

LEON S. PIÑERO, JESUS SAMANIEGO, SILVESTRE ATANACIO, JOSE CABRERA, RUFO CRUZ, LEONARDO DEL ROSARIO, RIZALDO GRANADA, EPITACIO GUEVARRA, ESMAEL C. HERNANDEZ, SEGUNDINO MANIMBO, D...

G.R. No. L-22562. October 22, 1966

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

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The Government has interposed a direct appeal against the judgment of the Court of First Instance of Manila, in its Case No. 54611, ordering the Secretary of Finance, the Commissioner of Customs and the Customs Auditor to reinstate the private appellees to their respective positions in the Customs Patrol Service, with payment of their back salaries, and ousting those who replaced them.

Alleging that they were dismissed for lack of confidence, in violation of the law and the Constitution, appellees Leon Piñero, et al., instituted mandamus proceedings in the court below against their replacements, the Commissioner of Customs, the Secretary of Finance and the Customs Auditor, to compel reinstatement to their positions in the Customs Patrol Service, with back salaries.

There is virtually no controversy over the facts that gave rise to this proceeding. In his decision, the trial judge, Hon. Conrado M. Vazquez, summarized thus the stipulated facts in this case:

"The thirty-two petitioners, at the time of their dismissal, were employees occupying positions in various capacities in the Port Patrol Division of the Bureau of Customs. With the exception of petitioners Jose Guerrero, Eleuterio Medrano and Ismael Hernandez, they were holding their positions under permanent appointments. The petitioners have rendered services in the Bureau of Customs which ranged individually from two years to twenty-six years. They were all insured with the Government Service Insurance System. On various dates between the first week of December, 1962 up to the last week of January, 1963, the petitioners were ordered dismissed or separated from the Bureau of Customs by the respondent Acting Secretary of Finance and Acting Commissioner of Customs, based on the ground that said respondent had lost confidence in them. After their dismissal, the petitioners individually and collectively demanded in writing for their immediate reinstatement, but their demands were unheeded. Instead, the other respondents (except Rodrigo D. Perez, Jr. and the Auditor of the Bureau of Customs) were appointed in the positions previously held by the petitioners. On July 27, 1963, the petitioners filed this action before this Court."

The trial court held that under the Constitution (Article XII, section 4) as well as the Civil Service Law (Rep. Act No. 2260) the petitioners below (private respondents in this Court) could not be dismissed or removed from their positions without cause and due hearing even if their positions should be primarily confidential, as contended by the Customs and Finance authorities, because the Civil Service law at present protects not only those who belong

to the classified service but also those in the unclassified service, that include positions primarily confidential, policy determining or highly technical. It, therefore, rendered judgment ordering the reinstatement of petitioners with payment of back salaries and commanding those who replaced them in their respective positions to vacate and surrender the same to the claimants, since these replacements were "illegally appointed to positions which were not vacant".

The State then duly brought the case to this Court by direct appeal.

The principal issue posed is whether claimants may be dismissed without cause or hearing for mere lack of confidence, in view of the fact that the positions occupied by them in the Customs Patrol Service are "primarily confidential", having been so declared by Executive Order No. 397, series of 1941, and Executive Order No. 94, series of 1947.

Appellants buttress their claim upon the executive orders aforesaid. It is well to note, however, that while Executive Order No. 397, Series of 1941, declares that –

"the appointment, promotion, discipline and removal of the members of the Harbor Police be subject only to the discretion of the appointing authority"

Executive Order No. 94, Series of 1947, in its Section 53 and 54, merely provides:

"SEC. 53. There is hereby organized as "Customs Patrol Service" through the consolidation of the Secret Service Division and the Harbor Police Division, including the positions and personnel paid by the entity operating the arrastre service, to take direct charge of the enforcement of the laws and regulations within the customs premises and the port area.

"SEC. 54. The positions in the Customs Patrol Service are hereby declared primarily confidential and appointments thereto will be subject only to the discretion of the Secretary of Finance."

without, therefore, reiterating the former Executive Order (397) that (besides appointment) their discipline and removal would be, likewise, at the discretion of the Secretary of Finance. Appellants, however, maintain that the Executive Order (No. 397) supplements the deficiency in the latter one (No. 94, series of 1947), and that in not so holding the trial court committed error.

