

**NELSON G. GOLENA, PETITIONER, VS. NATIONAL LABOR
RELATIONS COMMISSION (3RD DIVISION), OFFICE OF THE LABOR
ARBITER ANTONIO MACAM, JNJKONS ENTERPRISES AND MARIJANE
C. ISON, RESPO...**

Ponente: YBAÑEZ, J.

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YBAÑEZ, J.:

This is a Petition for Certiorari under Rule 65 of the Revised Rules of Court assailing the Resolution[1] issued by the National Labor Relations Commission, Third Division, dated 14 October 2011 denying the Petitioner's Motion for Reconsideration and affirming its earlier Resolution[2] dated 29 July 2011 and the Labor Arbiter's Decision[3] dated 20 September 2010 dismissing petitioner's Complaint for illegal dismissal.

ANTECEDENT FACTS

Public Respondent National Labor Relations Commission narrated the established facts as follows:

“We find the following facts:

Respondent JNJKONS Enterprises is a sole proprietorship engaged in the business of telecommunications and service provider. Complainant was its Operations Project Manager for the Outside Plant Department/Integrated Services Department. As such, he handled the overall technical operations of the enterprises including the scheduling of manpower, approval of request materials needed for the project, billing documentation, hiring of new technicians and handling and implementing specific projects. He was also entrusted with the custody, handling, care and protection of company properties.

Sometime December 2009, respondent received reports that a number of its employees were involved in the theft of company properties and equipment, particularly the burning and stealing of copper cable wires stored in the warehouse in Dasmariñas, Cavite. Complainant was one of these employees.

On March 15, 2010, respondent issued a Notice to Explain and Notice of Preventive Suspension to complainant. An administrative investigation ensued on March 19, 23 and 29, 2010. Witness Gabriel Cutay swore in his statement and during investigations that on the night of January 12, 2010, complainant came to the warehouse, told him he needed money as he had not received his salary and instructed him to burn and sell copper cable wires thereat; that when Cutay said he could not do it alone, complainant told him he would instruct his half-brother Reynald Go Ragasa, a former employee who resigned in December 2009 after the discovery of the theft incident, to assist him and to do the selling outside; that the following day, Ragasa

indeed came to the warehouse and burned the wires; and that Cutay went to complainant's house on January 15, 2010, and there complainant's wife handed P2,000.00. Cutay also testified that on February 21, 2010, complainant came again to the warehouse and had a drinking session with him and Bobby Escala. Complainant then told them not to trust Francis Ricafort, who was sleeping nearby, as he was a 'tao ng opisina'. Complainant then instructed Escala to be ready again because Nelson Sedon's group would come back to the warehouse to get, aside from the previous items already taken on February 5 and 12, 2010, the remaining equipment not included in the inventory made by Nuni Ragasa, wife of complainant's half-brother Ragasa.

In his written explanation and during the investigation, complainant denied the charges against him. He failed to appear at the scheduled investigation on March 23, 2010 and also did not present witnesses on March 29, 2010.

On March 31, 2010, respondent issued a Notice of Termination to complainant on the grounds of serious misconduct, dishonesty, loss of confidence and breach of willful trust.”[4]

On 5 April 2010, petitioner filed a complaint before Labor Arbiter Antonio R. Macam stating that there was no substantial basis for his dismissal and that a mere allegation is not sufficient to justify the dismissal of an employee. Likewise, he claims that his right to procedural due process was violated.[5]

Private respondents filed their Position Paper arguing that petitioner was afforded the required due process when he was terminated from the service on the ground that he was involved in the theft of company properties and caused the lost of trust and confidence reposed upon him by private respondent company, as evidence by the hand written statements of company employees Gabriel Cutay and Francis Ricafort.[6]

On 20 September 2010, Labor Arbiter Antonio R. Macam upheld the dismissal of petitioner to be valid on the basis of the statements of Cutay and Ricafort pointing to the participation of petitioner in the theft of the copper cable.[7]

Petitioner took an appeal therefrom to the public respondent NLRC which rendered a Resolution on 29 July 2011 dismissing the appeal for lack of merit.

