

**ROMULO A. YARCIA, PLAINTIFF-APPELLANT, VS. CITY OF BAGUIO,
REPRESENTED BY: THE CITY TREASURER, THE CITY AUDITOR, THE
CITY COUNCIL AND THE CITY MAYOR, DEFENDANTS-APPELLEES.**

G.R. No. L-27562. May 29, 1970

Ponente: TEEHANKEE, J.

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TEEHANKEE, J.:

Direct appeal on a question of law from the Court of First Instance of Baguio City. We uphold the trial court's dismissal of plaintiff-appellant's complaint for payment of back pay, since his removal from office during the period in question was valid-ly effected in pursuance of the Civil Service Commissioner's de-cision of dismissal, which was ordered to be immediately exe-cuted in the public interest, pending appeal. The Civil Service Board of Appeals' subsequent decision affirming the finding of guilt but modifying the penalty to-a six-months' pay fine in lieu of dismissal from the service entitled him to reinstatement but not to back pay.

Plaintiff, a market collector in the City Treasurer's Office of Baguio City was administratively charged for dishonesty. The Commissioner of Civil Service, taking note of the Baguio City treasurer's comment that "(plaintiff) in a previous case was found guilty of grave dereliction of duty with violation of regulations. This is the second case which involves money,"[1] ordered on February 19, 1963 plaintiff's dismissal from the service effective on his last day in office with pay" and further ordered "(I)n the in-terest of the public service . . . that this decision be executed imme-diately." The dismissal was effected at close of office hours of March 15, 1963.

Plaintiff timely appealed the Civil Service Commissioner's decision of dismissal to the Civil Service Board of Appeals. He filed a mandamus action in the Court of First Instance of Baguio, praying for his immediate reinstatement pending the appeal, but the said court dismissed the petition, and plaintiff took no further action.

Under date of October 1, 1965, the said Board rendered its decision extensively discussing the merits of plaintiff's appeal and "found nothing therein to justify (plaintiff's) exoneration from the charge preferred against him"[2] and "that the guilt of (plaintiff) has been amply established by the evidence of record." But "(C)onsidering, however; that the City Treasurer of Baguio who was more in a position to evaluate the facts of the case, re-commended the imposition upon (plaintiff) of a penalty short of dismissal from the service, coupled with the fact that the govern-ment did not incur any pecuniary loss, we believe that a fine equi-valent to (plaintiff's) six (6) months' pay will be commensurate with the offense committed," it disregarded the Secretary of Finance's recommendation for plaintiffs dismissal from the service[3] and modified the decision appealed from "in the sense, that in lieu of dismissal from the service, (plaintiff) is fined an amount equivalent to his six (6) months' pay, with warning that commission of the same or similar offense in the future will be dealt with more severe-ly." [4]

The board's decision was implemented on February 14, 1966, when plaintiff was reinstated in his position, and the City Treasurer ordered a 25% deduction from his monthly pay to cover the six-months fine.

Plaintiff, not content to let well enough alone, filed on Septem-ber 15, 1966, the present action of mandamus for payment of back pay from March 16, 1963 to February 13, 1966 at the rate of P180.00 per month, less the

six-months fine, and for damages and attorney's fees. After the parties agreed at the Pre-trial to submit the case for judgment on the pleadings, the trial court tersely dismissed the petition, "because aside from the fact that he did not render any service, he was not exonerated" and ordered plaintiff to pay the fine imposed upon him in the manner prescribed by the City Treasurer.

Plaintiff's lone assignment of error that the trial court should have held him entitled to back salaries from the time of his dismissal from the service up to his actual reinstatement is without merit.

