

ALMINDA DACOCO, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION (NLRC-SECOND DIVISION) HONS. RAUL T. AQUINO, VICTORIANO R. CALAYCAY AND ANGELITA A. GACUTAN ARE THE COMMISSIO...

Ponente: DE GUIA-SALVADOR, J.

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DE GUIA-SALVADOR, J.:

Challenged in this petition for certiorari filed pursuant to Rule 65 of the Rules of Court are the 30 June 2005 Resolution of the National Labor Relations Commission (NLRC) in NLRC-NCR Case No. 00-01-12037-2003 affirming that of the Labor Arbiter which found the termination of petitioner's employment legal, and its 09 September 2005 Resolution denying petitioner's motion for reconsideration.

The Facts

Record shows that petitioner was hired by private respondent Colegio de San Juan de Letran (LETRAN) as a probationary faculty member in its College of Business Administration and Accountancy on 14 January 1999. An Employment Contract[1] was thereafter executed by the parties providing for the status and conditions of petitioner's employment.

On the ground that petitioner fell short of the standards required by the school, particularly with respect to attendance and punctuality,[2] LETRAN terminated her probationary employment at the end of school year 2001-2002, or on 31 March 2002.

On October 15, 2003, petitioner filed a complaint with the Labor Arbiter for illegal dismissal, alleging that she was already a regular employee of LETRAN at the time of her termination. Further contending that in the computation of her 13th month pay, LETRAN failed to include her earnings for her overload of 6 units every semester, she further sought the payment of differential 13th month pay for the years 1999-2002.

The Labor Arbiter dismissed petitioner's complaint for lack of merit. It ratiocinated that her completion of service for six consecutive semesters alone did not automatically make her a regular employee. It was necessary that the service she had rendered must also be satisfactory. Petitioner's propensity to violate the school rules on punctuality made her service during the probationary period unsatisfactory, and disqualified her from becoming a regular employee of LETRAN. It likewise denied petitioner's prayer for the payment of 13th month pay differential.

On appeal by petitioner, the NLRC affirmed the decision of the Labor Arbiter. It also denied petitioner's subsequent motion for reconsideration. Hence, the instant recourse.

The Issues

Was petitioner a regular employee at the time of her termination? And, should overload pay be included in the computation of her 13th month pay? These are the twin issues petitioner raises in urging the grant of this petition.

The Court's Ruling

We resolve the foregoing issues in the negative and dismiss the petition.

First issue: Petitioner is not a regular employee.

A probationary employee is one who, for a given period of time, is being observed and evaluated to determine whether or not he is qualified for permanent employment. A probationary appointment affords the employer an opportunity to observe the skill, competence and attitude of a probationer. Used to describe the period of employment, the word "probationary" implies the purpose of the term or period. While the employer observes the fitness, propriety and efficiency of a probationer to ascertain whether he is qualified for permanent employment, the probationer at the same time, seeks to prove to the employer that he has the qualifications to meet the reasonable standards for permanent employment.[3]

In private educational institutions, the acquisition of regular or permanent status by faculty members is determined not by the Labor Code,[4] but by the provisions of the Manual of Regulations for Private Schools which pertinently state:

"Section 92. Probationary Period.- Subject in all instances to compliance with the [DECS] and school requirements, the probationary period for academic personnel[5] shall not be more than... six (6) consecutive regular semesters of satisfactory service for those in the tertiary level...

Section 93. Regular or Permanent Status. Those who have served for probationary period shall be made regular or permanent. Full-time teachers who have satisfactorily completed their probationary period shall be considered regular or permanent."

The legal requisites, therefore, for a teacher in the tertiary level to acquire regular or permanent employment are:

- (1) the teacher is a full-time teacher;
- (2) the teacher must have rendered six (6) consecutive regular semesters of service; and
- (3) such service must have been satisfactory.

With regard to the third requisite, the employer is the one who is to set the standards and to determine whether or not the services of an employee are satisfactory. It has the exclusive prerogative to determine whether or not the said standards have been complied with. In fact, it may even shorten the probationary period if he is impressed with the employee's services.[6]

In *Cagayan Capitol College vs. NLRC*, [7] the lone issue resolved was whether the service of respondent teachers, Villegas and Pagapong, during the probationary period was satisfactory. It appears that on account of the complaints lodged by students against respondent Villegas in his third year of teaching which were duly investigated by the school's Dean and the fact that respondent Pagapong was found to have committed absences, their performance during the probationary period were categorized as unsatisfactory. In finding that respondent teachers were not illegally dismissed, the Highest Court recognized that petitioner's academic freedom to choose who should teach in the school encompasses the prerogative to provide the standards for its faculty members and to determine due compliance therewith. Thus:

"This prerogative of a school to provide standards for its teachers and to determine whether or not these standards have been met is in accordance with academic freedom and constitutional autonomy which give educational institution the right to choose who should teach."[8]

In the present case, there is no dispute on the presence of the first two elements. The parties are at loggerheads

only with respect to the third requisite- whether petitioner's service was satisfactory.