Hence, the instant petition anchored on the lone assigned error purportedly committed by respondent NLRC, viz:

PUBLIC RESPONDENT GRAVELY ABUSED ITS DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN HOLDING THAT PETITIONER WAS VALIDLY DISMISSED AND WAS AFFORDED DUE PROCESS WHEN HE WAS TERMINATED FROM THE SERVICE.

The Issue

The core issue presented for Our resolution is whether or not petitioner was illegally dismissed.

Our Ruling

We rule in the negative.

There was substantial evidence supporting petitioner's dismissal.

Petitioner claims that there was no positive evidence proving that he was involved in the theft of company properties and that his denial should prevail over the allegation of witness Cutay.

We are not persuaded.

At the outset, it is worth noting that, for a petition for certiorari to be granted, it must be shown that the respondent court or agency committed grave abuse of discretion equivalent to lack or excess of jurisdiction and not mere errors of judgment, for certiorari is not a remedy for errors of judgment, which are correctible by appeal.[8] By grave abuse of discretion is meant such capricious and whimsical exercise of judgment equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It exercised arbitrarily or despotically by reason of passion or personal hostility. Such abuse must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[9]

After a review of the records at hand, we find that the NLRC did not gravely abuse its discretion when it affirmed the Labor Arbiter's finding that petitioner committed serious misconduct, dishonesty, loss of confidence and breach of willful trust.

The right of the employer to dismiss its erring employees is a measure of self-protection.[10] The employer cannot be compelled to maintain in its employ the undeserving, if not undesirable employees.[11]

As charged by respondent, petitioner was guilty of serious misconduct and loss of trust and confidence. Misconduct is defined as “the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment.”

For serious misconduct to justify dismissal under the law, “(a) it must be serious, (b) must relate to the performance of the employee's duties; and © must show that the employee has become unfit to continue working for the employer.”[12]

The act imputed against petitioner is grave or serious misconduct as it involved theft of company properties. Petitioner's position in respondent company as Operations Manager is a highly sensitive position which requires absolute trust and confidence, being the second man in command. He was mainly responsible for the day to day operations of the business and was entrusted with confidence on delicate matters and with the custody, handling in, care and protection of the company's properties.

Thus, the result of respondent company's investigation based on written statements of respondent's witnesses Gabriel Cutay and Francis Ricafort reveals of different incidents of theft of copper cable wires and other equipments stored in their Cavite warehouse were committed by several employees involving and/or masterminded by the petitioner. This was clearly elaborated by Labor Arbiter Antonio R. Macam in his decision, viz:

“On March 17, 2010, during the investigation of Ms. Nuni Ragasa, respondent's witnesses Mr. Gabriel Cutay and Francis Ricafort further confirmed their stories and made written statements of the different incidents of theft of copper cable wires and other equipments stored at the Cavite warehouse involving several employees including the herein complainant. Original copies of the written statement of Gabriel Cutay dated March 17, 2010 and Francis Ricafort dated March 17, 2010 are hereto attached as Exhibits “5” and “5-A” and Exhibits “6” and “6-A”, respectively.

On the same date, Renald Go Ragasa called Mr. Gabriel Cutay in his cellphone and was threatening him to

come back in the office otherwise “MAY PAGLALAGYAN SIYA”. Mr. Gabriel Cutay immediately reported the mater (sic) to the respondent and this prompted Mr. Cutay to change his cellphone number. Reynald Go Ragasa is the half-brother of complainant Nelson Go Golena and the husband of Nuni Ragasa. Reynald Go Ragasa was a former employee of respondent who was likewise involved in the theft of copper cable wires and other equipments of the respondent. He resigned last December 2009 after the discovery of the incidents of theft by the respondent.

As personally witnessed by Mr. Gabriel Cutay, on the night of January 12, 2010, operations manager Nelson Golena went to the warehouse in Dasmariñas, Cavite. Nelson Golena lives in Dasmariñas, Cavite a few minutes away from the warehouse.