1. The case of *Abellera vs. City of Baguio*[5] on which plaintiff pins his hopes in this appeal is not in point. In that case, Abellera, having been charged administratively of dishonesty and gross negligence was preventively suspended from his office as cashier in the office of the City Treasurer of Baguio. After the lapse of the period of preventive suspension, he was automatically reinstated to the service on May 24, 1960. On June 26, 1961, the Commissioner of Civil Service found him guilty as charged and considered him resigned "effective the date following his last day of duty with prejudice to re-instatement in positions involving money and/or property responsibility". Without any order of the Civil Service Commissioner directing in the public interest the immediate execution of the decision pending appeal, the City of Baguio prematurely dismissed Abellera from the service and appointed another person to replace him. After the Civil Service Board of Appeals on January 23, 1963 modified the Civil Service Commissioner's decision by reducing the penalty imposed on Abellera to two months suspension without pay, while affirming the Commissioner's decision in all other respects, the Court found that "clearly, Abellera's second suspension from office, from July 10, 1961 to November 10, 1963 was unjustified and the payment of the salaries for the said period is consequently proper." [6] The Court through Mr. Justice J. B. L. Reyes took care to point out that "(T)he rule on payment of back salaries during the period of suspension of a member of the civil service who is subsequently ordered reinstated, is already settled in this jurisdiction. Such payment of salaries corresponding to the period when an employee is not allowed to work may be decreed not only if he is found innocent of the charges which caused his suspension (Sec. 35, Rep. Act 2260), [7] but also when the suspension is unjustified."

2. The applicable doctrine where the employee has not been exonerated or found innocent of the charge and his suspension or removal from office pending appeal is lawful and not unjustified; as in the present case, is stated in *Villamor vs. Lacson*. [8] In that case Villamor and his co petitioners were found guilty of the administrative charge and required to tender their resignations within 72 hours from receipt of the Mayor's decision. [9] In Villamor's appeal to the Office of the President, the said office found him and his co-respondents guilty of the charge and affirmed the decision "with the modification that the suspension of over one year ... already suffered by respondents be considered sufficient punishment" and ordered their reinstatement. Resolving exactly the same question now raised by petitioner, the Court held that "(T)he fact that the Office of the President modified the decision from dismissal to a mere separation for one (1) year, five (5) months, and nine (9) days, did not bring the punishment within the purview of a preventive suspension which should be governed by Sec. 695 of the Revised Administrative Code. [10] The fallacy of petitioners' argument springs from assumption that the modified decision had converted the penalty to that of suspension. The modified decision connotes that although or resignation would be the proper penalty, the separation for the period until their reinstatement would be deemed sufficient. Said decision did not, in the least, insinuate that suspension should have been the penalty."

The Court added that "it will be noted also that the decision did not exonerate the petitioners. And if We take into account the fact that did not-work during the period for which they are now claiming can be no legal or equitable basis to order the payment of their salaries. The general proposition is that a public official is entitled to any compensation if he has not rendered any service. As you work, so shall you earn. And even if We consider the punishment as suspension, before a public official or employee is entitled to payment of salaries withheld, it

should be shown that the suspension was unjustified or that the employee was innocent of the charges preferred against him. (F. B. Reyes vs. J. Hernandez, 71 Phil. 397), which is not the case in the instant proceedings."

3. Here, the Civil Service Board of Appeals, in affirming the guilt of plaintiff but modifying the penalty of dismissal from the service to a fine equivalent to six (6) months' pay similarly connoted that although dismissal would be the proper penalty, it considered plaintiff's separation from work for the period covered of almost three years plus a six months fine as sufficient punishment. But the appeals board's modified decision did not exonerate the plaintiff nor did it affect the validity of his dismissal or separation from work pending appeal, as ordered by the Civil Service Commissioner. Such separation from work pending his appeal remained valid and effective until it was set aside and modified with the imposition of the lesser penalty, by the appeals board.

Parenthetically, the Civil Service Board of Appeals' tendency to modify the penalty of dismissal imposed by the Commissioner in dishonesty cases, with the imposition of a lesser and lenient penalty of suspension and/or fine notwithstanding the absence of any extenuating circumstances, cannot but have a demoralizing effect on the civil service. Dishonesty has always been and should remain anathema in the civil service. In the case at bar, the board inexplicably preferred the city treasurer's recommendation, for the imposition of a penalty short of dismissal notwithstanding plaintiffs having been found guilty of grave dereliction of duty in a prior case, over that of his superior, the Department head, for imposition of the capital administrative penalty of dismissal. It strikes us, too, that the circumstance that the government did not suffer any pecuniary loss, invoked by the board, did not mitigate plaintiff's offense, since the charge of which he was found guilty was mulcting the complainants by collecting from them unreceipted transfer fees of large cattle brought to Baguio City for butchering in the slaughterhouse when such fees were not actually collectible. The government thereby suffers a greater loss incapable of pecuniary estimation with the consequent undermining of the people's faith and confidence in their government and its civil servants.