We do not find it necessary to resolve this particular issue, because of the more fundamental reason that, under Section 5 of the Civil Service Act of 1959 now in force, what determines ultimately whether an administrative position is primarily confidential, policy determining or highly technical, is the nature of the functions attached to the position. This clearly appears from the wording and history of section 5 of the 1959 Civil Service Act (R. A. 2260), which recites:

"SEC. 5. The Non-competitive Service. - The non-competitive or unclassified service shall be composed of positions expressly declared by law to be in the non-competitive or unclassified service or those which are policy determining, primarily confidential or highly technical in nature." (Emphasis supplied)

The Act's legislative history reveals that while Senate Bill No. 133 (that ultimately became Republic Act 2260) was being debated in the Senate, Section 5 originally provided as follows:

"SEC. 5. The Non-competitive Service. - The non-competitive or unclassified service shall be composed of positions expressly declared by law to be in the non-competitive or unclassified service or to be policy determining, primarily confidential, or highly technical in nature." (Emphasis supplied)

The change from the original wording of the bill (expressly declared by law to be policy determining, etc.) to that finally approved and enacted ("or which are policy determining, etc. in nature") came about because

of the observations of Senator Tañada, that as originally worded the proposed bill gave Congress power to declare by fiat of law a certain position as primarily confidential or policy determining, which should not be the case. The Senator urged that since the Constitution speaks of positions which are "primarily confidential, policy determining or highly technical in nature"[1], it is not within the power of Congress to declare what positions are primarily confidential or policy determining. "It is the nature alone of the position that determines whether it is policy determining or primarily confidential." Hence, the Senator further observed, the matter should be left to the "proper implementation of the laws, depending upon the nature of the position to be filled", and if the position is "highly confidential" then the President and the Civil Service Commissioner must implement the law.

To a question of Senator Tolentino, "But in positions that involved both confidential matters and matters which are routine, ... who is going to determine whether it is primarily confidential?" Senator Tañada replied:

“SENATOR TAÑADA: Well, at the first instance, it is the appointing power that determines that: the nature of the position. In case of conflict then it is the Court that determines whether the position is primarily confidential or not.

"I remember a case that has been decided by the Supreme Court involving the position of a district engineer in Baguio, and there, precisely, the nature of the position was in issue. It was the Supreme Court that passed upon the nature of the position, and held that the president could not transfer the district engineer in Baguio against his consent.[2]"

Senator Tañada, therefore, proposed an amendment to section 5 of the bill, deleting the words "to be" and inserting in lieu thereof the words "Positions which are by their nature" policy determining, etc., and deleting the last words "in nature". Subsequently, Senator Padilla presented an amendment to the Tañada amendment by adopting the very words of the Constitution, i.e., "those which are policy determining, primarily confidential and highly technical in nature". The Padilla amendment was adopted, and it was this last wording with which section 5 was passed and was enacted (Senate Journal, May 10, 1959, Vol. 11, No. 32, pp. 679-681).

It is plain that, at least since the enactment of the 1959 Civil Service Act (R. A. 2260), it is the nature of the position which finally determines whether a position is primarily confidential, policy determining or highly technical. Executive pronouncements can be no more than initial determinations that are not conclusive in case of conflict. And it must be so, or else it would then lie within the discretion of the Chief Executive to deny to any officer, by executive fiat, the protection of section 4, Article XII, of the Constitution.[3]

Now, the record is devoid of data as to the functions discharged by the members of the Port Patrol, other than they are part of the Customs police forces. But this fact does not by itself indicate that the position is primarily confidential, so as to dispense with security of tenure for the incumbents. In *De los Santos vs. Mallare*, 87 Phil. 289, this Court, in holding that the position of City Engineer of Baguio was not a primarily confidential one, reasoned as follows:

"Every appointment implies confidence, but much more than ordinary confidence is reposed in the occupant of a position that is primarily confidential. The latter phrase denotes not only confidence in the aptitude of the appointee for the duties of the office but primarily close intimacy which insures freedom of intercourse without embarrassment or freedom from misgivings of betrayals of personal trust or confidential matters of state" (Cas. cit. at p. 298).

As previously pointed out, there are no proven facts to show that there is any such close Intimacy and trust between the appointing power and the appellees as would support a finding that confidence was the primary reason for the existence of the positions held by them or for their appointment thereto. Certainly, it is extremely improbable that the service demands any such close trust and intimate relation between the appointing official

and, not one or two members alone but the entire Customs Patrol (Harbor Police) force, so that every member thereof can be said to hold "primarily confidential" posts.

We are thus compelled to conclude that the positions formerly held by appellees were not primarily confidential in nature, so as to make their terms of office co-terminal with the confidence reposed in them. The inevitable corollary is that respondents-appellees, Leon Piñero, et al., were not subject to dismissal or removal, except for cause specified by law and with due process (Civil Service Law, Republic Act 2260, section 32). Hence, the court below committed no error in holding that appellees could not be legally separated from the service for mere lack of confidence, the same not being one of the causes for removal mentioned in section 33 of the Civil Service Act.

Nor do we find tenable the contention of appellants that removal of petitioners is discretionary in the Secretary of Finance because it is so provided in Executive Order No. 397, Series of 1941, that supplements the subsequent Executive Order No. 94, Series of 1947, Section 53, the latter being silent on the manner of removing Customs Patrol (ex-Harbor Police) officers. The reason is not only that Executive Order No. 94, Series of 1947, was issued pursuant to the Reorganization Act of 1946 (Republic Act No. 51), specifically enacted for the organization of the Administrative services of the independent Republic, and, therefore, it necessarily superseded Executive Order No. 397, Series of 1941, that only envisaged the services under the Commonwealth, but also because the 1941 order appears predicated upon Section 671, paragraph 1, of the Administrative Code [4], and the latter section was among those expressly repealed by Section 45 of the Civil Service Law of 1959. Even assuming, therefore, that Executive Order No. 94, Series of 1947, is still in force, the discretionary removal of appellees is not authorized by it.