Complainant (herein petitioner) upon arriving in the warehouse told Mr. Gabriel Cutay that he needed money and that he has not received his salary yet. Complainant immediately instructed Mr. Gabriel Cutay to burn and sell the copper cable wire thereat. The copper cable wire complainant wanted to be burned and sold is a 400 pairs copper cable wire with a length of 380 meters. Said copper cable wire is intended for Globe project and was delivered by Francis Ricafort at the Cavite warehouse.

Mr. Gabriel Cutay did not want to acced (sic) to his unlawful instruction and reasoned out that he cannot do it alone for it is very hard to burn copper cable wires and later sell it outside. Complainant then told Mr. Gabriel Cutay that he will instruct his half-brother Reynald Go Ragasa to go to the warehouse the next day to assist him in burning the said copper wire and that Reynald Go Ragasa will be the one to sell the same outside.

The next day, January 13, 2010, as told by complainant Nelson Golena, his half-brother Reynaldo Go Ragasa arrived at the Cavite warehouse and burned the said copper cable wire as per instructions of complainant. The half-brothers conspired to burn and sell the said copper cable wires.

On January 15, 2010, a number of respondent's equipments stored at the Cavite warehouse were stolen by several of respondent's employees, particularly the group of Nelson Sedon, an OSP technician occupying a supervisory position and Reynald Go Ragasa. (Please see written statement of Francis Ricafort annex “6”).

On February 21, 2010, complainant together with a companion went again at the barracks of the warehouse in Cavite. Complainant had a drinking spree with Mr. Gabriel Cutay and Bobby Escala, another employee of respondent. Francis Ricafort was also present and was sleeping nearby. Complainant initially was telling stories about sports and later on told Mr. Gabriel Cutay and Mr. Bobby Escala not to trust Mr. Francis Ricafort as he was a “TAO NG OPISINA”. Complainant then instructed Mr. Bobby Escala to be ready again because aside from the equipments already taken last February 5 and 12, 2010 by the group of Nelson Sedon and his half-brother Reynald Go Ragasa, the same group will come back at the warehouse to get the remaining equipments which were not included by Nuni Ragasa in her inventory. To reiterate, Nuni Ragasa is the wife of Reynald Ragasa and the sister-in-law of the complainant.” [13] (Underscoring supplied)

In view of the foregoing, it can be concluded that petitioner committed serious misconduct, dishonesty, loss of confidence and breach of willful trust because of his active participation in the theft of copper cable wires and other company properties in connivance with his half-brother and giving instructions to be ready for the next

heist. These are more than sufficient reasons to discontinue petitioner's employment in respondent company.

Moreover, as aptly stated by Labor Arbiter Macam, petitioner not only committed serious misconduct, he likewise breached the trust and confidence reposed upon him by the respondent company, to wit:

“We share the observations of the respondent that complainant's misconduct of committing theft of company property was quite serious considering that he was the operations manager and used and abused his position in committing the misconduct. Complainant, being the operations manager and second man in command, occupies a highly sensitive position which required absolute trust and confidence. He was mainly responsible for the day to day operations of the business and was entrusted with confidence on delicate matters and with the custody, handling or care and protection of the company's properties.

Not only did the complainant committed serious misconduct by stealing company properties, he likewise breached the trust and confidence reposed upon him by the respondent. His acts of stealing properties under his care and protection contravenes his duties and responsibilities as a operations manager, perforce, he is unfit to continue working for the respondent on the ground of loss of confidence and willful breach of trust and dishonesty.”[14] (underscoring supplied)

Anent the allegation of petitioner that his denial should prevail over the assertion of respondent witnesses' pointing to his acts of stealing the company's copper wire, the same deserves scant consideration. We agree with the ruling of the Labor Arbiter that denial cannot prevail over positive testimonies of a witness who has personal knowledge of the incident.[15] It is well settled that denial is weak as against the positive declarations of Gabriel Cutay who testified on affirmative matters and identified petitioner as the perpetrator of the theft of company properties.