4. As Justice Alejo Labrador succinctly stated for the Court in *Gonzales vs. Hernandez*,^[11] "(A) perusal of the decisions of this Court in cases similar to the case at bar, however, show that back salaries are ordered paid to an officer or an employee only if he is exonerated of the charge against him and his suspension or dismissal is found and declared to be illegal."

The principle was again reiterated by the Court in *Austria vs. Auditor General*,^[12] where the Court dismissed Austria's claim to back salaries, after the Civil Service Commissioner's decision demoting him from his former position as high school principal to classroom teacher with severe reprimand and warning was affirmed by the Civil Service Board of Appeals, in this wise: "(P)etitioner Austria was reinstated not because he was exonerated but because he was found guilty, and his reemployment or reinstatement to a lower position was the penalty for his guilt. Justice J. B. L. Reyes, again speaking for the Court, thus dismissed Austria's contention of being subjected to a double penalty: "But, then, Austria contends that if he is not paid his claim for back salaries he would, in effect, be punished twice: first, by his demotion; and second, by his suspension without pay. This argument is again untenable, because it erroneously assumes that he did not give ground for his suspension or that the ground existed only after the decision against him became final, and not that it had already existed When he committed the acts complained of against him by the four lady teachers."

5. Plaintiff, therefore, is not entitled to collect back salaries, since he was not exonerated of the charge against him and the modified decision of the appeals board merely considered his removal from office for the period in question plus a six months fine as sufficient punishment in lieu of dismissal as the proper penalty and allowed plaintiff's reinstatement. Far from being unjustified or illegal, plaintiff's dismissal from work during the period in question pursuant to the Civil Service Commissioner's decision which was ordered to be immediately executed in the public interest notwithstanding his appeal, was in accordance with and sanctioned by the Revised Service

Rules.[13]

The Court, in *Cabigao vs. Del Rosario*,^[14] speaking through Justice Dizon, explained the reason for the rule in "that, although the decision of the Commissioner of Civil Service adverse to the government employee under investigation is appealable to the Civil Service Board of Appeals, the Commissioner has discretion to enforce it and make it effective pending appeal, to protect public interest. However, the removal or the continued suspension of the employee effected through the execution of the appealed decision shall be considered as unjustified should said decision be reversed by the Civil Service Board of Appeals and, in such case, as provided for in. Section 35 of the Civil Service Act of 1959, the employee 'shall be restored to his position with full pay for the period of suspension,'" adding that "(O)bvious it should be to everyone that appellee's continuation in the service after having been found guilty of gross negligence in the performance of her official duties would have entailed grave risks for the state." This was reaffirmed in the case of *Trocio vs. Subido*,^[15] where the Court held that "it is primarily for the Commissioner to determine when public interest warrants the execution, pending appeal, of his decisions since that is not ministerial but discretionary on his part."

Plaintiff not having been exonerated, and his separation from work during the period covered having been lawfully effected and made a part of his penalty besides the six months fine as per the modified decision of the Civil Service Board of Appeals, his claim for back salaries for the period in question clearly has no basis in law or equity. If the civil service appeals board, aware as it was that plaintiff had been removed from office during the pendency of the appeal by virtue of the execution of the Commissioner's decision of dismissal had intended to over-generously grant him back salaries (notwithstanding its affirmation of his guilt and the validity of his removal and against the law's mandate that such back salaries may be awarded only where the employee is exonerated or his removal or suspension is illegal) and to reduce his penalty to a six months' fine to be deducted from such unearned back salaries, the board should have so expressly stated in its decision.

ACCORDINGLY, the decision appealed from is hereby affirmed. With costs against plaintiff-appellant in both instances.

Concepcion, C.J., Reyes, Dizon, Makalintal, Zaldivar, Fernando, and Villamor, JJ., concur.

Castro, J., on leave.

Barredo, J., dissents in a separate opinion.

[1] Rec. on Appeal, p. 17.

[2] Rec. on Appeal, p. 15.

[3] Idem. p. 13.

[4] Idem. p. 19.

[5] G.R. No. L-23957, March 18, 1967; 19 SCRA 600.

