PSF/Respondent No. 4 was on the terms and conditions of the MP Policy yet the Petitioner never complained or raised any objection to the appointing authority in this regard nor approached this Court to challenge the application of the MP Policy on his appointment on the ground that it was not mentioned in the Advertisement. In fact the Petitioner accepted the appointment and performed his duties as such for two and a half years. Such conduct of the Petitioner, in my opinion, shows acquiescence.

49. Most importantly, the Petitioner has not even challenged the application of the MP Policy to his appointment as Chairman of PSF/Respondent No. 4 even in the instant Petition! There is no prayer in the instant petition seeking a declaration that the MP Policy does not apply to the Petitioner's appointment as Chairman, PSF/Respondent No. 4. In fact the Impugned Show Cause Notice and Impugned Order have been challenged for being in violation of the MP Policy amongst the various grounds taken in the memo of Petition. The letter dated 08-08-2023 written by PSF/Respondent No. 4 attached to the memo of petition has been relied upon by the Petitioner wherein it has been acknowledged that the Petitioner has been appointed under the MP Policy.

50. Therefore, I see no reason to spend any more time to consider whether the MP Policy was made applicable upon the Petitioner's appointment as Chairman, PSF/Respondent No. 4 when the Gazette Notification dated 01.01.2021 expressly makes its terms and conditions applicable upon the Petitioner's appointment as Chairman, PSF against which no Court of competent jurisdiction has issued any declaration nor has any declaration been sought by way of this petition.

Exceptions within the MP Policy:

51. Now I come to whether the terms of the MP Policy apply to the appointment of the Petitioner as Chairman of PSF/Respondent No. 4 in its entirety or not. The learned counsel for the Petitioner relied upon clause (xiii) of paragraph 6 of the MP Policy to argue that where the MP scales

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are used only as benchmarks for the purpose of determining the pay scales, the remaining terms and conditions of the MP Policy would not apply. In response both clauses 6(xii) and 6(xiii) of the MP Policy were referred to, which are reproduced herein below:

> 6(xii) *The policy shall only be applicable on statutory bodies, including regulatory authorities, in such cases, where recruitment rules or service regulations for such positions have not been prescribed under the respective statutes, Statuary authorities and other authorities/organizations shall also be allowed to adopt the instant policy, with approval of the authority competent to do so, while remaining within their statutory mandate.*
>
> *6(xiii) The MP Scales shall also be used as benchmark scales for determination of terms and conditions of* ***other positions*** *in statutory bodies like FPSC, FST, OGRA, NEPRA, etc. with approval of the respective authorities competent to approve terms and conditions of such posts.* ***In such cases, the other provisions of the MP Scale Policy, 2020 shall not apply.*** [Emphasis added].

52. Various different explanations were given by the learned counsel for clauses (xii) and (xiii) of paragraph 6 of the MP Policy which have been recorded herein above but the most plausible, in my opinion, was proffered by the learned Additional Attorney General. He read out the introductory paragraph of the MP Policy to highlight that the policy is for MP scale appointments as such the reference to "other positions" in clause (xiii) of paragraph 6 of the MP Policy could not possibly include MP-1 scale posts such as the Chairman of PSF/Respondent No. 4. Hence, according to him, the Petitioner does not fall within clause (xiii) of paragraph 6 of the MP Policy and cannot claim exemption from the remaining provisions of the MP Policy.

53. There is no need for this Court to decipher the scope of clauses (xii) and (xiii) of paragraph 6 of the MP Policy. The opening line of the said clause makes it abundantly clear that the provision applies only to such cases wherein the MP scale is being used as benchmark. However, the analysis herein above has already established that the MP scale is not being applied to the Petitioner's appointment as Chairman of PSF/Respondent No. 4 merely for determination of his pay scale but that its terms and conditions have been applied expressly to the Petitioner's appointment by

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the President/Respondent No. 3 vide Gazette Notification dated 01.01.2021. Therefore, by the Petitioner's own interpretation of clause (xiii) of paragraph 6 of the MP Policy, the same is not attracted to the facts of the instant case.

Authority of Additional Secretary (In charge) to issue the Impugned Show Cause Notice:

54. The learned counsel for the Petitioner argued that even otherwise the Impugned Show Cause Notice has been issued in contravention to the terms of the MP Policy itself. This brings me to the consideration of clause (ix) of paragraph 6 of the MP Policy, which provides as follows:

> *"If satisfied with the valid reasons (unsatisfactory performance or evidence of financial or moral turpitude against the incumbent),* ***the concerned Secretary****, if deems fit and after fulfilling the formalities of disciplinary proceedings, may initiate a summary seeking approval of the Prime Minister for pre-mature termination of contract through Establishment Division."* [Emphasis added].

