

VICENTA OLIVEROS-TORRE, ASSISTED BY HER HUSBAND, FEDERICO TORRE, PETITIONERS, VS. FLORES BAYOT, ASSISTANT EXECUTIVE SECRETARY; DR. AMADEO H. CRUZ, DECEASED, SUBSTITUTED BY DR. C...

G.R. No. L-34433. July 31, 1974

Ponente: MAKASIAR, J.

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MAKASIAR, J.:

In this petition filed on December 11, 1971, for certiorari, mandamus and quo warranto with preliminary mandatory injunction, petitioner Vicenta Oliveros-Torre challenges the right of respondent Virginia O. Barros to be promoted to and occupy the position of Chief Drug Inspector of the Food and Drug Administration, claiming that she is better qualified and next in rank.

After the parties submitted their respective memoranda, reply and comments, this case was deemed submitted for decision on June 13, 1973 (p. 198, rec.)

In a manifestation dated December 27, 1973 and filed on January 4, 1974, respondent Virginia O. Barros, through counsel, stated that the contested position of Chief Drug Inspector no longer appears in Presidential Decree No. 233 (current budget), attaching thereto a certification to said effect issued by the Acting Chief of the Financial and Management Service of the Department of Health dated December 3, 1973, which certification however adds that the position of Head Drug Inspector appears under Item No. 11, page 507 of Presidential Decree No. 233 (pp. 227-228, rec.)

On January 15, 1974, the petitioner filed a counter-manifestation stating that while the contested position is designated in the current budget as Head Drug Inspector, it is still known as Chief Drug Inspector in the payroll of the Food and Drug Administration; that the term "Chief Drug Inspector" may be classified as "Head Drug Inspector", which is "the same dog with the not-so-different collar"; that the slight change of designation does not render this case academic; and that Administrator L.M. Pesigan of the Food and Drug Administration informed petitioner's counsel in a letter dated January 9, 1974 that "under the present budget per Presidential Decree No. 233, the position of Chief Drug Inspector has been designated as Head Drug Inspector, with the same duties and job description as the original position title", but added that the "present payroll however, does not reflect the new position title as yet". (pp. 231-233, rec.)

In her subsequent manifestation dated May 3, 1974 and filed on May 14, 1974, respondent Virginia O. Barros through counsel, stated that on July 1, 1973, she was appointed Supervising Food and Drug Inspector in the Office of the Chief of Inspection and Licensing Division, Food and Drug Administration and assumed the duties of the same on said date; and that said new position is different from the contested position of Head Drug Inspector in the current budget which was known as Chief Drug Inspector in the old budget (pp.236-238, rec.)

Because of the aforesaid manifestation of respondent Virginia O. Barros, in Our resolution dated May 22, 1974, We required the parties to comment on the aforesaid last manifestation of respondent Virginia O. Barros (p. 240, rec.)

In her counter-manifestation dated May 17, 1974 and filed on May 21, 1974, petitioner Vicenta Oliveros-Torre, through counsel, stated that she learned that she was recently promoted to Head Drug Inspector range 55, Food and Drug Administration (re-appointment); that she does not know anything about the appointment of respondent Barros as Supervising Drug Inspector; and that the position of Head Drug Inspector in the new budget seems to be the equivalent of the Chief Drug Inspector in the old budget (p. 241, rec.).

In her comment dated and filed on June 6, 1974, petitioner Vicenta Oliveros-Torre, through counsel, admitted that respondent Barros was appointed to and assumed on July 1, 1974 the duties of Supervising Food and Drug Inspector in the current budget, which is different from the disputed position; and stated that she herself (petitioner) was appointed to and assumed on July 1, 1974 the duties of the position designated in the current budget as Head Drug Inspector, which has the same functions and duties as those of the contested position and that in effect she (petitioner) was restored to the contested position as Chief Drug Inspector; but she insists that the issue raised in the petition should be resolved because if it is resolved in favor of the petitioner, she would be entitled to back salaries from April 16, 1970 when she was required to vacate the contested position until July 1, 1973, when she assumed the new position of Head Drug Inspector in the current budget (pp. 245-246, rec.).

Finally, Administrator L.M. Pesigan of the Food and Drug Administration stated in her comment dated May 30, 1974 and filed on June 7, 1974 that "a decision on this case is necessary to clarify whether the recommendation of the chief of office should be respected by the appointing official or whether politics can supersede the prerogative of the head of office in the selection of the personnel for that office." (p. 248, rec.).

The qualifications for said position are: (1) Bachelor of Science in Pharmacy, (2) Pharmacy eligibility under R.A. No. 1080, and (3) Five year experience in drug inspection work, four years of which have been in supervisory capacity. (Decision of the Office of the President, Annex "C", pp. 24, 31, rec.).

Both contestants more than meet the minimum educational and civil service eligibility requirements. Both petitioner Torre and respondent Barros hold the degree of Bachelor of Science in Pharmacy; but respondent Barros possesses in addition the degree of Master of Science in Public Health. (Ibid., pp. 25, 32, rec.; 3rd Indorsement, Protest case No. 8233, Comment, Annex "A", p. 95, rec.). Torre passed in July, 1936 the pharmacy board examinations as well as the civil service examinations for scientific research assistant, and in July, 1968, the career service examinations (professional, qualifying) (Bio-data, Annex "A", p. 21, rec.). Barros passed the pharmacy board examination in July, 1951 and the civil service examinations for supervisors. (Decision, Annex "C" to Comment, p. 98, rec.).

