

ACTING MAYOR LUCERO CORTES AND RICARDO VALENTIN, PETITIONERS, VS. FERNANDICO BARTOLOME, RESPONDENT.

G.R. No. L-46629. September 11, 1980

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Originally appealed to this Tribunal on questions of law, petitioners were required to file a Petition for Review. Complying, petitioners now seek a review of the Decision of the Court of First Instance of Ilocos Norte, Branch VI, Laoag City, in Civil Case No. 6288-VI for Mandamus and Quo Warranto entitled Fernandico Bartolome vs. Actg. Mayor Lucero Cortes and Ricardo S. Valentin.

Summarized hereunder are the background facts:

Generoso S. Aquino was the duly elected Municipal Mayor of Piddig, Ilocos Norte, during the general elections of 1971 for a term of four years. Like all other elective officials, his term of office was due to expire on December 31, 1975, but by Letter of Instruction No. 356, all said officials were allowed to hold over until their successors were duly appointed or they themselves were sooner removed.

Presidential Decree No. 826, promulgated on November 14, 1975, provided among others for change of the name of "existing" Municipal Councils to "Sangguniang Bayan" and increase of the membership thereof to include barangay captains and representatives.

On December 31, 1975, or at the expiration of the term of elected officials who were voted upon in the 1971 elections, respondent Fernandico Bartolome, a civil service eligible, was appointed by then Mayor Generoso S. Aquino as Secretary of the "Sangguniang Bayan" of Piddig, Ilocos Norte, effective on January 1, 1976.[1] The appointment was approved by the Civil Service Commission on May 11, 1976. The appointment was silent on whether it was "permanent" or "temporary". Previous to his appointment to the "Sangguniang Bayan", respondent was the duly appointed Municipal Secretary of the Municipality of Piddig, Ilocos Norte, continuously since January 1, 1968. His original appointment was characterized as "non-competitive or unclassified, sec. 5, RA No. 2260".

It is undisputed that on January 1, 1976, there was no existing position of "Sangguniang Bayan" Secretary in the organizational set-up of the municipal Government of Piddig, Ilocos Norte. Neither was there any appropriation for the said position in the municipal budget for 1975-1976 although an appropriation for the position of Municipal Secretary was retained in said budget.

Respondent took his oath of office before Mayor Aquino on February 1, 1976.

In a special session held on February 23, 1976, the "Sangguniang Bayan" of Piddig passed Resolution No. 1 creating the position of "Sangguniang Bayan" Secretary as a "vital" position,[2] and Resolution No. 2 re-validating the appointment of respondent as such.[3]

On March 1, 1976, Mayor Aquino sent a letter to the Regional Director of the Department of Local Government and Community Development at San Fernando, La Union, requesting for the creation of the office of "Sangguniang Bayan" Secretary and for the Municipal Secretary who served under the defunct Municipal Council to be "Sang-guniang Bayan" Secretary.[4] The request was favorably endorsed by both the Municipal Development Officer and the Provincial Development Officer.[5] On March 22, 1976, the Regional Director authorized the filling up of the revalidated position of "Sangguniang Bayan" Secretary.[6]

Mayor Generoso S. Aquino was suspended from office on April 7, 1976 by order of the President of the Philippines pending investigation of administrative charges filed against him. Petitioner Lucero Cortes was designated Acting Mayor of Piddig,[7] and he assumed office on April 13, 1976.[8] On May 3, 1976, the Acting Mayor sent a letter to respondent terminating the latter's services for alleged deliberate refusal to cooperate with his administration.[9]

The Minutes of the regular session of the Sangguniang Bayan held on May 11, 1976 were signed by petitioner Ricardo S. Valentin as Acting Secretary of "Sangguniang Bayan." [10] A communication sent to the Regional Director of the Department of Social Welfare at San Fernando, La Union, was also signed by him as Municipal Secretary for the Acting Mayor.[11]

So it was that on May 31, 1976, respondent filed an action for Mandamus and Quo Warranto against Acting Mayor Lucero Cortes and Ricardo Valentin before the Court of First Instance of Ilocos Norte. Petitioner Cortes disclaimed having appointed or designated his co-petitioner Ricardo Valentin as Acting Secretary, and the latter confirmed said allegation.