Initially, the argument made on behalf of the Petitioner was that the said provision of the MP Policy envisaging approval by the Prime Minister is in conflict with the PSF Act as the Prime Minister has no power to approve the termination of the appointment of the Chairman of PSF/Respondent No. 4 under the PSF Act.

55. However, the learned counsel for PSF/Respondent No. 4 drew the Court's attention to the table contained in paragraph 5 of the MP Policy where under, *inter alia,* the modalities of termination of contract for MP-1 has been laid down according to which termination by notice prior to completion of tenure requires approval of the appointing authority which in this case is admittedly the President/Respondent No. 3. He explained that a cumulative reading of the aforementioned provisions of the MP Policy indicates that the process involves initiation of disciplinary proceedings by the concerned Secretary who may, if satisfied with valid reasons, initiate a summary seeking approval of the Prime Minister for premature termination of contract through Establishment Division who in turn shall render his/her advice to the President/Respondent No. 3 as per Rule 15-A of the Rules of Business and termination of contract prior to expiry would be carried out

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on approval of the President/Respondent No. 3 being the appointing authority. He pointed out that the Petitioner's employment has not been terminated though therefore there is no question of seeking the Prime Minister or the President/Respondent No. 3's approval at this point in time and that no specific approval is required from the President/Respondent No. 3 for conducting disciplinary proceedings which fall within the purview of the Secretary pursuant to clause (ix) of paragraph 6 of the MP Policy.

56. At this point, the learned counsel for the Petitioner objected to the Additional Secretary issuing the Impugned Show Cause Notice. On the other hand, the counsel for PSF/Respondent No. 4 relied upon the definition of 'Secretary' as given in the Rules of Business under Rule, 1973 which includes Additional Secretary where there is no Secretary. He apprised the Court that the position of Secretary was vacant, however, the same has now been filled vide Notification dated 18.08.2023. The learned counsel for the Petitioner conceded in her rebuttal that an Additional Secretary is included in the definition of Secretary, however, she referred to O.M. dated 09.04.2020 whereby it is directed that as a matter of principle decisions in certain issues which are of quasi-judicial nature cannot be taken by an officer not formally designated to exercise those powers. Therefore, according to the learned counsel for the Petitioner Impugned Show Cause Notice could not be issued by an Additional Secretary who only had look after charge of the position.

57. It has been explained in *Mrs. Kaneez Fatima vs. The Islamic Republic of Pakistan,* PLD 2023 Lahore 324 that an office memorandum is a special order of the Government released by a proper authority stating the government's policy or decision, which has the force of law. Disciplinary proceedings are considered quasi-judicial in nature. Therefore, the Impugned Show Cause Notice issued by the Additional Secretary merely on acting charge basis was in violation of the O.M. dated 09.04.2020 whereby it is directed that as a matter of principle, decisions of

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quasi-judicial nature cannot be taken by an officer not formally designated to exercise those powers.

Delegation of powers without express authority to delegate:

58. The Petitioner's counsel also challenged the exercise of authority under clause (ix) of paragraph 6 of the MP Policy. She submitted that notwithstanding the application of the MP Policy upon the appointment of the Petitioner to the position of Chairman of PSF/Respondent No. 4, the initiation and conduct of disciplinary proceedings by the Secretary against the Petitioner would necessarily involve a delegation of powers by the President/Respondent No. 3 which even if intended is not permissible in the absence of express authority to do under the PSF Act.

59. In this regard, we can seek guidance from the ruling in *Dr. Karim Shah vs. Chairman Search and Nomination Council/Health Minister, Government Khyber Pakhtunkhwa, Peshawar and others,* 2021 PLC (C.S.) 235 as the facts of the case are similar to the instant case in that the petitioner therein was also a contractual employee appointed to a statutory post by the Board of Directors who challenged in writ jurisdiction the initiation of disciplinary proceedings against him through impugned letters issued by the Chairperson of the Board of Directors. It was held that the Chairperson had no lawful authority to issue the impugned letters independently without approval of the Board of Directors which as such were set aside. In reaching its decision, the Peshawar High Court relied upon *Saleem Wazir Professor Community Medicine and 6 others vs. Government of Khyber Pakhtunkhwa through Secretary Health, Peshawar and 2 others,* 2019 PLC (C.S.) 224 wherein the relevant Act provided for the procedure of appointment and functions of the Dean but was completely silent about the procedure for removing him. Notwithstanding the foregoing, it was noted that the power to appoint and remove the Dean was with the Board of Directors who is not empowered to delegate its powers to any other authority for appointment and removal of the Dean.

