

**PRISCILLA FERNANDEZ-SUBIDO, PETITIONER AND APPELLANT, VS.
ARSENIO LACSON, AS MAYOR OF MANILA, RESPONDENT AND
APPELLEE.***G.R. No. 16494. August 29, 1961*

Ponente: LABRADOR, J.

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This is an action of mandamus and prohibition to compel the respondent mayor to appoint petitioner to the position of school physician created by an ordinance of the Municipal Board of the City of Manila dated July 25, 1958, and to prohibit said respondent from appointing any other person to that position.

The complaint alleges that on December 5, 1955, petitioner was appointed substitute school physician in the Division of City Schools of Manila, with a compensation at the rate of P2,760 per annum; that subsequently, in October, 1956, her position was changed from substitute school physician to regular school physician at the same rate of pay; that her position was carried in the budget for the Division of City Schools, City of Manila, the said position, among several others, being paid from dental and medical fees collected from city school students; that by Ordinance No. 4033 dated July 22, 1958, four positions of school physicians at P3,480 per annum each were created; and that the understanding was the four city school physicians already in the service, petitioners included, were to be named or appointed to the new positions, in recognition of their loyal and efficient service to the city government; that the respondent city mayor appointed the incumbent school physicians and dentists except the petitioner; that petitioner was not appointed to the position created or reserved for her, because she is the sister-in-law of Atty. Abelardo Subido, a consistent critic of respondent mayor and a well-known Liberal Party man, and for the further reason that the policy of the respondent mayor has been to appoint to the government positions persons who belong to the Nacionalista Party; that the petitioner is not affiliated with the Liberal Party, nor has she engaged in partisan politics; that the petitioner has presented her case to the Municipal Board and the latter, in a resolution dated July 1, 1958, recommended her appointment to any one of the newly-created positions of physicians, on the ground that the policy of the Administration is to give priority to those already in the service and petitioner is one of these; that the respondent has refused to appoint petitioner to the latter's prejudice and to the prejudice of the service, because the staff of school physicians is undermanned; that the act of the respondent in not appointing petitioner to the position reserved to her on the ground that she is a Liberal Party member is a violation of Section 689 of the Revised Administrative Code; that the respondent has acted in grave abuse of discretion amounting to a lack or excess of jurisdiction in not appointing to the position the petitioner herein; and that there is no appeal, nor any speedy and available remedy.

The respondent, having been summoned, presented through counsel, a motion to dismiss the complaint, on the ground that the complaint states no cause of action. In support of the motion to dismiss, it is claimed that the power of appointment is intrinsically an administrative or executive function, involving exercise of discretion, and that the writ of mandamus can not issue to control exercise of such discretion; that the case at bar is not one in which the appointment is limited to a person having certain prescribed qualifications, and that petitioner is not the

only one which such prescribed qualifications, etc.

The motion to dismiss was opposed on the ground that the reasons supporting the same are evidentiary.

Acting upon the motion to dismiss, the trial court dismissed the complaint. Hence this appeal.

Petitioner-appellant contends that the ordinance created the four positions ostensibly to do away with the collection of dental and medical fees from city school students, but actually to remove the power to appoint city employees from the Secretary of Education and transfer it to the respondent mayor. Whether the motive of the Municipal Board in enacting the ordinance is one or the other, or both, is of no consequence—both of them appear legitimate, if not praiseworthy. For us the pertinent question is, Did the ordinance merely provide funds for the positions then existing, one of which was held by the petitioner, or did it create new positions? Because if the purpose of the ordinance was merely to provide funds for the positions already held by the four physicians, petitioner included, then the allegation of petitioner that it was the duty of the respondent mayor to extend her an appointment would merit serious consideration; otherwise stated, if the ordinance only intended to substitute funds appropriated by the Municipal Board for contributions of city school students, there is no question that petitioner would be entitled to be protected in her position. But the ordinance in question states otherwise. Section 1 provides:

"SECTION 1. The creation of the following positions in the Manila Health Department is hereby authorized:

- Four (4) Physicians at P3,480.00 per annum
each P13,920.00".