Before joining the government service, Torre was a member of the faculty, from 1946 to 1949, and the dean, from 1949 to 1953, of the College of Pharmacy in the University of San Agustin. On the other hand, Barros was engaged from 1953 to 1961, in the private sector in successive capacities as supervisor, chief supervisor, and production manager of E.R. Squibb (Decision, loc. cit.).

Both entered the government service under the same agency, the Food and Drug Services (headed by a Food and Drug Supervisor in each of eight regions) under the Bureau of Health Services, Department of Health, although each was assigned to a different region - Barros in Regional Health Office No. 1 at Dagupan City, Torre in parallel office No. 3 at Manila (Ibid.: Comment of the Food and Drug Administrator, p. 63, rec.).

Barros entered the government service in March, 1961 at once as a Food and Drug Supervisor (Decision, loc. cit.;

Memorandum for the FDA Administrator, p. 189, rec.).

Torre joined the government in December, 1962 as Substitute Senior Pharmacist (Decision, loc. cit.; Bio--data, Petition, Annex "A", p. 22, rec.) and was given permanent status on May 4, 1964 (Decision, loc. cit.). She was assigned as Drug Inspector starting January 2, 1963 (Petition, p. 4, rec.), and as Supervising Drug Inspector from July, 1964 to January, 1965, when the incumbent went on leave. (Bio-data, loc. cit.). In 1966, she was appointed as Supervising Drug Inspector, said appointment having been attested to by the Commissioner of Civil Service effective July 15, 1967. (Petition, loc. cit.).

In 1967, Rosario Capistrano was promoted Chief Drug Inspector in the then newly-organized Food and Drug Administration. Upon learning of said appointment, Barros filed a protest with the Civil Service Commission (Decision, pp. 24 and 31, rec.).

On May 1, 1968, while the parties in above-mentioned protest were awaiting the resolution of the case by the Civil Service Commissioner, Torre was transferred, as were all Drug Inspectors and Supervising Drug Inspectors in the Food and Drug Services, to the Food and Drug Administration, pursuant to a Health Department Order. (Petition, loc. cit.; Memorandum for Respondents, p. 138, rec.). Then, on June 28, 1968, x x x x when Capistrano went on a six-month leave with pay, Torre was designated Acting Chief Drug Inspector. (Special Order No. 55, s. 1968, Comment, Annex "1", pp. 4 and 64, rec.). On December 27, 1968, when said leave expired, Torre was extended by Secretary of Health Amadeo H. Cruz, an appointment as Substitute Chief Drug Inspector "effective Dec. 1, 1968, until the return of Miss Rosario Capistrano, the former incumbent who is on a study leave abroad," (Decision, pp. 25 and 32, rec.; Civil Service Appointment Form, Petition, Annex "G", pp. 49, 65, rec.), which appointment was given due course by the Office of the President (Petition, Annex "F", p. 48, rec.) and approved by the Commissioner of Civil Service. (Civil Service Appointment Form, Petition, Annex "G", loc. cit.).

In June, 1969, the decision of the Civil Service Commission dated April 8, 1968 was received by the parties. (Petition, p. 8, rec.; Memorandum for Respondents, p. 140, rec.; Memorandum for the FDA Administrator, p. 190, rec.). Then Commissioner Abelardo Subido adjudged Capistrano unqualified and "suggested" Miss Barros for appointment in her stead. (3rd Indorsement, Protest Case No. 8233, Comment, Annex "A", p. 95, rec.).

On July 30, 1969, after Miss Capistrano's request for reconsideration failed (7th Indorsement, Comment, Annex "B", pp. 96-97, rec.), the Food and Drug Administrator recommended temporary incumbent Torre for permanent appointment as Chief Drug Inspector at P5640 per annum. (Civil Service Appointment Form, Annex "H", p. 50, rec.; Comment, Annex "2", p. 65, rec.).

However, on November 20, 1969, then Secretary of Health Amadeo H. Cruz tendered Barros the appointment (Decision, pp. 24 and 31, rec.; Civil Service Appointment Form, Petition, Annex "B", p. 23, rec.; Comment, Annex "C", p. 98, rec.). Soon after, Torre lodged her own protest. The Committee on Evaluation and Protests of the Department of Health, acting on the protest, recommended the appointment of Barros on the ground that Torre failed to meet the four year supervisory experience. Torre elevated the matter to Commissioner Subido of the Civil Service, who rendered a decision on April 3, 1970 finding Torre's protest without merit and approved as permanent the appointment of Barros (Decision, loc. cit.; 1st Indorsement, Comment, Annex "D", p. 99, rec.). The decision states in part:

"The record shows that Mrs. Torre is a Bachelor of Science in Pharmacy. She has been granted eligibility under R.A. 1080, as amended, as a Pharmacist. She has been connected with the Department of Health since 1964 as Senior Pharmacist; Supervising Drug Inspector (July 15, 1967) and Substitute Chief Drug Inspector, 1968.

On the other hand, Miss Barros is also a pharmacist, and Pharmacist, R.A. 1080, and Supervisor eligible. She

entered the Department of Health in 1961 as Food and Drug Supervisor which position she holds up to the present.

An evaluation of the above data shows that Mrs. Torre does not meet the 4 years specialized experience requirement while Miss Barros meets the minimum requirement. Wherefore, and considering that she is the choice of the Appointing Authority (*Pineda vs. Claudio*) her appointment described above is hereby approved as permanent under Sec. 24 (b) of R.A. 2260."

Torre then relinquished the position on April 15, 1970 and Barros assumed the same the following day. (Petition, p. 8, rec.; Comment, pp. 83-84, rec.).