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The Peshawar High Court observed that it is settled law that when power is conferred to a particular person then that person alone has to exercise the same and that in order to enable a person to delegate the powers and functions there must be an authority expressed or implied to delegate.

60. In the instant case, it is the President/Respondent No. 3 who has the power to appoint and remove the Chairman, PSF/Respondent No. 4 under the PSF Act and no power to delegate such authority has been expressly or impliedly conferred upon the President/Respondent No. 3 thereunder.

61. The learned counsel for PSF/Respondent No. 4 defended the application of the MP Policy by arguing that its application does not entail delegation by the President/Respondent No. 3 given that the President/Respondent No. 3, in any event, acts on the advice of the Prime Minister under Article 48 of the Constitution and in this regard referred to Rule 15-A of the Rules of Business where under the Prime Minister shall render his advice to the President where in terms of any provision of the Constitution or under any other statutory provision, *inter alia,* any function is to be performed by the President. He argued that the President/Respondent No. 3 after all cannot be expected to carry out every menial step involved in the process of recruitment or disciplinary proceedings in order to fulfill his statutory duty of appointing the Chairman of PSF/Respondent No. 4 or terminating such appointment. Therefore, he explained that once the disciplinary proceedings are carried out by the Secretary in accordance with the MP Policy, a summary will be moved to the Prime Minister who shall then advise the President/Respondent No. 3 accordingly but the ultimate decision would be his.

62. The learned counsel for the Petitioner, on the other hand, contended that the President has a Secretariat that assists the President in performing the Presidential duties and functions by carrying out the ancillary steps intrinsic thereto. In this regard, the learned counsel for the Petitioner referred to the representations that are decided by the President against orders of various Ombudsmen.

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63. However, I cannot help but notice that this line of argument is a double edged sword for the Petitioner as the process of appointment of the Petitioner was also carried out under the MP Policy on the advice of the Prime Minister. The advertisement was placed by the Ministry/Respondent No. 1, the scrutiny committee was formed as provided for in the MP Policy, who conducted the interviews, shortlisted names and moved a summary before the Prime Minister who in turn advised the President/Respondent No. 3 and the President/Respondent No. 3 while acting on such advice issued the Gazette Notification of the Petitioner's appointment as Chairman, PSF/Respondent No. 4. While the Petitioner did not object to the President/Respondent No. 3 acting on advice of the Prime Minister under the MP Policy in respect of the appointment process, he is objecting to the carrying out of disciplinary proceedings against him thereunder.

64. Be that as it may, let us see whether the appointment of the Chairman, PSF/Respondent No. 4 and initiation and conduct of disciplinary proceedings against him pursuant to the MP Policy can be justified under Article 48(1) of the Constitution.

Case law regarding whether the President is bound to act on advice of the Cabinet or the Prime Minister in exercise of powers, functions or duties conferred upon him by way of statute.

65. This Court in the case of *Senator Taj Haider v Government Of Pakistan, through Secretary, Finance Division,* 2018 CLC 1910 considered whether the impugned appointment of the Governor of the State Bank of Pakistan **("SBP")** by the President was illegal *inter alia* on account of being in violation of Article 48 of the Constitution as the President had not acted with the advice of the Cabinet or the Prime Minister. The Court opined that there is a distinction in the Constitutional functions and statutory powers of the President. It was held that the term *"exercise of his functions"* as used in Article 48(1) *ibid* is relatable to the functions that the President exercises under specific provisions of the Constitution as opposed to the powers conferred upon him by statute. The President is

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bound by the advice of the Cabinet or the Prime Minister under Article 48 of the Constitution where he performs his Constitutional functions. On the other hand, it was observed that when the President appoints the Governor of the SBP under the SBP Act it is not in exercise of his functions under the Constitution but as *persona designata*. The Court stressed on the fact that the appointment of the Governor of SBP was not a Constitutional function of the President rather in appointing the Governor the President was exercising his statutory power conferred and controlled by the SBP Act. Therefore, it was held that since the State Bank of Pakistan Act, 1956 **("SBP Act")** does not obligate the President to make the said appointment on the advice of the Cabinet or the Prime Minister the President was under no obligation to have sought the advice of the Cabinet or the Prime Minister before making the impugned appointment. In short the opinion expressed by this Court in *Senator Taj Haider (Supra)* appears to be that the President is *persona designata* when exercising statutory powers as opposed to Constitutional functions in which case he is not bound to take advice from the Cabinet or the Prime Minister as per Article 48(1) of the Constitution.