[6] To the same effect is *Bautista vs. Peralta*, G.R. No. L-21967, Sept. 29, 1966, 18 SCRA 223, where the employee's penalty of dismissal for dishonesty, effective as of the date of his preventive suspension, as imposed by the Commissioner, was reduced by the Civil Service Board of Appeals to "suspension for two months without pay, chargeable to his preventive suspension." See also *Tañada vs. Legaspi*, G.R. No. L-22537, Mar. 31, 1965, 13 SCRA 566, where employee's suspension and dismissal were declared illegal.

[7] "Sec. 35. Lifting of Preventive Suspension Pending Investigation. -- When the administrative case against the officer or employee under preventive suspension is not finally decided by the Commissioner of Civil Service

within the period of sixty (60) days after the date of suspension of the respondent, the respondent shall be reinstated in the service. If the respondent, officer or employee is exonerated, he shall be restored to his position with full pay for the period of suspension." Republic Act 2260.

[8] G.R. No. L-15549, Nov. 28, 1964, 12 SCRA 418; emphasis supplied.

[9] The administrative proceedings here were instituted under the Administrative Code and the Charter of Manila prior to the enactment of Republic Act 2260.

[10] Now superseded by Sec. 35 of R. A. 2260, quoted in fn. 7.

[11] G.R. No. L-15482, May 30, 1961.

[12] G.R. No. L-21918, Jan. 24, 1967; 19 SCRA 79.

[13] Rule XVIII, D. "Sec. 28. The Commissioner shall transmit to the head of the Department concerned his decision on the case within six months from date of receipt of the complete record of the case and the head of Department shall, within 10 days from receipt thereof, serve the respondent a copy of the decision. The Commissioner, if public interest so warrants, may order his decision executed pending appeal to the Civil Service Board of Appeals."

[14] G.R. No. L-18379, Oct. 31, 1962, 6 SCRA 578:

[15] G.R. No. L-23363, May 31, 1967; 20 SCRA 354; see also *Subido vs. Gopengco*, L-25618, March 28, 1969, 27 SCRA 455.

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DISSENTING OPINION

BARREDO, J.:

Verily, every government employee found after pro-per hearing to be dishonest in the performance of duty should get the full measure of punishment. With so many employees who ought to be dealt with escaping prosecution or even only the filing of charges, on account of political pressure, "tayo-tayo" considerations and other improper reasons, the government is lucky when once in a while somebody really gets caught, is prosecuted or investigated, found guilty and punished. Surely, this is not to say that just, because such, a guilty employee has to be punished, this Court should sanction the execution of penalties in a manner far beyond those fixed or imposed by the appropriate authority. Any penalty to be suffered by an erring employee must be one authorized by law and determined by the corresponding judicial or administrative body or officer. The execution of the corresponding decision cannot go beyond what is so determined. I hold these principles to be the imperatives of justice and the rule of law in every case, regardless of the nature of the offense or misconduct committed by a government employee. The fact that appellant was found guilty of dishonesty, instead of another kind of offense, does not justify deviation from these principles.

On these premises, it is my considered view that the decision of the majority in this case is not in accordance with law and unjust.

In brief, the situation confronting the Court in this case is the following: Appellant, a market collector of Baguio City, working directly under the City Treasurer, was charged with having collected an extra sum of P2.00 from each of two meat vendors, making it appear in the official receipts as if they were officially collected and payable to the government, when in fact, the money was for him, thereby profiting therefrom personally albeit without loss to the government. Found guilty by the City Treasurer and upon recommendation of the Secretary of Finance, the Commissioner of Civil Service ordered his dismissal from the service and further enjoined the immediate execution of his decision, "in the interest of the public service", so, he ceased working on March 15, 1963. On appeal to the Civil Service Board of Appeals, this body "found nothing" in the records "to justify respondent's (appellant's) exoneration from the charge proffered against him, but "considering, however, that the City Treasurer of Baguio who was more in a position to evaluate the facts of the case, recommended the imposition upon respondent-appellant of a penalty short of dismissal from the service, coupled with the fact that the government did not incur any pecuniary loss, We believe that a fine equivalent to respondent-appellant's six (6) months' pay will be commensurate with the offense committed." On the basis of this decision and because, as already stated, he had been out of the service by virtue of the "immediate dismissal" ordered by the Commissioner of Civil Service since March 15, 1963 to February 14, 1966, when he was reinstated, a period of two years and nine months, he demanded the payment of back-pay computed at the rate of P180.00 a month for the whole of said period minus the amount corresponding to the fine imposed upon him by the Civil Service Board of Appeals, or a net amount of around P5,400.00 and when refused, filed this action with additional prayer for moral and exemplary damages and costs.