The appellants argue that respondents-appellees herein do not possess civil service eligibility appropriate for the positions they were holding. But this question was not invoked in petitioners' answer in the court below, and hence can not be raised for the first time on appeal. Besides, the parties expressly stipulated that appellees (with the exception of Jose Guerrero, Eleuterio Medrano and Ismael Hernandez) were issued permanent appointments, and the presumption of regularity applies to them. Even in the case of those holding provisional or probationary appointments (like the three above-named) the invalidity thereof can not be declared unless it is first shown that there were appropriate eligibles at the time they were appointed, and this requisite has not been established by evidence (Civil Service Rule VI, sections 13 and 14).

"SEC. 13. Whenever a vacancy occurs and the filling thereof is necessary in the interest of the service and in the findings of the Commissioner there is no appropriate eligible at the time of appointment, the appointing officer may, upon prior authorization of the Commissioner, Provincial or City Treasurer, as the case may be, issue a provisional appointment to a person who has not qualified in an appropriate examination but who otherwise meets the requirements for appointment to a regular position in the competitive or classified service.

"SEC. 14. A provisional appointment shall in no case extend beyond 30 days from receipt by the appointing officer of the certification of eligibles."

In view of the deficiencies of the record, and the failure in the answer to properly tender issue on these points, it is our opinion that the matter of eligibility should be threshed out in an appropriate proceeding, giving all parties ample opportunity to litigate their respective contentions.

Appellants, likewise, aver that appellees are in estoppel to claim dismissal without just cause and hearing, because they accepted appointment and assumed their positions under Executive Order No. 397, series of 1941, declaring their positions to be primarily confidential. But assuming that such declaration was constitutional and valid, the subsequent 1959 Civil Service Law determined the character of the appellees' tenure according to the nature of the position itself, and we fail to see how estoppel could operate to deprive appellees of the benefits accorded by this

subsequent statute, particularly when the law itself prohibits waiver of any right or rights accruing under the law to the civil service employee.

"SEC. 40. Waiver of Rights. - No public officer or employee acting for a public officer shall be permitted to require an applicant for employment or any employee to sign any paper or document whereby such applicant for employment waives any right or rights accruing to him under this law."

The final contentions are procedural. Petitioners Insist that the National Treasurer is an indispensable party to this action, since appellees claimed payment of back salaries; and that these proceedings are in fact a suit against the government, not maintainable without its consent.

We find these contentions of appellants untenable. The payment of appellees' back salaries is purely incidental to the main question relative to the legality of their ouster, and would be a mere consequence of a declaration that the same was illegal. It nowhere appears that the Insular Treasurer has objected to paying the back salaries of appellees herein in the event it should be declared by the courts that they were illegally dismissed; nor does it appear that such salaries are not, or have not been, included and appropriated in the yearly budgets enacted by the Legislature and approved by the President of the Philippines.

It was pointed out in *State Mineral Lease Commission vs. Lawrence*, 157 So. 897 (quoted with approval in *Ruiz, et al. vs. Cabahug, et al.*, 54 Off. Gaz., No. 2, pp.351, 354), that the cases wherein the rule of state immunity from suit has been applied and upheld are:

"xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx those which demanded a money judgment, and wherein the discharge of the judgment, if obtained, would require the appropriation or an expenditure therefrom, which being legislative in its character is a province exclusively of the political departments of the state. And in the less frequent number of cases where no money judgment is demanded, and the rule of immunity is still upheld, it will be found in them that the relief demanded would be, nevertheless, to require of the state or its political subdivision the affirmative performance of some asserted obligation, the nature of which, and the process of its discharge belong to the state in its political capacity."

None of these circumstances obtains in this case.

WHEREFORE, the appealed decision is hereby affirmed. Without costs.

Concepcion, C.J., Dizon. Regala, Makalintal, Bengzon, J. P., Zaldivar, Sanchez and Ruiz Castro, JJ., concur.
Barrera, J., on leave.

[1] Constitution, Article XII (Civil Service), Section 1. "A Civil Service embracing all branches and subdivisions of the Government shall be provided by law. Appointments in the Civil Service, except as to those which are policy-determining, primarily confidential or highly technical in nature, shall be made only according to merit and fitness, to be determined as far as practicable by competitive examination."

[2] Senator Tañada must have had in mind the case of *De los Santos vs. Mallare*, 87 Phil. 289.

[3] Section 4. No officer or employee in the Civil Service shall be removed or suspended except for cause as provided by law."

[4] Sec. 671, Adm. Code. "Persons embraced in unclassified service - x x x (1) Positions which may be declared by the President of the Philippines, upon recommendation of the Commissioner of Civil Service, as policy determining, primarily confidential, or highly technical in nature.

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