66. With reference to Rule 15-A of the Rules of Business the Court observed that it is only relevant when the President/Respondent No. 3 is performing functions as required under any provision of the Constitution. However, since the passage of the said judgment, Rule 15-A has been amended vide S.R.O. 623(I) /2021 dated 27-05-2021 whereby the words *"or under any other statutory provision"* have been added to sub-rule (1) of Rule 15-A of the Rules of Business vide S.R.O. 623(I) /2021 dated 27-05-2021. Notwithstanding the said addition, sub-rule (1) of Rule 15-A provides that the cases to which this sub-rule applies are enumerated in Schedule V-B. The said Schedule which contains the list of cases requiring orders of the President on the advice of the Prime Minister does not include appointment of the Chairman of PSF/Respondent No. 4 till date.

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67. It also bears mentioning that the Court in *Senator Taj Haider (Supra)* assessed the legislative intent evident from the fact that where the Legislature intended to give the power to the Federal Government to make appointments in SBP, it did so clearly through the provisions of the SBP Act. The power to appoint the Governor, SBP was however given to the President by way of amendments introduced in the SBP Act vide the State Bank of Pakistan (Amendment) Ordinance, 2002 as otherwise such power also lay with the Federal Government previously. Therefore, the Court maintained that holding that the powers to appoint and remove the Governor are also to be exercised by the Federal Government would render the said amendment an exercise in futility.

68. In so far as Article 48(1) of the Constitution is concerned, a contrary view was espoused by this Court in *Mushtaq Ahmad Sukhera vs. President of Pakistan,* PLD 2020 Islamabad 1 while considering whether or not the President was bound to act on advice from the Cabinet or the Prime Minister when appointing the Federal Tax Ombudsman under the Federal Tax Ombudsman Ordinance, 2000 **("FTO Ordinance")**. The Attorney General of Pakistan contended in the said case that the notification of appointment of the petitioner as the Federal Tax Ombudsman was void *ab initio* because the President had made the appointment upon the advice of the Prime Minister which was in violation of the legislative intent of vesting the power of appointment in the President hence the impugned withdrawal of the notification of appointment. The counter argument raised by the counsel for the petitioner in such case was that Article 48(1) of the Constitution applied to *all* actions of the President whether under the Constitution or any subordinate laws.

69. The Court held that in exercising the power of appointment of the Federal Tax Ombudsman under section 3(1) of the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 **("FTO Ordinance")** the President, has a constitutional duty to act on the advice of the Prime Minister, however, the power of hearing representations

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conferred under Section 32 of the FTO Ordinance or Section 14 of the Federal Ombudsmen Institutional Reforms Act, 2013 has to be exercised independently by the President and not on the advice of the Prime Minister because its nature is adjudicatory or quasi-judicial. Essentially, the Court differentiated between administrative functions to be performed by the President under statute such as appointments and adjudicatory or quasi-judicial powers. The Court also discussed when the powers and functions exercised by the President are as *persona designata*. The following is the relevant portion of the said judgment:

> *"16. In the light of the above discussion, it is obvious that the scheme of the Constitution is based on the foundation of parliamentary form of Government and democracy and thus it is the constitutional obligation of the President to act on the advice of the Prime Minister except when the Constitution has explicitly empowered the former to act in his discretion. Moreover, while interpreting a statutory provision the scheme of the Constitution is an important factor that has to be taken into consideration.* ***The Majlis-e-Shoora (Parliament) is empowered to confer powers, duties and functions on the President, either as President or in a different capacity. Likewise, the duties, powers and functions conferred through a statute can either be administrative e.g. making an appointment or adjudicatory or quasi-judicial in nature such as deciding representation under Article 32 of the Order of 1983 or review, revision or appeal. When the power, duty or function has been conferred under a statute on the President as President and it is not in the nature of adjudicatory or quasi judicial power then it is mandatory to act on the advice of the Prime Minister. On the other hand, when the power or function conferred under the statute on the President is not qua the President but in a different capacity such as Chancellor of a University, as was the case in the aforementioned judgments, then such power or function is to be exercised independently and not on the advice of the Prime Minister. In such an eventuality the President is vested with powers not as qua President but rather as persona designata.*** *In the case in hand, section 3(1) of the Ordinance of 2000 provides that 'there shall be a Federal Tax Ombudsman who shall be appointed by the President'. This function has been conferred on the President qua the President and not in a different capacity. It is an administrative function and does not involve exercising adjudicatory or quasi-judicial power. The President thus does not as persona designata, rather the power and function has been conferred on the President as President and not in a different capacity. On the touchstone of the principles and law enunciated by the august Supreme Court in the cases titled University of the Punjab vs. Ch. Sardar Ali, supra, Federation of Pakistan vs. Mohammad Tariq Pirzada, supra and Dr. Zahid Javed vs. Dr. Tahir Riaz Chaudhry, supra* ***the President, in exercising power under section 3(1) of the Ordinance of 2000, has a constitutional duty to act on the advice of the Prime Minister. However, though the power conferred under section 32 of the Ordinance of 2000 or section 14 of the Act of 2013 is conferred on the President qua the President but it has to be exercised independently and not on the advice***