Then, on May 4, 1970, Torre filed with the Civil Service Commissioner a Petition for Reconsideration with a request for a hearing thereon. The request was granted and on December 10, 1970, after said hearing, Commissioner Subido revoked the appointment of Barros and "suggested" Torre for appointment. (Decision, loc. cit.; 1st Indorsement, Petition, Annex "D", pp. 40-41, rec.). The decision reads:

"In the hearing of the said case, Mrs. Torre presented creditable evidence to support her claim that she meets the experience requirement as she has enough supervisory experience acquired prior to her employment in the government service as she was a member of the faculty of the College of Pharmacy in the University of San Agustin from 1946- 1949 and Dean thereof from 1949 to 1953; that she operated a drug store and had several apprentices under her supervision, that she was Secretary and later President of the Iloilo Pharmaceutical Association from 1951 to 1952 and from 1957 to 1958 and that she wrote scientific papers on pharmacology which were published in the Journal of the Philippine Pharmaceutical Association, that she received a certificate of Appreciation for Pharmaceutical Service, etc.

On the other hand, it was established in the investigation that while Miss Barros was appointed Food and Drug Supervisor, she performed staff functions and had not a single Food and Drug Inspector under her supervision, and that she was on a study leave for one year.

Premises considered, the appeal of Mrs. Torre is found meritorious. Wherefore, the appointment of Miss Barros as Chief Food and Drug Inspector which was approved as permanent under Sec. 24 (b) of R.A. 2260 subject to the condition that there is no "decision by competent authority that will adversely affect the approval of this appointment," is hereby revoked. It is suggested that Mrs. Torre be appointed in her stead."

A petition for reconsideration filed by Barros was rejected by Commissioner Subido on February 23, 1971 (Decision, loc. cit.; 1st Indorsement, Petition, Annex "D--1", pp. 42-44, rec.). The resolution states thus:

"In support to her petition, Miss Barros raised the following grounds, to wit:

- This Honorable Office heavily ERRED in holding that while protestee VIRGINIA O. BARROS was appointed Food and Drug Supervisor, she only performed staff functions and had not a single Food and Drug Inspector under her supervision, and that she was on a study leave for one year.
- This Honorable Office heavily ERRED in not maintaining its previous final ruling and/or decision in Protest Case No. 8233, entitled "VIRGINIA O. BARROS, versus ROSARIO CAPISTRANO", involving the same position of the Chief Drug Inspector, holding, among others, that herein protestee Virginia O. Barros meets all the qualification requirements for appointment as Chief Drug Inspector.
- This Honorable Office ERRED in not taking into account in the determination of this case the well settled law or jurisprudence that the power and prerogative to determine as to who is best qualified for appointment to a vacant position in the civil service, competitive or otherwise, is lodged with the appointing authority, that is, the Department Head.
- This Honorable Office ERRED in not taking into account in the determination of this case the well settled law or

jurisprudence that once an appointment is extended by the proper Department Head and approved by the Commissioner of Civil Service, the said appointment becomes complete and irrevocable, and thus completed the appointment, like the herein petitioner, acquired a legal, not merely an equitable right, which is protected by law and the Constitution, and this right cannot be taken away from said appointee either by revocation of the appointment or by removal from the position, except for cause, and if revocation is to be successful, it should be made before the appointment has been completed.

- This Honorable Office ERRED in taking into account in the determination of this case the supervisory experience of protestant VICENTA O. TORRE acquired prior to her employment in the government service.

"A perusal of the pertinent records shows that practically all the points raised in the within request for reconsideration has been previously brought out and the same were likewise previously considered by this Office.

"Anent the first ground raised, suffice it to state that the two issues have been established during the hearing of the case when Miss Barros categorically admitted that for one year she was not able to perform the duties attached to the contested position (sic) while she was on study grant at the U.P. For the sake of argument, while it is true that Exhibit "2" (List of persons who allegedly had been under the supervision of Miss Barros while she was a Food and Drug Inspector) was admitted by the Hearing Officer of the said case, said admission is only part of the evidence presented but the same is not conclusive as to the facts therein stated for the persons who prepared the certification did not appear during the hearing to identify the same. Moreover, Miss Barros could not present or produce any report she has prepared during the time that she was a Food and Drug Inspector.

"The second allegation by the petitioner is untenable on the ground that although the position that had been contested in the "R. Capistrano vs. V. Barros" is exactly the same position now being contested in the "V. Barros vs. V. Torre" case, the circumstances surrounding the first case are entirely different for while Miss Capistrano fell short of the four-year supervisory experience requirement, Mrs. Torre, with her vast and rich experience acquired in private firms and in the government, fully meets the required experience. Moreover, had it been found earlier in "Capistrano vs. Barros" case that Miss Barros, notwithstanding her being appointed to the position of Food and Drug Supervisor, failed to fully discharge the duties of the position, her protest against Miss Capistrano would not have prospered.

"Considering that the third and fourth allegations are interrelated to each other, they are herein discussed jointly. Granting arguendo, that the power and prerogative to appoint lie in the sound discretion of the appointing official, still the power to review said personnel action is lodged in the Commissioner of Civil Service. As a corollary power, the Commissioner can refuse to attest an appointment on the grounds provided in the Civil Service law and rules. This is especially so in the instant case where Miss Barros' appointment is protested because the Commissioner is vested with final authority to decide the contest and with it the power to modify or reject the recommendation of the appointing official, when the circumstances so warrant or when the same is not in accordance with law or regulation. Otherwise, if all the Commissioner can do is to abide by the choice of the appointing official, his power to finally decide a protest case will become meaningless.

