

**BENJAMIN T. PONCE, PETITIONER AND APPELLEE, VS.
HEADQUARTERS, PHILIPPINE ARMY EFFICIENCY AND SEPARATION
BOARD, RESPONDENT AND APPELLANT.**

G.R. No. 15471. April 29, 1966

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

Benjamin T. Ponce, petitioner below and appellee here, is a reserve officer in the armed forces. He has been in the active service since 1939 and in 1958 had the rank of Major. On October 21 of that year he received a communication from the Chief of Staff to appear at a hearing to be conducted by respondent (Headquarters, Philippine Army, Efficiency and Separation Board) on November 10, 1958 for the purpose of determining "the mode and character of your separation or retirement as the case may be in the AFP pursuant to Ex. O. No. 302cs and Cir. 7 GHQ as for having been deferred twice which is known as officers passed over for the second time in accordance with the provisions of Section 6 (F) and 7 (F) of R.A. No. 291."

On November 13, 1958 Ponce filed a petition in the Court of First Instance of Rizal for a writ of prohibition to stop respondent from proceeding with its investigation for the purpose aforesaid, and for a declaration that Executive Order No. 302 dated May 5, 1958 and Circular No. 7 GHQ AFP, dated August 29, 1958, were null and void as violative of Republic Act No. 1382, As prayed for in the petition a writ of preliminary injunction was issued by the lower court; and after trial judgment was rendered for petitioner, declaring among other things that respondent was without jurisdiction, power or authority to investigate and separate him from the active service of the armed forces. The case is now before Us on appeal by respondent, represented by the Solicitor General.

Under Section 22 (f) of the National Defense Act (Commonwealth Act No. 1) "any reserve officer may, in the discretion of the President, be discharged at any time."

With respect to officers in the regular force, separation from the active service is governed by Republic Act No. 291, which took effect on June 18, 1948. Section 7 (f) of this Act provides:

"Deferred officers in any grade shall be considered a second time by the next selection board designated for consideration of officers or his grade and promotion list. If an officer fails of selection for any grade but is subsequently recommended and promoted to that grade, his failure in the grade from which promoted shall not in any sense be counted as a failure of selection when he is subsequently considered for further promotion. If a deferred officer is not recommended by the next consecutive selection board, he shall be eliminated from the active list of the Regular Force and separated under the provisions of section twenty-two (f) of the National Defense Act, as amended, or any other law which may hereafter be provided for such purpose."

On July 24, 1957 the President issued Executive Order No. 260, which adopted the procedure laid down in Republic Act No. 291, section 7 (f), and made it applicable in respect of the separation of reserve officers from the active service. And on March 5, 1958, the President issued Executive Order No. 302 creating an Efficiency and Separation Board for each of the four major services in the armed forces. Said Board is the administrative agency

which inquires into the efficiency of an officer who has been by-passed twice in the promotion of officers, and makes the corresponding recommendation in each case.

Petitioner was one of those who had been by-passed twice when respondent issued the call for investigation to him. His discharge, if it should result at all after such investigation, would be by virtue of the authority of the President under Section 22 (f) of Commonwealth Act No. 1, although after going through the procedure laid down in section 7 (f) of Republic Act No. 291, made applicable to reserve officers by Executive Order No. 260.

In questioning the authority of respondent to proceed against him petitioner contends that Section 22 (f) of Commonwealth Act No. 1, insofar as it empowered the President to discharge any reserve officer at anytime at his discretion, has been repealed by Republic Act No. 1382, which became effective on June 18, 1955. Section 1 of that Act provides:

"Reserve Officers with at least ten years of active accumulated commissioned service who are still on active duty at the time of the approval of this Act shall not be reverted into inactive status except for cause after proper court martial proceedings or upon their own request: Provided, That for purposes of computing the length of service, six months or more of active service shall be considered one year."

It is petitioner's contention that under this subsequent law reserve officers with at least ten years of active service like himself may be discharged only for cause after proper court martial proceedings or upon their own request. Admittedly the investigation to be conducted by respondent Board was not a court martial proceeding.

The question presented here is not one of first impression. We have settled it in the case of *Constante V. Alzate vs. General Headquarters Efficiency and Separation Board AFP*, G. R. No. L-16572, February 27, 1965, where we held that section 1 of Republic Act No. 1382 refers to reversion of reserve officers to inactive status and not to their separation or discharge from the service, which is the subject-matter of section 22 (f) of Commonwealth Act No. 1. We quoted with approval the distinction between reversion and discharge as stated in *De la Paz vs. Alcaraz, et al.*, 99 Phil., 130; 52 Off. Gaz. p. 3039, as follows:

* * * appellant's reversion to inactive status in the reserve force is not, as he claims a dismissal from the service. Although he had ceased to be in the active service of the Philippine Navy, appellant remains nevertheless an officer of the Army reserve force. Officers in the naval reserve may be transferred from active to inactive service as the army authorities may see fit (cf 6 C.J.S. 17, citing *Denby vs. Berry*, 44 S. Ct. 74, 263 U.S. 29, 68 L. Ed. 148), and appellant can not rightly complain that he had been dismissed or discharged without due process because mere transfer from active to inactive service in the army is neither dismissal or discharge."

Considering the distinction just stated, there is no justification for extending the scope of application of section 1, Republic Act No. 1382, beyond what it specifically covers, namely, reversion to inactive status of reserve officers with at least ten years active service, so as to include their discharge. If there is any seeming lack of logic in the result, in that while reserve officers may not be reverted without court martial proceedings and for cause, except upon their own request, yet they may be discharged summarily by the President under section 22 (f) of the National Defense Act, the remedy lies in Congress, not in the courts. Indeed petitioner's interpretation would itself be illogical in result, because it would place reserve officers in a higher category than regular officers, for while regular officers are subject to discharge under Republic Act No. 291 and in accordance with the procedure laid down in Executive Order No. 302, which provides that "the several Efficiency and Separation Boards shall annually review the personal records and efficiency of all officers . . . and recommend for discharge or separation those whose qualifications are unsatisfactory," yet reserve officers could be discharged or separated only after court martial proceedings and for cause. We do not believe such result was intended by Congress.

Wherefore the decision appealed from is reversed and the petition for prohibition is dismissed, without pronouncement as to costs.

Bengzon, C.J., Bautista Angelo, Concepcion, Reyes, J.B.L., Barrera, Dizon, Regala, Bengzon, J.P., Zaldivar, and Sanchez, JJ., concur.

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