> ***of the Prime Minister because its nature is adjudicatory or quasi-judicial.*** *The summary, dated 17-05-2019, submitted to the Prime Minister and proposing to withdraw the summary dated 30-08-2017, whereby advice was tendered to the President regarding the appointment of the Petitioner as Tax Ombudsman was based on gross misinterpretation of section 3(1) of the Ordinance of 2000 and the law enunciated by the august Supreme Court in the judgments which have been discussed above. This Court has been informed that only recently the Ombudsman under the Insurance Ordinance, 2000 was appointed by the President on the advice of the Prime Minister pursuant to a summary initiated by the Ministry of Law and Justice. The learned Attorney General, despite his able assistance, could not give a plausible explanation for the submission by the Ministry of Law and Justice of an altogether contradictory opinion in the case of the Petitioner's appointment. The opinion stated in the summary, dated 17-05-2019, by the Ministry of Law and Justice and the consequent impugned notification, dated 12- 06-2019, are declared as illegal, issued in violation of the Ordinance of 2000 read with the Act of 2013 and without lawful authority and jurisdiction."* [Emphasis added].

70. The takeaway from this case is that it is mandatory for the President to act on the advice of the Prime Minister even when exercising powers, duties or functions conferred under a statute subject however to two exceptions i.e. (a) where such power or function has been conferred by way of statute on the President as *persona designata* i.e. not qua the President but in a different capacity; and/or (b) where the power, duty or function is adjudicatory or quasi-judicial power and not administrative. As such, while the Court held that the President is bound to act on advice of the Cabinet or the Prime Minister in respect of the appointment of the Federal tax Ombudsman he is not so bound when deciding representations pursuant to Section 32 of the FTO Ordinance.

71. The fundamental difference between *Senator Taj Haider (Supra)* and *Mushtaq Ahmad Sukhera (Supra)* is that while the former concludes that appointment to an office by the President under a statute is not in exercise of his functions under the Constitution but as a *persona designata* the latter is of the opinion that the President is *persona designata* only when he has been conferred powers and functions by statute not as President but in some other capacity such as Chancellor of a University. As such the Court in *Senator Taj Haider (Supra*) held that the appointment of the Governor of the State Bank of Pakistan was lawful despite being without the advice of the Cabinet or the Prime Minister but the Court in *Mushtaq Ahmad Sukhera*

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(Supra) held that the appointment of the Federal Tax Ombudsman was not unlawful on account of being on the advice of the Prime Minister and that the withdrawal of the notification of such appointment for such reason was unlawful by holding that the President was bound to act on such advice in a Parliamentary form of Government.

Advice from Prime Minister regarding appointment of Chairman, PSF/Respondent No. 4:

72. If the holding of *Senator Taj Haider (Supra*) is followed in the instant case then the President/Respondent No. 3 was not bound to act on the advice under Article 48(1) of the Constitution pursuant to the MP Policy in respect of the appointment of the Petitioner to the post of Chairman, PSF/Respondent No. 4 and acting on such advice would defeat the legislative intent. But as per *Mushtaq Ahmad Sukhera (Supra)* it was mandatory for the President to act on the advice of the Prime Minister as far as appointment of the Chairman of PSF/Respondent No. 4 is concerned irrespective of the MP Policy therefore the appointment of the Petitioner made by the President under the MP Policy would not be unlawful.