"Finally, as regards to the fifth ground raised, attention is invited to No. 16 (Record of Service) of the Civil Service Form No. 212 (1965) which includes the service or experience gained in the government service and/or private firm.

"In view thereof, and there being no justifiable reason or reasons to warrant modification of the action taken by this Office in its Indorsement dated December 10, 1970, the same is reiterated. Accordingly, the instant petition is hereby denied."

She then appealed to the Office of the President, and on October 29, 1971, obtained a reversal of the appealed decision on three main points:

1. Evidence is sufficient to show that Miss Barros met the experience requirement.
2. Correct construction of the law places Barros as the officer next in rank for purpose of appointment.
3. Being the choice of the appointing authority, she should be preferred in the appointment (Decision, pp. 32-37, rec.). Extracts of the decision follow:

"After a careful review of the records, this Office finds the instant appeal meritorious. Appellant has demonstrated by sufficient quantum of evidence that she has more than 5 years' drug inspection experience, more than 4 years of which in a supervisory capacity as Food and Drug Supervisor of Regional Health Office No. 1, Department of Health. Thus Exhibit 10 (for appellant) enumerates and shows the specific duties and responsibilities of a Food and Drug Supervisor I of the Department of Health, Region I, among which are to 'supervise and coordinate the work of inspection of Food & Drug in the region';

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"Although the foregoing job description of appellant's position does not seem to demonstrate actual drug inspection work, a considerable quantity of corroborative evidence established the same. Hence, appellant's Exhibit 2 a certification issued by the Regional Health Director, Region I, Department of Health, attests to the fact that she, as 'Food and Drug Supervisor, had been supervising the food and inspection activities within Region I, during her incumbency as such Food and Drug Supervisor', listing therein 10 persons under her supervision, and certifies further that 'even after the absorption of the drug inspector items in the Food and Drug Administration, Manila, Miss Barros continued to supervise and evaluate the Food and Drug inspection activities with Health Region I, until her transfer to Manila', and her Exhibit 4, another certification issued by the Chief of Consultants that 'Miss Virginia Barros, until lately the Food and Drug supervisor of this region, has been submitting her supervisory monthly report to the Regional Health Director from 1961 to March 1970.' Both certifications attest to her performance of drug inspection and supervisory work.

"Then, too, appellant's Exhibit 3 clearly establishes her drug inspection and supervisory experience during her entire stint as Food and Drug Supervisor since 1961. Said Exhibit consists of the letter-directive of the Chief, Food and Drug Inspector of the Food and Drug Administration dated June 19, 1969, for her to 'prepare a qualification standard requirement of each level of position under the Division (Inspection and Licensing Division, Food and Drug Administration) as well as ranking to such positions,' and requesting further 'that each drug inspector be possibly evaluated or graded by your good self of their potentiality, considering their ability and capability in the performance of their work for reference.' It is therefore inescapable that appellant has been actually performing supervisory functions over drug inspectors, otherwise there would be no reason for the existence of this particular exhibit whereby she is called upon to perform and accomplish the tasks in her capacity as supervisor over drug inspectors.

"Undeniably confirmatory of the foregoing is a series of official papers submitted as evidence by appellant unquestionably reflecting her performance of Food and Drug Inspection and supervisory functions in her capacity as Food and Drug Supervisor consisting of the following, to wit: (a) Monthly Report of Regional Health Office No. 1 on its drug inspection activities for the month of January 1962 dated February 7, 1962, submitted by her in her capacity as Food & Drug Supervisor; (b) Monthly Report of the Food and Drug Inspection Services, Regional Health Office No. 1, for February 1968, submitted by her in her capacity as Food and Drug Supervisor; (c) Special Order 189, series of 1968, dated November 11, 1968, directing her 'to proceed to Tarlac from November 25-29, 1968, to confer with and supervise the drug inspectors therein . . .' and 'for other drug inspection purposes;' (d) approved Itinerary of Travel dated October 11, 1968, of Virginia Barros, Food & Drug Supervisor 'for the purpose of inspecting food manufacturing and processing establishments for registration'; (e) approved Itinerary of Travel dated July 11, 1968, of Virginia Barros, Food

& Drug Supervisor, to 'follow-up food establishments found using borax and inspection of food establishments for the purpose of registration and supervision of drug inspectors; (f) Special Order No. 155, series of 1967, dated August 15, 1967, directing Virginia Barros, Food & Drug Supervisor, to proceed to Pangasinan to look into reports of the presence of drug peddlers in the areas of food and drug laws; (g) approved authority to travel dated July 3, 1969, of Virginia Barros, Food & Drug Supervisor, for the purpose of 'supervising the food and drug inspectors in the provinces of Pangasinan, Tarlac and La Union. . .' (from July 7-25, 1969); (h) Department Order No. 363 dated December 3, 1968, with subject: 'Training Seminar for Personnel Involved in Food, Drug & Cosmetic Inspection Activities,' and directing Food & Drug Supervisors and Food and Drug Inspectors listed therein including Virginia Barros,' to attend a 5-day training/seminar starting December 16, 1968, on a revised operational inspection scheme on food, drug and cosmetic establishments with special emphasis on food inspection'; and (i) letter of the Food & Drug Administrator to the Director, Regional Health Office No. 1, dated May 17, 1968, requesting that 'your Food & Drug Supervisors be allowed to complete the inspection of food manufacturing establishments . . . in connection with the inspection of food manufacturing establishments in the region for purpose of issuing licenses.'

"The foregoing official papers, office reports and orders, itineraries of travel and travel orders and communications are indubitable memorials of the truth that appellant has been performing drug inspection and supervisory functions as Food & Drug Supervisor. Having served in such capacity since 1961 or for almost 10 years, the CCS ruling in his appealed decision that appellant does not meet the 5 years' experience in drug inspection work and 4 years' supervisory experience along this line is clearly baseless.