After hearing on the merits, the trial Court, on December 8, 1976, rendered judgment in respondent's favor. The dispositive portion of its Decision reads:

"WHEREFORE, in view of the foregoing, judgment is hereby rendered:

- Declaring the termination or removal of the petitioner Fernandico Bartolome from his position as Sangguniang Bayan Secretary of Piddig, Ilocos Norte as illegal and null and void;
- Ordering the respondent Acting Mayor Lucero Cortes of Piddig, Ilocos Norte to reinstate petitioner to his position as Sangguniang Bayan Secretary;
- Ordering the said respondent Acting Mayor to authorize and approve the payment of the back salaries of said petitioner from May 7, 1976, the date of his termination or removal, to the date of his re-instatement;
- Ordering the said respondent Acting Mayor to pay the petitioner the sum of P700.00 by way of attorney's fees and to pay the costs of this suit."

Before us, petitioners have assigned the following errors to the trial Court:

- The lower Court gravely erred in holding that the respondent has a valid appointment.
- The lower Court gravely erred in holding that the position of the Secretary of Sangguniang Bayan which belongs to the noncompetitive or unclassified service enjoys the legal protection of law on security of tenure.
- The lower Court further gravely erred in holding that appointment in the classified and unclassified service shall be made only according to the merit and fitness to be determined as far as practicable by competitive examination.

The predominant issues for resolution are: (1) the validity of respondent's appointment as Secretary of the "Sangguniang Bayan" of Piddig, Ilocos Norte; and (2) the legality of his termination or removal.

For resolution of the first issue, the following telegram sent by the Secretary of Finance to all municipal

treasurers of Ilocos Norte[12] gives a clue as to the official intendment regarding the position of Secretary of the Municipal Council and Secretary of the "Sangguniang Bayan."

"AFTER CONSULTATION WITH DLGCD BY THIS DEPARTMENT BE INFORMED YOU MAY NOW PAY SALARIES AND AUTHORIZED REPRESENTATION ALLOWANCES OF SECRETARIES PROVINCIAL CITY AND MUNICIPAL BOARDS OR COUNCILS AT EXISTING RATES UP TO DECEMBER THIRTY FIRST NINETEEN SEVENTY FIVE STOP BEGINNING JANUARY FIRST DEFER PAYMENTS UNTIL ADVISED THAT THEY HAVE BEEN REAPPOINTED OR THEIR APPOINTMENTS REVALIDATED BY SANGGUNIAN BAYAN END."

Clearly inferable from the aforesaid directive is that the position of Secretary of the defunct Municipal Council and that of Secretary of the "Sangguniang Bayan" was intended to be a continuing position except that beginning January 1, 1976, a reappointment, and a revalidation of an incumbent's appointment by the "Sangguniang Bayan" was necessary. Those requisites were met in respect of respondent. He was appointed on December 31, 1975 by the then Municipal Mayor with competent authority to extend the same.[13] His re-appointment was revalidated by the "Sangguniang Bayan" on February 23, 1976.[14]

While it may be that at the time of appointment, no position of "Sangguniang Bayan" Secretary formally existed, whatever defect there may have been initially was cured subsequently by the creation of said position and the revalidation of respondent's appointment. That appointment was ultimately approved by the Civil Service Commission on May 11, 1976 thus giving it the stamp of finality. The appointment could have been revoked by the appointing power before it became complete[15] if it had been tainted with invalidity.

Coming now to the second issue, petitioners posit that inasmuch as the position of Secretary of the "Sangguniang Bayan" belongs to the noncareer service, formerly the non-competitive or unclassified service, and is primarily confidential, the appointment of respondent is coterminous with that of the appointing authority or subject to his pleasure so that he can be dismissed without cause.

It is a fact that respondent's appointment as "Sangguniang Bayan" Secretary is silent on whether it is permanent, temporary or provisional. His appointment as Municipal Council Secretary was characterized as non-competitive or unclassified pursuant to section 5(f) of Republic Act No. 2260, or the former Civil Service Law, which reads:

The following specific officers and employees shall be embraced in the non-competitive service:

"(f) x x x secretaries of provincial, city and muni-cipal boards or councils and secretaries of provincial governors, city mayors and municipal mayors;

"x x x"[16]

The non-competitive or unclassified service is 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.[17] Qualification in an appropriate examination is not required unless it is so directed by the appointing power and the taking thereof is required in the interest of the service.[18]

Under Presidential Decree No. 807, the new Civil Service Decree promulgated on October 6, 1975, positions in the civil service are now classified into career service and noncareer service.