73. The Court in *Mushtaq Ahmad Sukhera (Supra)* relied upon *Dr. Zahid Javed vs. Dr. Tahir Riaz Chaudhry,* PLD 2016 S.C. 637, wherein the Honorable Supreme Court held that the law as laid down in *Rana Aamer Raza Ashfaq v Dr. Minhaj Ahmad Khan,* 2012 SCMR 6 that the Chancellor in performance of his powers and duties was bound by the advice of the Chief Minister is not good law. In other words, the apex Court recognized that the Governor when performing functions and duties or exercising powers under a statute in any capacity other than that of the Governor is acting as *persona designata.* Therefore to that extent the question has been settled by the Supreme Court. The case in hand is different though as the President/Respondent No. 3 under the PSF Act is vested with power as President and not in any other capacity. Therefore, the question arises as to whether the President/Respondent No. 3 will be considered *persona designata* or not under the PSF Act given the

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conflicting opinions expressed in *Senator Taj Haider (Supra*) and *Mushtaq Ahmad Sukhera (Supra)*.

74. The Amicus Curiae appointed by the Supreme Court of Pakistan in *Dr. Zahid Javed (Supra)* had submitted that the office of the Governor is a Constitutional office and when the Constitution talks of the functions of the Governor it is talking of its Constitutional functions and not of functions outside the Constitution and that functions conferred upon the Governor outside the Constitution by a statute would inherently be the functions conferred upon him as a *persona designata*. Similarly in a dissenting note in *Dr. Zahid Javed (Supra)* it was discussed that functions conferred upon the Governor or more accurately the person who acts as Governor by any law other than the Constitution would be in the nature of functions conferred upon a *persona design*ata. It was explained that the latter phrase means that a person is considered as an individual rather than as a member of a class. The *persona designata* doctrine is that non-judicial functions can be conferred on judges in their personal capacity. Originally the idea was that a judge, in his personal capacity, could be appointed to an office involving the performance of administrative or executive functions including functions which were quasi-judicial in their nature.

75. The history of the doctrine of *persona designata* has been discussed in detail in an article authored by Kate Chetty titled "*Persona Designata, Punitive Purposes and the issue of Preventative Detention Orders: All roads lead to infringement of the separation of powers"* published in Melbourne University Law Review, Volume 40(1) [2016], wherein it was noted that the doctrine was discussed in various Australian judgments in the context of separation of powers with regard to non-judicial functions exercised by judges acting *persona designata* or in personal capacity. In Hilton v. Wells, (1985) 157 CLR 57 while considering the Telecommunications (Interception) Act, 1979 which conferred upon 'a Judge of the Federal Court of Australia' the power to issue warrants authorizing the interception of telecommunications on behalf of the

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executives, it was held that conferral of an administrative function upon the Federal Court would have been an infringement on the separation of powers given that it was not ancillary or incidental to a judicial function, however, since it was determined that individual judges were undertaking the administrative functions in a personal capacity the validity of such arrangement was confirmed. The concept is often times the subject of debate due to the potential infringement upon separation of powers but for our purposes what is relevant to note is that the concept of *persona designata* arises from judges performing non-judicial functions.

76. Given this historical background of the doctrine of *persona designata* I would tend to agree with the view expressed in *Senator Taj Haider (Supra)* that when the President is exercising functions conferred upon him by way of statute and not Constitutional functions he is acting as a *persona designata* and therefore not bound to take advice from the Cabinet or the Prime Minister pursuant to Article 48(1). Consequently, in my opinion, an appointment would be in violation of the legislative intent if it is made by the President on the advice of the Prime Minister pursuant to the MP Policy under the garb of Article 48(1) of the Constitution despite the fact that it is the President who is vested with the power of appointment by statute.

77. Without prejudice to the foregoing, I consider the Petitioner's appointment as Chairman, PSF/Respondent No. 4 a past and closed transaction by virtue of having attained finality (subject of course to termination in accordance with the PSF Act) and in any event the same is not under challenge before this Court. (Nevertheless this discussion will be relevant when I consider assignment of the acting charge of the said post vide the Impugned Order).

Advice from Prime Minister regarding disciplinary proceedings against the Chairman of PSF/Respondent No. 4:

78. Notwithstanding the differences between the judgments rendered by this Court in *Senator Taj Haider (Supra)* and *Mushtaq Ahmad Sukhera*

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(Supra) there is no doubt that it is not necessary for the President to exercise his statutory powers, duties or functions on the advice of the Prime Minister where such powers, duties or functions arise from a statute and are in respect of adjudicatory functions or quasi-judicial powers. The matter has in fact been settled by the apex Court in *Dr. Zahid Javed (Supra)* wherein it has been held that quasi-judicial powers can neither be delegated nor can be exercised on the recommendation of any other person or authority.