"Scrutinizing, on the other hand, whether appellee meets the experience qualification, it appears that although she was appointed Supervising Drug Inspector in July 1967 only, which covers a period of more than 3 years, and therefore short of the required 5 years' experience in drug inspection and 4 years' supervisory experience along the same line, the CCS reversed his previous decision and concluded that appellee met the requisite experience qualifications by adding to her computed experience her service in the private sector prior to entering the government service, which is along the line of pharmaceutical instruction (as instructor and then dean of the College of Pharmacy, University of San Agustin, Iloilo City). We find it illogical for the CCS not to apply the same rule in favor of appellant, the choice of the appointing power, who has also to her credit vast outside experience in the field of pharmaceutical manufacturing as Supervisor, then Chief Supervisor in the Philippines of E.R. Squibb, and ultimately Production Superintendent of the same company in its Cambodia plant from 1953 to 1961, a field which is more akin to drug inspection called for in the requisite experience than appellee's experience along the line of instruction or teaching involving as it does, no drug inspection. There is no question therefore that if appellant's outside experience were to be tacked, as was done in the appellee's case, to the totality of her government experience for appointment purposes, it is obvious that she would more than meet the experience requirement and rightly deserves to be appointed to the controverted position.

"Moreover, as between appellee and appellant, jurisprudence has clung with unswerving fidelity that the choice of the latter by the appointing authority must be respected. After all, as to who is more competent to the position to be filled or who is most qualified among those qualified and eligible is addressed primarily to the discretion of the appointing power. Thus, the Supreme Court ruled that the appointing authority is granted the discretion and prerogative of choice of the one he deems most fit for appointment, provided the appointee is qualified and eligible (*Pineda vs. Claudio*, PB SCRA 34L[]). The CCS should not substitute his judgment or discretion for that of the appointing power (*id.*).

"Again, in contesting the validity of appellant's appointment, appellee insists that she is next in rank and advances the argument that her item as Supervising Drug Inspector is in the Food and Drug Administration where the contested position is, while appellant's item as Food and Drug Supervisor is in the Department of Regional Office, in view of which the latter may not and should be excluded from those to be considered next in rank. The specific issues posed by appellee's line of reasoning is answered by Section 3, Rule VII of the

Civil Service Rules, which reads:

‘SEC. 3. (a) In determining the officer or employee next in rank, consideration shall be based on the hierarchical relationship of the positions in the Department or agency taking into account the (1) organizational structure as reflected in the organization chart duly approved by the proper Department head; (2) classification and/or functional relationships of positions; (3) salary and/or range allocation; and (4) geographic location. Such determination shall provide for as wide an area of selection as possible within the Department or agency.

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‘(c) In the filling of new positions, except at the lowest level, similar or allied positions existing in the Department or agency shall be considered next in rank to such new positions.’

"If the above-quoted legal provisions enunciate the principle that the determination of the next-in-rank 'shall provide for as wide an area of selection as possible within the Department or agency,' then we see no reason why we should adopt so restricted an interpretation as that invoked by appellee by limiting the next in rank to employees on the agency level instead of 'as wide an area of selection as possible' up to the department level, a line of reasoning squarely opposed to the philosophy enunciated by the Civil Service Rules. To quote again from the Pineda-Claudio decision:

'It may be added that there is no valid or cogent reason to consider it mandatory and ministerial that the filling of vacancies be by promotion, transfer, reinstatement or reemployment, and certification, in that order. There is no legal fiat that those next in rank for promotion are more fit and meritorious for appointment than those moved by transfer from another unit or department, and that those applying for transfer should have 'preference' to those seeking reinstatement, and the latter in turn to those who are duly certified eligibles.'

‘ . . . but such official (next-in-rank) cannot claim any preferential right to appointment to the vacancy over others equally certified to be qualified and eligible for appointment by transfer, reinstatement or reemployment or by appropriate certification, just as those applying for transfer cannot claim preference over those seeking reinstatement, etc., per subject the appointing authority's reasons for his choice to final review and decision by the Civil Service Commissioner. To so hold as the petitioner and the respondent Commissioner contend, would be to invalidly substitute the judgment of the Commissioner of Civil Service for that of the appointing authority, in whom the prerogative of free choice resides.'

"Furthermore, a comparison of the contestant's salary and/or range allocation evidence the fact that appellant is more ranking than appellee, her position as Food and Drug Supervisor being allocated range 45 (WAPCO) in contrast to appellee's position as Chief Drug Inspector with range 48. It would be illogical for any valid ranking plan to place a position of higher range allocation, like appellant's as subordinate in line of promotion to a position of lower range allocation such as appellee's.

"All factors considered, appellee is not entitled to the appointment in question over and above appellant who is the choice of the appointing authority.

"In view of the foregoing considerations, the CCS decision dated December 10, 1970 is hereby reversed and the permanent appointment of appellant Virginia Barros to the position of Chief Drug Inspector, Food and Drug Administration, Department of Health, declared valid."

Petitioner anchors her position on two main issues, namely:

- (1) Whether the Office of the President has jurisdiction to review the decisions of the Commissioner of Civil Service on contested appointments; and
- (2) Whether the respondent Executive Secretary committed a grave abuse of discretion in reversing the decision of the Commissioner of Civil Service.