"SEC. 5. The Career Service shall be characterized by (1) entrance based on merit and fit-ness to be determined as far as practicable by competitive exa-minations, or based on highly technical qualifications; (2) opportunity for advancement to higher career positions; and (3) security of tenure.

"X X X X"

"SEC. 6. The Non-Career Service shall be characterized by (1) entrance on bases other than those of the usual tests of merit and fitness utilized for the career service; and (2) tenure which is limited to a period specified by law, or which is coterminous with that of the appointing authority or subject to his pleasure, or which is limited to the duration of a particular project for which purpose employment was made.

"The Non-Career Service shall include:

"(1) Elective officials and their personal or confidential staff;

" x x x x x x x x x x "

There should be no question then that since re-spondent's position does not require the usual test of merit and fitness utilized for the career service, its classification is that of noncareer.

Can he then be dismissed without cause as petitioners allege? We opine in the negative. Firstly, it should be stressed that he does not belong to the personal or confidential staff of the Mayor because he is Secretary not of the Mayor but of the "Sangguniang Bayan" itself with the latter body having revalidated his appointment. "A municipal Secretary is the clerk of the municipal council (now 'Sangguniang Bayan') and performs such duties as the council shall by ordinance prescribe" (sec. 2212, Revised Administrative Code). Secondly, the fundamental protection against removal of civil service employees except for cause as provided by law is enshrined in the 1973 Constitution.[19] That provision contemplates the entire civil service. It is an essential and guaranteed feature of our civil service system. It was reproduced in the new Civil Service Decree (PD No. 807) with particular emphasis on due process.

"SEC. 36. Discipline: General Provisions. - (a) No officer or employee in the Civil Service shall be suspended or dismissed except for cause as provided by law and after due process.

" x x x x x x x x x x x x x x "

As an employee in the civil service and as a civil service eligible, respondent is entitled to the benefits, rights and privileges extended to those belonging to the service. He cannot be removed or dismissed without just cause, much less, without formal charge or prior notice.[20] The fact that his position falls under the unclassified service or the noncareer service does not remove him from the protective mantle of the Civil Service Law. Persons in the unclassified service are merely so designated because the nature of their work and qualifications are not subject to classification unlike those in the classified service.[21] As succinctly held in *Barbero vs. Paraguya*,[22] "employees in the civil service, regardless of their status, are entitled to security of tenure of office. They can not just be removed at the mere caprice of the appointing power." In fact, section 2178 of the Revised Administrative Code itself provides that appointive municipal officers hold office until resignation or removal according to law. That principle holds true in respondent's case even granting, as petitioners contend, that the appointment of a "Sangguniang Bayan" Secretary is coterminous with that of the Mayor as the appointing authority. It should be recalled that at the time respondent's services were terminated by the Acting Mayor, Mayor Aquino's term had not yet ended. He was merely suspended pending investigation of administrative charges against him.

Inescapable then is the conclusion that respondent was illegally dismissed when he was summarily terminated from the service for alleged and unsubstantiated un-cooperative, arrogant, and hostile attitude towards the Acting Mayor's administration. Petitioners' submission that respondent's appointment was temporary and could validly be terminated any time is not conclusively borne out by the records. Exhibit 1-A, purporting to show that respondent's appointment was "approved as temporary" by the Civil Service Commission, was not given any probative value by the trial Court for lack of proof of its authenticity. That is a finding of fact that we are not in a position to review on direct appeal.[23] Besides, it is well settled that the determination of the kind of

appointment to be extended lies in the official vested by law with the appointing power and not in the Civil Service Commission.[24] If respondent's appointment was intended to be temporary, it should have been expressly so stated. It can not be made to rest on inconclusive evidence specially because a temporary appointment divests the temporary appointee of the constitutional security of tenure against removal without cause even if he is a civil service eligible.[25]

Respondent has likewise rightfully put in issue the Acting Mayor's power of removal. Petitioner Acting Mayor maintains that he was clothed with the power to appoint which carried with it the power to remove. That contention is negated by Section 17, paragraph 3 of Republic Act No. 6388 (Election Code of 1971), the legislation then in force, reading:

X X X X

"In the event of temporary incapacity of a local officer to perform the duties of his office on account of effective absence, sickness, suspension or any other temporary incapacity, the officer next in rank shall perform the duties and exercise the power of the officer temporarily incapacitated except the power to appoint, suspend or dismiss employees; Provided, That in the event said temporary incapacity or disability exceeds six months, the official assuming said office shall exercise all the pre-rogatives and power appurtenant thereto."