The trial judge predicated his judgment against petitioner on the following concededly righteous postulations:

"Defendants contend that plaintiff is not entitled to collect back salaries because aside from the fact that he did not render any service he was not exonerated.

"The contention of the defendants is in order since it clearly appears that it is true. Furthermore, the demoralizing effect on the public service will be so tremendous if employees who have been suspended for cause will be allowed to collect back pay while not performing any service at all. It will be conducive to infraction of rules and regulations of the Civil Service sufficient to cause suspension but not dismissal. The Court will not give a premium to employees for their failure to do their duty or to be dishonest."

Comes now the majority and, obviously imbued with the same righteous considerations, holds:

"Parenthetically, the Civil Service Board of Appeals' tendency to modify the penalty of dismissal imposed by the Commissioner in dishonesty cases, with the imposition of a lesser and lenient penalty of suspension and/or fine notwithstanding the absence of any extenuating circumstances, cannot but have a demoralizing effect on the civil service. Dishonesty has always been and should remain anathema in the civil service. In the case at bar, the board inexplicably preferred the city treasurer's recommendation, for the imposition of a penalty short of dismissal notwithstanding plaintiff's having been found guilty of grave dereliction of duty in a prior case, over that of his superior, the Department head, for imposition of the capital administrative penalty of dismissal. It strikes us, too, that the circumstance that the government did not suffer any pecuniary loss, invoked by the board, did not mitigate plaintiff's offense, since the charge of which he was found guilty was mulcting the complainants by collecting from them unreceipted transfer fees of large cattle brought to Baguio City for butchering in the slaughter-house when such fees were not actually collectible. The government thereby suffers a greater loss incapable of pecuniary estimation with the consequent undermining of the people's faith and confidence in their government and its civil servants."

With all due deference to my senior brethren and their well grounded concern for our "people's faith and confidence in our government and its civil servants", and without yielding to anyone in requiring absolute honesty from all in the public service, I submit that the first point that bears emphasis is that this Court has no power to

read into the decision of the Civil Service Board of Appeals something that is not there. We are not called upon to review the said decision; nor is it within Our legal competence to do so, (Section 18 [b], Civil Service Act of 1959) much as there might be reason to do so because it is not in accord with Our sense of justice. Unfortunately, under the rule of law, as I conceive it, that decision must stand, right or wrong and whether We like it or not. There is no law authorizing Us to review decisions of the Civil Service Board of Appeals. Indeed, We are not being asked, to do so in this case. No amount of rationalization can take Us out of the stark reality that the punishment found by the Civil Service Board of Appeals to be commensurate with the offense committed by petitioner is fine equivalent to six months' pay, no more. For Us to sanction the execution of this decision in a manner which will make him, in effect, lose two-years-and-nine-months' -pay is, to say the least, manifestly unwarranted and baseless in law and justice.

The majority tries to draw aid and comfort from decided cases. Regretably, if We must be candid, the present case is unprecedented. The case of Villamor v. Lacson, 12 SCRA 418, which appears to bear the closest resemblance to it, is still authority for appellant rather than for appellee. It is true that in that case, Villamor was immediately considered resigned and was not allowed to serve, and he was denied backpay after the Office of the President expressly considered the period he was not in the service as sufficient penalty for the offense he was found guilty of. And this is where, I am afraid, the majority flaws. It is equat-ing the present case with that of Villamor when nowhere in the decision, of the Civil Service Board of Appeals may it be remotely inferred that the Board "connoted that although dismissal would be the proper penalty, it considered plaintiff's separation from work for the pe-riod covered of almost three years plus a six-months' fine as sufficient punishment." On the contrary, what the Board very explicitly held was simply this:

"From all the foregoing, we are morally persuaded that the guilt of respondent-appellant has been amply established by the evidence of record.