I

1. Article IV - captioned "Qualifications, Salaries, Powers and Duties" - of the Civil Service Act of 1959, otherwise known as Republic Act No. 2260, as amended, defines the qualifications, salaries, powers and duties of the Commissioner and Deputy Commissioner of Civil Service, the Regional Directors of the Civil Service Commission as well as the Civil Service Board of Appeals.

Pursuant to Section 16 (j) under said Article IV, the Civil Service Commissioner is vested with power "to hear and determine x x x appeals instituted by any person aggrieved by an action or determination of any appointing authority contrary to the provisions of the Civil Service Rules; x x x and affirm, review or modify such action or determination, and the decision of the Commissioner shall be final, unless appealed from as provided by law by any person adversely affected by such decision;"

Under Section 18 (b) of said Article IV, the Civil Service Board of Appeals is empowered "to hear and decide all administrative cases brought before it on appeal from the decision of the Commissioner of Civil Service x x x".

It is significant to note that Section 16 (j) does not specify to whom or to what body or agency shall the decision of the Commissioner of Civil Service be appealed with respect to contested appointments; neither does Section 18 state that the appellate jurisdiction of the Civil Service Board of Appeals include decisions of the Commissioner of Civil Service on contested appointments under Section 16 (j) or that the term "administrative cases" in Section 18 (b) comprehends contested appointments.

Although Section 36, as amended by Republic Act 6040 explicitly states that the decision of the Commissioner of Civil Service may be appealed by the party adversely affected to the Civil Service Board of Appeals, the same does not include contested appointments; because said Section 36 falls under Article VII captioned "Discipline" - of the Revised Civil further strengthened by Sections 30, 31 and 32 of Rule XVIII - captioned "Discipline" - of the Revised Civil Service Rules, which expressly delineate the procedure for appeal from the decision of the Civil Service Commissioner to the Civil Service Board of Appeals. But no such recognition - express or implied - of the appellate jurisdiction of the Civil Service Board of Appeals appears in Rule VI on Appointments and Rule VII on Promotion of the Revised Civil Service Rules.

If Congress intended by the amendatory law, Republic Act No. 6040, to make all decisions of the Civil Service Commissioner appealable to the Civil Service Board of Appeals, it could have expressly - and easily amended Section 16 (j) or Section 18 [b] to that effect.

Both under Section 74 of the Revised Administrative Code, as amended, and the Integrated Reorganization Plan as approved by the President of the Philippines through Presidential Decree No. 1 issued on September 24, 1973, the Civil Service Commission is placed under the Office of the President. Incidentally, under the said Integrated Reorganization Plan as approved, the Civil Service Board of Appeals was expressly abolished.

2. Under Section 79 (c) of the Revised Administrative Code and Section 37 of Act No. 4007, the President as department head can review, modify or revoke decisions or actions of the chiefs of bureaus, offices, divisions or service under his department as well as exercise the power expressly vested by law in such chief or head of the bureau, office, division or service.

The appellate jurisdiction of the President on disputed appointments is also expressly affirmed by Section 693 of the Revised Administrative Code which provides that "A disbursing officer, the head of any department, bureau, or office, or the Auditor General, may apply for, and the Commissioner of Civil Service shall render, a decision upon any question as to whether a position is in the classified or in the unclassified civil service, or whether the appointment of any person to a classified position has been made in accordance with law, which decision, when

rendered, shall be final unless reversed by the President of the Philippines on appeal."

But even without such express statutory conferment of appellate jurisdiction on the President, he can at any time by virtue of his power of control over executive departments, bureaus and offices, expressly vested in him by Section 10 (1) of Article VII of the 1935 Constitution, review, modify, alter or nullify any action, or decision of his subordinate in the executive departments, bureaus or offices under him. (*Mondano vs. Silvosa*, 97 Phil. 143, 148). He can exercise this power *motu proprio* without need of any appeal from any party (*Negado vs. Castro*, 104 Phil. 103, 107). This power of control of the President under the 1935 Constitution is also expressly conferred on the Prime Minister by Section 11 of Article IX of the 1973 Constitution.

Petitioner argues that the power of control granted by the Constitution to the President over executive departments, bureaus, offices and services, should be limited to a review of administrative acts, not to decisions of the Commissioner of Civil Service on contested appointments. This posture is at war with the basic rule that where the Constitution or the law does not distinguish, We are not at liberty to indulge in any distinction. Then again, such a constricted construction of the Presidential power of control in effect amends the fundamental law, which vests the amending prerogative in Congress, the Constitutional Convention and in the people, but never in the Supreme Court.

The appellate jurisdiction of the Office of the President over the decisions of the Commissioner of Civil Service on contested appointments is thus patent.

II

As above reproduced the decision of the respondent Assistant Executive Secretary contains an extensive analysis of the qualifications of both petitioner Torre and respondent Barros for the disputed position, revealing a painstaking and judicious study of the case and a reasoning that is as persuasive as it is logical, which we can neither ignore nor disregard. There is nothing in the said decision that is indicative of arbitrariness, much less grave abuse of discretion; for said decision is amply buttressed by controlling jurisprudence.

In *Pineda vs. Claudio*, May 30, 1969, 28 SCRA, p. 34, the power of the mayor of Pasay City to appoint an outsider - a state prosecutor from the Department of Justice - as Pasay City Chief of Police, without stating any special reasons therefor, was challenged by the incumbent Deputy Chief of Police Pineda. WE ruled through Mr. Justice Fred Ruiz Castro, against the incumbent Deputy Chief of Police, that Section 23 of the Civil Service Act "does not require that vacancies must be filled by promotion, transfer, reinstatement, reappointment or certification, in that order. That would be to construe the provision not merely as a legislative prescription of qualifications but as a legislative appointment, repugnant to the Constitution. What it does purport to say is that as far as practicable, the person next in rank should be promoted, otherwise the vacancy may be filled by transfer, reinstatement, reappointment or certification, as the appointing power sees fit, provided the appointee is certified to be qualified and eligible x x x.