LETRAN claimed, and both the Labor Arbiter and the NLRC found that petitioner's frequent tardiness made her service unsatisfactory. We agree.

The Employment Contract[9] between petitioner and LETRAN provides for the period and conditions of petitioner's probationary employment, as well as the grounds and procedure for her termination, as follows:

"1. [Petitioner] shall undergo a probationary period of not more than six (6) consecutive semesters or three (3) continuous school years starting on the date of this contract; that the period of employment shall be from June 14, 1999 to June 13, 2002; ...her performance in the first year of probation shall determine the continuance of [her] services for the second year; and ...her performance on the second year becomes the basis for the retention of ...her services for the succeeding year.

x x x x x x x x

3. The [petitioner] during ...her probationary employment shall:a. Report promptly to work;

x x x x x x x x

f. Abide by and comply with the policies, rules and regulations, the Letran Faculty Manual orders and instructions ...

x x x x x x x x

5. It is clearly understood by [petitioner] that the provisions of paragraph 3 hereof shall be the standards by which ...her performance shall be rated and assessed during ...her probationary period to determine whether or not ...she qualifies to become regular employee of [LETRAN].

6. The probationary employment of [petitioner] may be terminated at anytime ...when she fails to keep up with the above-stated standards; provided that [petitioner] shall be given a notice of termination by [LETRAN] at least thirty (30) days before the effectivity of such termination."

As may be clearly gleaned from the foregoing, petitioner's qualification to become a regular employee depends on her performance during the probationary period which shall be rated and assessed based on the standards set forth in paragraph 3 of the contract. One such standard obliges her to "Report promptly to work."

Knowledge of this criterion failed to deter petitioner from habitually reporting late for her class on various school days of June 2000 to June 2001. Petitioner was initially informed on 15 February 2001[10] of her tardiness incurred for the month of January 2001. She received the first warning on 09 March 2001,[11] for absences and tardiness committed in year 2000 for the months of June, July, and September to December.[12] On 16 March 2001,[13] LETRAN reminded her, again with warning, that she incurred further tardiness for the month of February 2001. For exceeding the allowable frequency of tardiness for three consecutive months, petitioner was suspended for three days on 11 May 2001. Despite her suspension, petitioner still reported late for her class 8 times in the subsequent month of June.[14]

Concededly, the repeated warnings made by LETRAN did not deter petitioner from coming late to her classes. Just a month after service of her suspension, she committed the same infraction 8 times. By all account, petitioner's impenitent and recalcitrant attitude in reporting late for her classes despite warnings and her suspension suffice to render her service as unsatisfactory, thereby disqualifying her to become a regular employee.

The accolade she received from the Dean of the College of Business Administration and the Head of the Economics and Financial Area of LETRAN;[15] the good ratings her students[16] and superior[17] gave her in

the evaluation reports; and her promotion as Assistant Professor 2,[18] are simply not enough to make up for petitioner's propensity to violate the rules on punctuality.

An institution of higher learning has the prerogative to provide standards for its teachers and determine whether these standards have been met.[19] The educational institution's academic freedom encompasses the autonomy to choose who should teach and who should be retained in the rolls of professors and other academic personnel.[20] Thus, as an institution of higher learning, it is for LETRAN to determine whether petitioner's service conforms to its standards for her to qualify to become a regular employee. As it stands, LETRAN construed petitioner's habitual tardiness as constitutive of unsatisfactory service. There is no denying the fact that it is LETRAN's academic and constitutional freedom to do so and, absent grave abuse of discretion in the exercise thereof, we are not inclined to interfere in its exercise of said right. All told, petitioner's failure to controvert the charge of habitual tardiness only shows that the labor tribunals justly rejected her complaint for illegal dismissal.

Nevertheless, LETRAN failed to show that petitioner was furnished a notice of termination within 30 days prior to the effectivity of her termination[21] as called for in paragraph 6 of the Employment Contract, thus:

"The probationary employment of [petitioner] may be terminated at anytime ...when she fails to keep up with the above-stated standards; provided that [petitioner] shall be given a notice of termination by [LETRAN] at least thirty (30) days before the effectivity of such termination."

Academic freedom neither gives educational institutions absolute authority over its employees nor exempts it from the requirements of due process in its dealing with them. As institutions of higher learning, they have a special duty to provide a fitting example to their students in the proper observance of the law and the rudiments of fair play.[22] In this case, LETRAN's failure to give the notice of termination is a violation of petitioner's right to due process for which it must be held to account in damages.

As held in *Agabon vs. NLRC*,[23] an employer who dismisses an employee for just cause but does so without notice, is liable for nominal damages in the amount of P30,000.00.

Not intended to penalize the employer but to vindicate the employee's right to statutory due process which was violated by the employer,[24] the amount of P30,000.00 is reasonable indemnification for LETRAN's violation of petitioner's right to due process given the factual milieu of the case.