"Considering, however, that the City Treasurer of Baguio who was more in a position to evaluate the facts of the case, recommended the imposition upon respondent-appel-lant of a penalty short of dismissal from the service, coupled with the fact that the government did not in-cur any pecuniary loss, we believe that a fine equivalent to respondent-appellant's six(6) months' pay will be commensurate with the offense committed."

It is precisely because the Civil Service Board of Appeals was very specific and definite in opining and holding that it "believe(d) that a fine equivalent to six(6) months' pay will be commensurate with the offense committed - considering that the City Treasurer of Baguio who was more in a position to evaluate the facts of the case, recommend the imposition of a penalty short of dismissal from the service coupled with the fact that the government did not incur pecuniary loss", that I am vehement in insisting that there is no room whatsoever for the construction of its decision: Much less can We alter it by drawing therefrom an inference that is diametrically different from what is very emphatically stated therein in the most unequivocal way. Stated dif-ferently, the Board stated in unmistakable terms the reason for the lighter punishment it has provided, how can We add to these reasons in order only that We may justify Our decision which We believe to be more in con-sonance with the public interest?

The invocation of the principle of no-work-no-pay does not impress me in this instance, for the simple rea-son that in the decided cases wherein such principle was applied, the Court was dealing with preventive suspen-sions or dismissals cut short by immediate reinstatement on the ground that, according to the deciding authority the period covered by the proceedings and during which the employee concerned did not work was deemed sufficient pu-nishment. It was, therefore, proper to apply the principle in those cases; but as will be explained later, such application has no justification in this case. Any way, what is said in the Villamor case about "as you work, so shall you earn" is pure obiter dictum, since the Office of the President expressly ordered that the whole period

Villamor was out of the service was the penalty. Here, We have an entirely different situation. Here there was no preventive nor unjustified suspension. Neither did the Civil Service Board of Appeals consider the period appellant was not in the service as a proper penalty or part thereof. Not by any means is such an idea suggested in the Board's derision which I have read thoroughly and repeatedly. Frankly, I am at a loss how the majority can claim such an idea is "connoted" there-in. I submit that the more reasonable view is that treating, as We are treating, of a penalty no less, the failure of the Board to state expressly the idea suggested by the majority must be construed, if construction must be indulged in, in favor of the respondent. As far as I know, this is the rule of liberal construction We have always followed.

As to the cases of *Gonzales v. Hernandez* and *Austria v. Auditor General*, also relied upon by the majority, it only need be: mentioned that in the *Gonzales* case, the decision of the Civil Service Board of Appeals expressly provided that *Gonzales* should not be given back salaries whereas the case of *Austria* was one of preventive suspension, not immediate dismissal. The case of *Abellera v. City of Baguio* likewise cited, aside from being one of unauthorized preventive suspension will be further referred to anon. This is really the first case that has come to this Court where an "immediate dismissal" has been ordered by the Civil Service Commissioner and later the Civil Service Board of Appeals has imposed a much lighter penalty. In the case of *Tañada v. Legaspi*, *infra*, an "immediate dismissal" was also involved but as will be discussed later, there the respondent was exonerated on appeal.

As I see it, the issue We must resolve in the present case is this: When a government employee is immediately dismissed from the service by order of the Commissioner of Civil Service and on appeal to the Civil Service Board of Appeals, the latter body finds that while such employee is indeed guilty, the penalty commensurate with the offense committed is less than such dismissal, is the employee without any remedy for the damages suffered by him from the erroneous decision of the Commissioner of Civil Service that might have caused such employee and his family untold misery and woe? I grant that guilt must be punished, and more, dishonest employees in the public service must be booted out without unnecessary delay and without mercy. I do not question now the power of the Commissioner of Civil Service to order the immediate execution of his decision in administrative cases.[1] What I cannot accept, however, is that by the majority decision, We are rendering nugatory the power and jurisdiction of the Civil Service Board of Appeals to impose a penalty less than that imposed by the Civil Service Commissioner, and what is more, We are making an employee, guilty of dishonesty though he is, suffer a penalty definitely heavier and more harsh than that ordained by the authority that has the legal power to determine what the final penalty should be, which authority, happens not to be the Supreme Court. A single example will serve to illustrate my point. Supposing an employee is found guilty of an administrative offense and the Commissioner of Civil Service orders the immediate execution of the penalty imposed by him of six months suspension and after a year or so, the Civil Service Board of Appeals decides that the penalty should have been only one month fine or suspension, is the employee to be left to suffer the penalty of six months suspension by denying him his backpay for five months? In such a case, what good will it serve him to appeal and what legal worth would the decision of the Civil Service Board of Appeals have? To ask these questions is to see how plainly absurd the majority's position is. Withal, in the very case of *Abellera v. City of Baguio*, cited by the majority, our learned brother, Mr. Justice J.B.L. Reyes very aptly said, "Clearly, *Abellera's* second suspension from office, from July 10, 1961 to November 10, 1963, was unjustified and the payment of the salaries corresponding to said period is, consequently, proper. Otherwise, *Abellera* would in effect, suffer a suspension longer than that meted him by the Civil Service Board of Appeals. (Emphasis supplied) Notably, the *Abellera* case was also a case of dishonesty involving not only P4.00 but P8,750.48.