79. The concerned authority in disciplinary matters exercises adjudicatory and quasi-judicial powers[1]. Thus, following the said case law, it becomes clear that the President/Respondent No. 4 is not obligated to act on the advice of the Cabinet or the Prime Minister under Article 48(1) of the Constitution in respect of disciplinary proceedings carried out against persons appointed by him under the PSF Act. In fact, the President/Respondent No. 3 cannot even act on the recommendation of any other person or authority in respect of disciplinary proceedings. In stark contrast, the MP Policy not only empowers the Secretary to initiate and conduct disciplinary proceedings under clause (ix) of paragraph 6 but to do so without the direction or even approval of the President. As such, clause (ix) of paragraph 6 of the MP Policy usurps the power of the President under the guise of Article 48(1) of the Constitution, which is not justifiable in light of the apex Court ruling according to which the said article does not even come into play in respect of quasi-judicial proceedings.

80. On a side note, the learned counsel for the Petitioner had argued that even the Letter dated 16.06.2021 containing the terms and conditions of the Petitioner's appointment does not envisage disciplinary proceedings, who is a contractual employee liable to termination. However, this view has already been dispelled by the Supreme Court in *Syed Liaquat Shah v Vice-Chancellor, University of Engineering and Technology, Peshawar,* 2018 SCMR 1661, wherein it has been observed relieving a contractual

[1] *Habibullah Bhutto vs. Collector of Customs*, 2011 PLC (C.S.) 1094.

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employee *simpliciter* does not mean that any wrongdoings committed by him during contractual period cannot be inquired into. The Supreme Court held that only where the tenure of service of an employee is protected under law, it cannot be curtailed without first initiating and completing disciplinary proceedings against him. However, where wrongdoing comes to light pertaining to a contractual employee, who is governed by the principles of master and servant, he can be relieved of his service first and inquiry into his wrongdoing can commence thereafter. The point being that disciplinary proceedings can be held in case of wrongdoings against a contractual employee even in the absence of a specific statutory or contractual provision providing for the same albeit by the authority that has the power of appointment and removal which power can neither be delegated without an express provision conferring the power of delegation under the relevant statute nor can it be exercised on the recommendation of another.

Synopsis:

81. In a nutshell, I find the instant writ petition maintainable since the issue is regarding issuance of show cause notice to an incumbent of a statutory position allegedly without jurisdiction and in violation of statute. With regard to the applicability of the MP Policy, I find that although the MP Policy does not apply to the post of Chairman of PSF/Respondent No. 4 *per se*, the President/Respondent No. 3 chose to apply its terms and conditions to the appointment of the Petitioner to the post of Chairman of PSF/Respondent No. 4 by way of the Gazette Notification dated 01.01.2021. I am unable to see how any prejudice was caused to the appointment process in general or to the Petitioner in particular by the failure to mention the applicability of the terms and conditions of the MP Policy in clear and uncertain words in the advertisement for the post of Chairman of PSF/Respondent No. 4. Even otherwise, it is also relevant to note the conduct of the Petitioner upon coming to know that his appointment would be governed by the MP Policy. The Petitioner never complained or raised any objection to the appointing authority in this

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regard nor approached this Court to challenge the application of the terms and conditions of the MP Policy vide the Gazette Notification dated 01.01.2021. Most importantly, the Petitioner has not even challenged the same even in the instant Petition.

82. The exception as contained in clause (xiii) of paragraph 6 of the MP Policy does not apply to the case of the Petitioner given that according to the Petitioner's own interpretation it only pertains to cases which are benchmarked against MP-1 scale for determination of emoluments whereas the terms and conditions of the MP Policy have been applied to the appointment of the Petitioner expressly by way of Notification dated 01.01.2021 as opposed to benchmarking such appointment to MP scales. Having said that I find that the Impugned Show Cause Notice issued by Additional Secretary on acting charge basis was in violation of the O.M. dated 09.04.2020 whereby it is directed that as a matter of principle, decisions of quasi-judicial nature cannot be taken by an officer not formally designated to exercise those powers.