Second issue: Overload pay is not included in the computation of 13th month pay of teachers

Petitioner faults public respondent NLRC in not including her overload pay in the computation of her 13th month pay when the same forms part of her basic pay citing in support thereof the Explanatory Bulletin on the Inclusion of Teachers Overload Pay in 13th Month Determination[25] issued on 03 December 1993 by then Acting DOLE Secretary Crensenciano Trajano.

This contention is not accurate.

Overload means the load in excess of the normal load of private school teachers as prescribed by the school. Where a teacher is engaged to undertake actual additional teaching work after completing his regular teaching load, such additional work is generally referred to as overload. In short, overload assignments is an additional work in excess of the regular teaching load of a teacher.[26]

It has been opined[27] that overload work represents extra work for teachers and the compensation they receive therefor is extra pay. This is a wage supplement that can in no way be considered part of the regular or basic salary, even if the overload is taken on during the normal eight-hour workday. Thus, overload pay, like overtime and premium pay, are considered additional compensation excluded from the computation of 13th month pay.

The uncertainty on whether overload pay should be included in the computation of 13th month pay was settled by DOLE-DECS-CHED-TESDA Order No. 02, the Guidelines on Compensation for Overload and Overtime in Private Educational Institutions, issued on 7 February 1996. As found by the labor tribunals below, this Order superseded Sec. Trajano's Explanatory Bulletin, as it specifically provides that overload pay does not form part of the basic pay, thus:

“3....Overload partakes of the nature of temporary extra assignment and compensation therefore shall be considered as an overload honorarium if performed within the 8-hour period and does not form part of the regular or basic pay. Overload performed beyond the eight-hour daily work is overtime work.”[28]

Under the Revised Guidelines on the Implementation of 13th Month Pay, the amount of the basic salary is the sole factor which will determine the amount of the 13th month pay. The overload pay which does not form part of the basic salary of a teacher is not included in the computation of petitioner's 13th month pay.

All stated, the NLRC committed no grave abuse of discretion amounting to lack or excess of jurisdiction when it ruled that petitioner did not become a regular employee and that she is not entitled to a differential amount in her 13th month pay. However, petitioner is entitled to nominal damages of P30,000.00.

WHEREFORE, the assailed Resolutions of the NLRC are **AFFIRMED** with the **MODIFICATION** that LETRAN is ordered to pay petitioner nominal damages in the amount of Thirty Thousand Pesos (P30,000.00).

SO ORDERED.

Reyes, (Chairman) and Roxas, JJ., concur.

[1] Rollo, p. 108

[2] Id., p. 213.

[3] Escorpizo vs. University of Baguio, G.R. No. 121962, April 30, 1999.

[4] University of Santo Tomas vs. NLRC, G.R. No. 85519, February 15, 1990.

[5] Includes those engage in actual teaching service (Section 4.4 (c) of the Manual of Privatization for Private Schools).

[6] Cagayan Capitol College vs. NLRC, G.R. Nos. 90010-11, September 14, 1990.

[7] 189 SCRA 658 (1990).

[8] Citing Dizon, Law on Schools and Students, pages 289 to 292, citing Wilsons Institutional Academy.

[9] Rollo, p. 108

[10] Id., p. 111

[11] Id., p. 112

[12] The tardiness for January 2001 is the subject of the 15 February letter.

[13] Rollo, p. 113

[14] Id., p. 114

[15] Rollo, p. 138

[16] Id., pp. 79-83.

[17] Id., pp. 139-143.

[18] Id., p. 135.

[19] Lacuesta vs. Ateneo de Manila University, G.R. No. 152777, December 9, 2005.

[20] See University of the Philippines vs. Civil Service Commission, G.R. No. 132860, April 3, 2001.

[21] In LETRAN's Comment, it averred that petitioner's probationary employment was terminated at the end of school year 2001-2002 because she demonstrated certain behavioral problems particularly with regard to attendance and punctuality (Rollo, pp. 212-213).

[22] Colegio del Sto. Nino vs. NLRC, G.R. No. 96301, May 28, 1991.

[23] G.R. No. 158693, 17 November 2004. Iterated in Central Luzon Corporation of Seventh Day Adventist Church, Inc., vs. court of Appeals, G.R. No. 161976, August 12, 2005.

[24] Id.

[25] It reads:

"In light of the foregoing discussions, it is the position of [DOLE] that all basic salary/wages representing payments earned for actual work performed during or within the eight hours in a day including payments for overload work within eight hours, form part of the basic wage and therefore are to be included in the computation of 13th month pay mandated by PD 851."

[26] Explanatory Bulletin on the Inclusion of Teachers Overload Pay in 13th Month Determination.

[27] Ulpiano Sarmiento, Manual of Regulations for Private Schools, Annotated, 1995 ed., p.408.

[28] Emphasis supplied.

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