At this juncture, it is important to note that appellant has cited in his brief the decision of this Court in *Tañada v. Legaspi*, 13 SCRA 566, over the pen of our able colleague, Mr. Justice Zaldivar. Indeed, the facts of that case are

the ones almost parallel to the present one. Tañada, an assistant sanitary inspector was administratively charged with having confiscated four cans of salted fish from one Maria Llarinas, who claimed additionally that one of said confiscated cans was later being offered for sale by somebody at the instance of Tañada. At the same time, a criminal case of robbery, based on the same facts, was filed against him in court. Meanwhile, he was suspended. In due course, because he was convicted by the court in the criminal case, he was found guilty in the administrative case and the Commissioner of Civil Service ordered his dismissal from the service. On appeal, however, of the criminal case, the Court of Appeals absolved him. Nevertheless, the Commissioner of Civil Service, acting on a motion for reconsideration of Tañada, relented only slightly; instead of affirming the dismissal, he ordered that Tañada be considered resigned as of the date of his suspension. This decision was appealed to the Civil Service Board of Appeals, but the appeal was dismissed for having been made out of time. Tañada took the case to the Office of the President. Here he was exonerated and ordered reinstated. Upon these acts, this Court sentenced the City of Tacloban, Tañada's employer, to pay him back salaries for the full period he was out of the service.[2] Did it matter to this Court that the charge was robbery or malversation? No.

I am the first to realize that this case of Tañada deals with an exonerated and acquitted employee, whereas, in the case at bar, Yarcia was not exonerated; on the contrary, he was found guilty. My point, however, is that although he was not exonerated, the authority that has the final say as to what penalty should be meted him has ruled that he should pay only six months' salary as fine, because of reasons, expressly stated in its decision, related to the circumstances attending the commission of the offense which, according to the Board, were best known to the City Treasurer who refused to recommend dismissal. I hold that if an exoneration justifies complete restitution, there is no reason why the imposition of a lighter penalty by the reviewing authority, because of attending circumstances found by it to justify such penalty, should not have pro tanto beneficial effect for the employee. I must keep on saying, because this is the main element of legal baselessness and injustice that I find in the majority decision, the effect of Our decision is to make appeals to the Civil Service Board of Appeals, more often than not, nothing but an exercise in futility, as the common saying goes. It is too settled to, need citation of authorities that a construction which has this effect is not favored.

What I cannot understand is why the majority seems to consider immediate dismissal before final decision of the Civil Service Board of Appeals as being in the same plane with preventive suspension. To begin with, I do not believe it can be denied that juridically and conceptually, dismissal cannot be equated with suspension; it is well known that their respective consequences and implications are clearly different. Secondly, preventive suspension is not in legal contemplation a penalty; it is just an administrative device to insure the smooth and unobstructed course of the investigation of the employee and in order to remove him from any opportunity to tamper with the evidence or the witnesses or otherwise hamper the investigation. On the other hand, an immediate dismissal is a penalty, no more no less than a final dismissal, except for the possibility that it may be reversed. In the first case, therefore, the employee is not punished; in the second, he definitely is. Thirdly, with respect to preventive suspension, there is a specific statutory provision to the effect that in case of exoneration, the employee suspended is entitled to backpay. (Sec. 35, Civil Service Act of 1959) In other words, there is, at least, statutory basis for the existing jurisprudence, which I am not presently questioning to avoid confusion of discussion,[3] holding that in any case short of exoneration, the suspended employee has no right to backpay. Now, in the case of immediate dismissal, which after all, has no statutory but only reglamentary basis, as already noted earlier, there is no similar statutory provision. Are We authorized by any principle of construction to supply this legislative paucity? This is exactly what the majority is doing, and I disagree. They are trying to draw a parallel where the legislature has not deemed it wise to provide for it. That would be judicial legislation, and on top of it, We are making our own construction of our judicially created substantive rule. Considering again that We are here dealing with a punishment or penalty, I feel very strongly that fundamental principles of statutory