"x x x For it is not enough that an aspirant is qualified and eligible or that he is next in rank or line for promotion, albeit by passive prescription. It is just as necessary, in order for public administration to be dynamic and responsive to the needs of the times, that the local executive be allowed the choice of men of his confidence, provided they are qualified and eligible, who in his best estimation are possessed of the requisite reputation, integrity, knowledgeability, energy and judgment." (*Pineda vs. Claudio*, 28 SCRA 34, 46-47, italics supplied). The department head is primarily responsible for the efficient administration of his department and is directly answerable to the President and indirectly to the people for such performance, and not the bureau head or chief of office under him nor the recommending officer (*Ibid.* p. 47).

WE then added that "the principle of seniority and the next-in-rank rule embodied in Section 23, with its corollary

requirement to set forth the 'special reason or reasons' in case the officer next in rank is not appointed to the vacant position, applies only to cases of promotion, hence, where the appointing power chooses to fill the vacancy not by promotion but by transfer, reinstatement, reappointment or certification (not necessarily in that order, as we have already said) he is under no duty whatsoever to explain his action, for the law does not so require him. The reason for this distinction is simple. When a person who is a junior jumps over his senior, the ranking is disturbed and the person next in rank is actually by-passed, and so it is reasonable to require the appointing power to give his 'special reason or reasons' for preferring his appointee to the officer next-in-rank. But where the vacancy is filled not by promotion but by transfer, the person next in rank is not really by-passed because the person appointed is one who holds a position of equivalent rank as the vacant position. To the appointee, the new position is hardly a higher one.x x x". (Pineda vs. Claudio, supra, pp. 47, 48).

xxx xxx xxx

"There is no legal fiat that those next in rank for promotion are more fit and meritorious for appointment than those moved by transfer from another unit or department, and that those applying for transfer should have 'preference' to those seeking reinstatement, and the latter in turn to those who are duly certified eligibles. From the perspective of practical experience it cannot be doubted that some next-in-rank officers or employees have risen to seniority slots through mere passivity.... The only way to determine such fitness would be to hold a competitive examination among all applicants every time a vacancy occurs, which would be completely disruptive of the public service. Our Constitution recognized this and hence provided that appointments be made according to merit and fitness, to be determined only as far as practicable by competitive examination. Hence, our system of qualification through periodic appropriate examinations. Among those qualified and eligible, the appointing authority is granted the discretion and prerogative of choice of the one he deems most fit for appointment.x x x" (Pineda vs. Claudio, supra, p. 49).

The one next-in-rank, while he should be among the first to be considered for the vacancy, if qualified and eligible, cannot claim any preferential right to appointment to the vacancy over others equally certified to be qualified and eligible for appointment by transfer. To so hold as the petitioner and the Civil Service Commissioner subsequently contend in the case at bar, "would be to invalidly substitute the judgment of the Commissioner of Civil Service for that of the appointing authority, in whom the prerogative of free choice resides x x x Such a theory x x x would in some cases permit unauthorized interference by the Commissioner of Civil Service with the appointing authority's free exercise of his judgment and prerogative of free choice." (Pineda vs. Claudio, supra, pp. 49-50).

There is no demonstration that the respondent Secretary of Health arbitrarily exercised his appointing authority as to constitute a denial of due process, which would justify the interposing hand of this Court. The qualifications, merit, experience and competence of herein petitioner for promotion are not clearly superior to those of the herein respondent Barros, to warrant judicial review of the appointment of respondent Barros by the Secretary of Health (Pineda vs. Claudio, supra, p. 50; see also Moreno vs. Bocar, 66 Phil. 429, 431).

In the earlier case of Reyes vs. Abeleda 22 SCRA 825, Mr. Justice Fernando, speaking for the Court, stated that "the law does not impose a rigid or mechanistic formula on the appointing power, compliance with which is inexorable and a deviation therefrom fatal. ... for it is axiomatic that public needs could best be attended to by officials about whose competency and ability there is no question. Through that overmastering requirement, personal ambition must of necessity yield. Discretion if not plenary, at least sufficient, should thus be granted to those entrusted with the responsibility of administering the office(r)s concerned, primarily the department heads. They are in the most favorable position to determine who can best fulfill the functions of the office thus vacated. Unless, therefore, the law speaks in the most mandatory and peremptory tone, considering all the circumstances,

there should be, as there has been, full recognition of the wide scope of such discretionary authority. Happily, there is nothing in the Civil Service Act, which is fittingly concerned with protecting the rights of those in the career service, that, rightly construed, calls for a different conclusion. It is well worth repeating that the broad authority of the department head appears indisputable. Such is the policy of the law, a policy reflected with fidelity in the decisions of this Court." (pp. 830, 831).

We are not aware of any jurisprudence affirming the proposition that the recommendation of the chief or head of office under a department, who is the immediate superior of his recommendee, is binding on the department secretary who is the appointing authority.