X X X X

By analogy, the foregoing provision may be made to apply to petitioner Cortes who, while not a vice-Mayor acting as Mayor, was designated as Acting Mayor in view of the suspension of then incumbent Mayor Aquino pending investigation of the administrative charge filed against the latter. At the time petitioner Cortes sent the letter terminating the services of respondent, he had been Acting Mayor for less than a month. Thus, pursuant to the aforementioned provision, he was bereft of power to appoint, suspend or dismiss employees. For this added reason, therefore, his act of terminating respondent's services can not be sustained.

Lastly, petitioners assail the availment by respondent of the remedies of Mandamus and Quo Warranto on the grounds of lack of previous exhaustion of administrative remedies and absence of a clear legal right to the position. For reasons expounded above, the latter ground has been shown to be untenable. Respondent has a clear right to the office in question. He had every reason to believe that petitioner Valentin had usurped his position since the latter had signed Minutes of "Sangguniang Bayan" sessions as "Acting Sangguniang Bayan Secretary".[26] He had also addressed an official communication to the Department of Social Welfare as "Municipal Secretary." And while it may be that non-judicial remedies could have been available to respondent in that he could have appealed to the then Secretary of the Department of Local Government and Community Development and thereafter to the Civil Service Commission,[27] the principle of exhaustion of administrative remedies need not be adhered to when the question is purely legal as in this case, which involved not only an Acting Mayor's power to remove but also the validity of respondent's appointment. Neither does the doctrine apply when the act complained of was done without or in excess of jurisdiction, or when due process is clearly violated[28] as is typified in the case at bar where respondent had been dismissed without any administrative charges having been filed nor any investigation conducted.

In sum, we find the judgment sought to be reviewed to be in order except for the award of attorney's fees in respondent's favor inasmuch as petitioner Lucero Cortes was sued not in his personal capacity but in his official capacity, the illegal act complained of having been done in the performance of official functions.[29]

WHEREFORE, except as to the elimination of attorney's fees, the judgment of the trial Court is hereby affirmed.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Fernandez, Guerrero, and De Castro, JJ., concur.

- [1] Exhibit B or 5.
- [2] Exhibit C or 3.
- [3] Exhibit 3-B.
- [4] Exhibit D.
- [5] Exhibits E-1 and E-2.
- [6] Exhibit E-3.
- [7] Exhibit 8.
- [8] Exhibit 9.
- [9] Exhibits H, H-1 or 10, 10-A.
- [10] Exhibits I, I-1, I-2.
- [11] Exhibits J, J-1.
- [12] Exhibit G.
- [13] R. A. No. 5185.
- [14] Exhibit 3-B.
- [15] Mitra vs. Subido, 21 SCRA 127 (1967).
- [16] Sec. 5, Rep. Act No. 2260, as amended by Sec. 3, Rep. Act No. 6040.
- [17] Sec. 5, RA No. 2260.
- [18] 4th parag., Sec. 23, R.A. No. 2260; Sec. 2, Rule III, Revised Civil Service Rules.
- [19] Section 3, Article XII-B.
- [20] Balquidra vs. Court of First Instance of Capiz, 80 SCRA 123 (1977).
- [21] Garcia vs. Executive Secretary, 6 SCRA 1 (1962); Ramos vs. Romualdez, 32 SCRA 590 (1970).

[22] 58 SCRA 603 (1974).

- [23] Arguelles vs. Timbancaya, 72 SCRA 193 (1976); Dimasiado vs. Velasco, 71 SCRA 105 (1976).
- [24] Said Benzer Ali vs. Teehankee, 46 SCRA 728 (1972); Re: Appointment of Elvira C. Arcega, 89 SCRA 318 (1979).
- [25] Tolentino vs. de Jesus, 56 SCRA 167 (1974).
- [26] Exhibits I-1 and I-2.
- [27] section 37(b) PD 807.

[28] *Mendoza vs. Social Security Commission*, 44 SCRA 373 (1972); *Bagatsing vs. Ramirez*, 74 SCRA 306 (1976); *Reyes vs. Subido*, 66 SCRA 203 (1975).

[29] see *San Miguel Brewery, Inc. vs. Magno*, 21 SCRA 292 (1967).

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