construction, if not of justice, should re-strain Us from such, a questionable venture.

The question may be asked, why should a rule be adopted in cases of preventive suspension different from that in cases of "immediate dismissal"? I believe that the reason is because, by its very nature and considering the reasons therefor, such a suspension may be lifted as soon as the need for it ceases, whereas there is hardly any such chance in the case of "immediate dismissal". So, if the employer does not take any step to have his suspension lifted, then he is estopped from claiming any salary during his suspension. And should such suspension be found by the authorities concerned as essential during the whole investigation, the employ-ee must suffer it just the same, because, by legislative fiat which has declared that he is entitled to backpay only if exonerated, this Court, has ruled, in effect, that such suspension retroactively becomes part of any penalty that may be imposed on him on appeal, even if this should be lighter than that provided in the original decision.[4] Moreover, under Section 35 of the Civil Service Act, a preventive suspension cannot last more than sixty(60) days, hence, the loss to the employee concerned is not really substantial. Parenthetically, must add that what I say in this separate opinion about "immediate dismissal" applies equally to punitive, as distinguished from preventive, suspension.

The majority opinion exudes a tone of distrust or at least, laments the alleged leniency or benignity, of the Civil Service Board of Appeals. This Board is composed of three members. Truth to tell, I would rather have confidence in a board of three than fully entrust the fate of government employees in the hands of one Civil Service Commissioner who can, as likely, abuse his powers founded, to be sure, not on the Service Law itself, but on regulations issued by himself.

I would like to point out that while the immediate implementation of the order of dismissal by the Civil Service Commissioner may be within his legal competence and could, therefore, have been legal before the decision of the Commission was modified, the modificatory decision of the Civil Service Board of Appeals removed completely the basis of such implementation and as a necessary legal consequence, the effects thereof must be set aside and repaired. This is to me the essence of justice and the rule of law.

Legal solutions in *pari materia* are not wanting. Section 2 of Rule 39 of the Rules of Court authorize for good reasons, the immediate execution of decisions of the Courts of First Instance during the pendency of an appeal, but then, evidently to avoid injustice, Section 5 of the same Rule provides: "When the judgment executed is reversed totally or partially on appeal, the trial court, on motion, after the case is remanded to it, may issue such orders of restitution as equity and justice may warrant under the circumstances." I am aware of no better principle than that underlying this provision that can be applied to the case at bar, for here, as in the case before Us, the order of immediate execution is concededly authorized when is-sued, but it is considered, in effect, as losing its legal basis after the executed decision is reversed or modified, hence the necessity of equitable restitution to the party prejudiced by the premature execution.

I, therefore, vote to reverse the judgment of the trial court so that appellant may be paid his back salaries during the period of his originally authorized dismissal which was subsequently deprived of legal basis, minus the fine which he has been sentenced to pay the government.

[1] The source of this power is not the Civil Service Act; it is derived from the Civil Service Rules purportedly implementing the Civil Service Law. (See Sec. 28 of the Rules)

[2] I note that the Court treated the case as if it were a case of preventive suspension. This is evident from the citation made in the decision.

[3] When the appropriate time comes, I might have occasion to examine this ruling more deeply; it is not involved here now.

[4] This is a construction of Sec. 35 of the Civil Service Law which expressly provides that in cases of preventive suspension, should the respondent be exonerated, he shall be reinstated and paid his salaries during the period of suspension. No similar provision, exists as to "immediate dismissal", per-chance because such a procedure is not part of the law itself but is merely a concoction of the Commissioner of Civil Service in the Rules promulgated by him purportedly to implement the law.

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