83. Last but certainly not least, the power to remove the Chairman of PSF/Respondent No. 4 cannot be delegated by the President/Respondent No. 3 without the power to delegate conferred upon him by the PSF Act. Therefore, the MP Policy is not sustainable under the PSF Act to the extent that it entails delegation of the President's quasi-judicial powers. The same is also not justifiable under Article 48(1) of the Constitution as according to *Dr. Zahid Javed (Supra)* the President/Respondent No. 3 is not obligated to act on the advice of the Cabinet or the Prime Minister in exercise of quasi-judicial powers conferred by statute or to even act on the recommendation of any other authority or person with regard thereto. Thus, the MP Policy to the extent that it empowers the Secretary to initiate and conduct disciplinary proceedings (which are considered quasi-judicial in nature) against the Petitioner could not be justified under Article 48(1) of the Constitution.

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84. For all the foregoing reasons, the Impugned Show Cause Notice dated 07.08.2023 is hereby **set aside** as being without jurisdiction and void *ab initio*.

85. Now I will turn to the Impugned Order:

86. In view of the foregoing, the very *raison d'etre* as given in the Impugned Order dated 07.08.2023 whereby the Petitioner was sent on forced leave i.e., pendency of disciplinary proceedings is no more available and as such the Impugned Order whereby the Petitioner has been sent on forced leave and acting charge has been assigned to the Joint Secretary (Org) is not sustainable.

87. Without prejudice to the above, it bears emphasis that the Ministry/Respondent No. 1, is in any event, not empowered to send the Petitioner on forced leave or to grant look after charge of the post of Chairman, PSF/Respondent No. 4. It is undisputed that the President/Respondent No. 3 has the exclusive power to appoint the Chairman, PSF/Respondent No. 4 and there is no power of delegation conferred upon the President/Respondent No. 3. It has already been concluded herein above that the power of appointment cannot be delegated by the President/Respondent No. 3 in the absence of such power having been conferred upon him vide the PSF Act.

88. The learned counsel for PSF/Respondent No. 4 relied upon clause (vi) of paragraph 6 of the MP Policy and tried to justify the same under Article 48(1) of the Constitution. The said provision of the MP Policy provides as follows:

> *"**Current charge or additional charge of the positions of MP Scales** may not be granted to any regular civil/ Government servants. However, **in cases of Heads of Autonomous bodies/** Semi-Autonomous bodies, Executive/Attached Department, Regulatory Authorities, Corporations, Commissions and Companies etc. **where the situation necessitates, the additional charge may only be granted** to a civil/ government servant **of equivalent grade** as given in Schedule-III **with approval of the appointing authority** for a maximum period of three (03) months only. No extra remuneration will be given to the officer holding the additional charge other than additional charge allowance as determined by Finance Division from time to time."*[Emphasis added]

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89. However, it has also been concluded herein above that since the President exercises the power of appointment of the Chairman, PSF under the PSF Act as *persona designata* he is not bound to act on the advice of the Cabinet or the Prime Minister under Article 48(1) of the Constitution. Therefore, the MP Policy cannot be applied in respect of appointments under the garb of Article 48(1) of the Constitution and the question of the Ministry/Respondent No. 1 assigning look after charge does not arise.

90. Even otherwise, Article 48(1) of the Constitution cannot be used to bypass the President/Respondent No. 3 completely and to act in his stead. Yet that is exactly what has been done vide the Impugned Order. There was no advice rendered to the President/Respondent No. 3 rather the matter was taken into the hands of the Ministry/Respondent No. 1 itself and an attempt was made to override the provisions of the PSF Act. The PSF Act requires the Chairman of PSF/Respondent No. 4 to be appointed from amongst eminent scientists of the country having requisite experience. Whereas, the acting charge of the post of Chairman of PSF/Respondent No. 4 has been assigned vide the Impugned Order to someone who is neither qualified nor of equivalent grade to the Petitioner, which is a gross violation of the PSF Act that can neither be justified under Article 48(1) of the Constitution nor even under the MP Policy.

91. In view of the foregoing, the Impugned Order dated 07.08.2023 is hereby **set aside** as being without jurisdiction and void *ab initio*. However, any acts done by the person acting in charge of the work of Chairman, PSF/Respondent No. 4 pursuant to the Impugned Order which are not in violation of O.M. dated 09.04.2021 are protected under the doctrine of *de facto* power[2].

92. Before parting with the Judgment I would like to express my appreciation of the assistance provided by the learned counsel for the parties as well as the learned Additional Attorney General.

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[2] *Mehram Ali v Federation of Pakistan,* PLD 1998 Supreme Court 1445 and *Malik Asad Ali v Federation of Pakistan,* PLD 1998 Supreme Court 161

93. The instant writ stands **allowed** in the above terms.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on this 21st day of September, 2023.

JUDGE

Approved for reporting.

Tanveer Ahmed/*

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