Petitioner Torre's evidence is not convincing as to her claim of seniority or of being next-in-rank or of superior competence over respondent Barros. She entered the government service in December, 1962 as substitute pharmacist RHO No. III, Manila, over one year and eight months after respondent Barros was appointed in March, 1961 initially as Food and Drug Supervisor, not just a pharmacist, RHO No. I, Dagupan City. While petitioner Torre was assigned on January 2, 1963 as Drug Inspector, on May 4, 1964 as Senior Pharmacist, and as Supervising Drug Inspector at P3932 per annum (Annex E, p. 46, rec.) when the incumbent was on leave from July, 1964 to January, 1965, and appointed Supervising Drug Inspector on July 15, 1967; respondent Barros had four drug inspectors under her supervision from January 5 to January 30, 1967. It was only on December 1, 1968 that petitioner Torre was proposed for and on December 27, 1968 was appointed Substitute Chief Drug Inspector at P5640 per annum (Annexes E and G, pp. 46, 49, rec.) during the pendency of the protest of respondent Barros against the appointment of Capistrano, then the appointee-incumbent Chief Drug Inspector. It may be emphasized that the regional health offices in Manila and Dagupan City are of the same category. While petitioner Torre has no post-graduate degree; respondent Barros obtained in 1963 her Master in Public Health degree from the University of the Philippines.

Petitioner Torre's having operated a drugstore with apprentices under her supervision for about 24 years from November, 1936 to 1960, is not comparable to the experience of respondent Barros as Supervisor, then Chief Supervisor and finally Production Superintendent of E.R. Squibb and Company in Cambodia from 1953 to 1961. One's efficiency is not inevitably enhanced by being dean and professor in the College of Pharmacy from 1946 to 1953. Proficiency in theory does not necessarily guarantee superior performance, especially in a supervising capacity. Petitioner Torre's efficiency rating as of October 16, 1969, like that of respondent Barros, was satisfactory (Annexes H and C, pp. 66, 98, rec.). As of July 1, 1973 when she was appointed Supervising Food and Drug Inspector at P8832 per annum, the efficiency rating of respondent Barros as Chief Drug Inspector from April 16, 1970 to June 30, 1973 - for over 3 years - was very satisfactory (Annex A, p. 237, rec.). If she were successful and efficient as a pharmacist of a private drugstore with supervision over several apprentices, petitioner Torre would not have left private employment only to join the government in December, 1962 as a lowly Substitute Pharmacist at the low salary of less than P3932 per annum, which was her salary as Supervising Drug Inspector in 1964. On the other hand, being a supervisor, then promoted to chief supervisor in the Philippines and finally to production superintendent of such a big drug manufacturer as E.R. Squibb and Company for over eight years in Cambodia, whose performance is always under the close scrutiny and review of her division chief, department head, the general manager of the corporation and the board of directors of the firm, one has to render more than just a creditable service to merit promotion to chief supervisor and production superintendent of a drug firm assigned in a foreign country for about eight years.

Moreover, petitioner Torre, who is now about 60 years old, is about 18 years older than respondent Barros, who is only 42 years of age. Age makes a lot of difference in the performance of the functions of Chief Drug Inspector.

These foregoing factors must have been considered by then Secretary of Health Amadeo Cruz as the appointing

authority, in extending the appointment to respondent Barros.

Respondent Barros appears to be next-in-rank. As contended by the Solicitor General, the contested position of Chief Drug Inspector was allocated by the WAPCO in 1969 Range 49 with a salary of P6,552 per annum and in 1972, Range 55. Next in rank are six Senior Food and Drug Inspectors, allocated in 1969 Range 41 at P4,796 per annum, and in 1972, Range 47; followed by the position of Supervising Drug Inspector (present position of petitioner Torre), which was allocated in 1969 Range 40 at P4,397 per annum and in 1972, Range 46. Respondent Barros' former position as Food and Drug Supervisor carried in 1969 Range 45 with a salary of P6,400 per annum, and in 1972, Range 51 which is nearest to the disputed position of Chief Drug Inspector than the position of Supervising Drug Inspector (pp. 24, 152, rec.).

It should be emphasized that respondent Barros did not usurp the position of Chief Drug Inspector. She entered into the performance of the functions of said office only the day after petitioner herself relinquished the position on April 15, 1970, pursuant to the decision of the Civil Service Commissioner on April 3, 1970 approving the appointment of respondent Barros. It was only on May 4, 1970 when petitioner Torre filed her petition for reconsideration of the said adverse decision of the Civil Service Commission.

It is apparent therefore that petitioner Torre has not demonstrated that she has a clear right to be appointed as Chief Drug Inspector; consequently, mandamus will not lie to compel the respondent Secretary of Health to issue an appointment in her favor for the writ is never issued in doubtful cases. (*Orencia vs. Ponce Enrile, et al.*, G.R. No. L-28997, February 22, 1974; *Enriquez, Mr. vs. Bidin*, L-29620, October 12, 1972, 47 SCRA 183; *Yuvienco vs. Canonoy*, L-23352, June 30, 1971, 39 SCRA 597; *Del Rosario vs. Subido*, L-30091, January 30, 1970, 21 SCRA 382; *Vda. de Serra vs. Salas*, L-27150, November 28, 1969, 30 SCRA 541; *Commissioner of Immigration vs. Go Tieng*, L-22581, May 21, 1969, 28 SCRA 34; Cf. *Lemi vs. Valencia*, L-20768, November 29, 1968, 26 SCRA 203). And since there is no grave abuse of discretion on the part of respondents Secretary of Health and Assistant Executive Secretary, neither will the petition for certiorari prosper. (*Torres vs. Borja, et al.*, G.R. No. L-31947, March 21, 1974; *Aguilar vs. Nieva, Jr.*, L-28422, July 29, 1971, 40 SCRA 113; *Del Rosario vs. Subido*, supra).

WHEREFORE, petition is hereby dismissed, without costs.

Makalintal, C.J., Teehankee, Esguerra, and Munoz Palma, JJ., concur.

Castro, J., took no part.

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