The language of the ordinance shows that the positions created by it one of which petitioner is seeking appointment, are entirely different from the positions of the physicians in the Division of City Schools, one of which was held by petitioner. If positions are being "created", the positions never existed therefore. Furthermore, the positions are being established in the Health Department; hence they are distinct from the positions held by petitioner and her colleagues in the Division of City Schools. Lastly, appointments to the positions of physicians in the Division of City Schools are made by the Secretary of Education, whereas, appointments to those provided for in the new ordinance are to be made by the mayor. There is, therefore, no ground for supporting the claim of the petitioner that she should be appointed to one of the positions. The above considerations refer to the right or privilege of the petitioner to be appointed to the newly-created position of physician in the Department of Health.

We will now proceed to consider whether the city mayor has the duty to issue the appointment in her favor. Section 11 of the city charter of Manila provides, among the general duties and powers of the mayor (par. q), the power of appointing all officers and employees of the city of Manila except those whose appointments are vested within the President (Sec. 11 [q]). The above power of appointment is an executive function which cannot be controlled by the courts (*Lamb vs. Phipps*, 22 Phil., 456; *Inchausti & Co. vs. Wright*, 47 Phil., 866). Under the principle of separation of powers obtaining in this government, the executive, legislative and judicial departments are coordinate, each supreme within the legitimate sphere of its constitutional or legal duties. In the same manner that the legislature has no authority to direct the judiciary in the exercise of powers that are strictly judicial, neither has the judiciary any power to command the executive, or those holding executive powers, in the use of functions that are purely executive. In the City of Manila the executive functions of government are vested in the mayor and the method of their exercise is confided to his conscience, judgment and discretion. The executive himself is the only judge, under the responsibilities which the city charter imposes, of the manner in which the executive powers shall be employed, and he is answerable for his use, or his omission to use, such powers only in the manner provided by the city charter. (Note to *Hawkins vs. Governor*, 1 Arkansas, 570, 33 Am. Dec. 346, 361.) In the exercise of his powers and functions, especially those of purely executive character, the courts cannot

interfere; with the manner in which he uses his discretion in the choice of his appointees, the court should not and cannot interfere.

The case at bar is not one in which an appointment is to be made in favor of designated persons with special qualifications, in which the mayor would have no choice or discretion. In these cases he is to act in obedience to a declared rule, which he is bound to conform to, and not for a purpose originating in an executive authority. Had the ordinance expressly declared that the positions created are for those then employed in the Division of City Schools, then the power of the city mayor to appoint would be circumscribed by the ordinance and limited only to those mentioned in the ordinance. Even then if he refuses to appoint petitioner, there would still be a doubt whether he could be compelled by mandamus to exercise his right of appointment in favor of the persons already indicated. (Ibid., 362.)

Considering the case at bar from the point of view of the remedy employed, that of mandamus, we are also constrained to hold that the action cannot be entertained. Mandamus only issues when there is a clear legal duty imposed upon the officer sought to be compelled to perform the act, or the duty of appointing petitioner in the case at bar, and when the party in whose favor the appointment is to be extended has a clear legal right to such appointment. The pleadings in the case at bar indicate that perhaps petitioner has the moral right to be appointed and the mayor has the moral obligation to make the appointment. Such moral right and moral duty are not sufficient in law to justify the exercise by us of the special civil remedy of mandamus.

Petitioner alleges that she has exhausted all the administrative remedies, but nowhere does it appear that she has appealed to the President of the Philippines, or to the Department Head, from the refusal of respondent mayor to appoint her to one of the newly created positions. For this reason also, we may not intervene.

For the foregoing considerations, the order of dismissal appealed from is hereby affirmed, with costs against petitioner-appellant.

Bengzon, C. J., Padilla, Concepcion, Reyes, J. B. L., Paredes, Dizon, De Leon, and Natividad, JJ., concur.

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