Procedural due
process was observed
in the dismissal of
the petitioner

In the dismissal of employees, it has been consistently held that the twin requirements of notice and hearing are essential elements of due process. Article 277(b) of the Labor Code of the Philippines and Section 2, Rule XXIII, Book V of the Rules Implementing the Labor Code require the employer to furnish the employee with two written notices, to wit: (1) a written notice served on the employee specifying the ground or grounds of termination, and giving to said employee reasonable opportunity within which to explain his side; and (2) a written notice of termination served on the employee indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination. The first notice which may be considered as the proper charge, serves to apprise the employee of the particular acts or omissions for which his dismissal is sought. The second notice on the other hand seeks to inform the employee of the employer's decision to dismiss him.[16]

In this case, all the two requirements of notice and hearing were complied with by the respondent company.

As borne by the records, a notice to explain was served on him specifying the grounds for his termination and giving him time to explain his side. In fact series of scheduled investigations were conducted by the respondent on March 19, 23 and 29, 2010 where petitioner was duly notified and attended said hearings. In all the proceedings held, petitioner simply offered denials in his defense. He did not present witnesses or evidence to rebut the charges against him. Clearly, he was afforded due process.

Be that as it may, this Court agrees with the Labor Arbiter's finding that petitioner committed serious misconduct by stealing company properties since he could not refute respondent's witnesses Gabriel Cutay and Francis Ricafort statements against him as the author of theft of the company copper wires.

All told, nowhere in the petition is it shown that the NLRC committed such patent, gross and prejudicial errors of law or fact, or a capricious disregard of the settled law and jurisprudence, as to amount to a grave abuse of discretion or lack of jurisdiction on its part. Clearly, the arbiter's decision, as affirmed by the NLRC, is based on substantial evidence, and no infirmity or circumstance can be found in its factual findings as would detract from the conclusiveness thereof. Any error which may be attributed to respondent NLRC would at most be a mere error of judgment which cannot be a proper subject of the special civil action for certiorari.[17] Moreover, it must be stressed that factual findings of the NLRC affirming those of the Labor Arbiter, both bodies being deemed to have acquired expertise on matters within their jurisdictions, when sufficiently supported by evidence on record, are accorded respect if not finality and are considered binding.[18] As long as their decisions are devoid of any unfairness or arbitrariness in the process of their deduction from the evidence proffered by the parties, all that is left is for the Court to stamp its affirmation and declare its finality.[19]

WHEREFORE, the instant petition is DISMISSED for lack of merit.

SO ORDERED.

Dimaampao, (Chairperson), and Sadang, JJ., concur.

[1] Rollo, pp. 24-25

[2] Ibid., pp. 35-41

[3] Ibid., pp. 42-55

[4] Ibid., pp. 35-37

[5] Ibid., pp. 56-62

[6] Ibid., pp. 97-100

[7] Ibid., p. 55

[8] Tomas Claudio Memorial College, Inc. vs. Court of Appeals, G.R. No. 124262, October 12, 1999, 316 SCRA 502

[9] Cantoria vs. COMELEC, G.R. No. 162035, November 26, 2004, 444 SCRA 538

[10] PNB vs. Padaos, G.R. NOS. 180849 and 187143, November 16, 2011,

[11] Shoemart, Inc. et al., vs. NLRC, et al., G.R. No. 74229, August 11, 1989, 176 SCRA 385.

[12] NLMK-OLALIA-KMU vs. KEIHIN Phils., Corp., G.R. No. 171115, August 9, 2010.

[13] Ibid., pp. 46-48.

[14] Ibid., pp. 51-52

[15] People vs. Rolly Flora, G.R. No. 181594, August 28, 2008.

[16] Edpan vs. Philippine Pasay Chung Hua Academy, G.R. No. 172093, February 10, 2009.

[17] Restituto C. Palomado vs. NLRC, et al., G.R. No. 96520, June 28, 1996.

[18] Ignacio vs. Coca-Cola Bottlers Phils., G.R No. 144400, September 19, 2001.

[19] Ibid.

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