

OFFICE OF THE OMBUDSMAN, PETITIONER, VS. NELLIE R. APOLONIO, RESPONDENT.*G.R. No. 165132. March 07, 2012*

Ponente: BRION, J.

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Through a petition for review on certiorari,[1] petitioner Office of the Ombudsman (Ombudsman) seeks the reversal of the decision[2] dated March 23, 2004 of the Court of Appeals (CA) in CA-G.R. SP No. 73357 and the resolution dated August 23, 2004, which dismissed the Ombudsman's Motion for Reconsideration. The assailed decision annulled and set aside the decision of the Ombudsman dated August 16, 2002[3] (docketed as OMB ADM-0-01-0405), finding Dr. Nellie R. Apolonio guilty of grave misconduct and dishonesty.

THE FACTUAL ANTECEDENTS

Dr. Apolonio served as the Executive Officer of the National Book Development Board (NBDB) from 1996 to August 26, 2002. As NBDB's executive officer, Dr. Apolonio supervised NBDB's Secretariat and managed its day-to-day affairs.[4]

In December 2000, NBDB's Governing Board approved the conduct of a Team Building Seminar Workshop for its officers and employees. The workshop was scheduled to be a two-day event, to be held on December 20-21, 2000.[5]

On March 29, 1995, the Department of Budget and Management (DBM) issued National Budget Circular No. 442[6] prescribing a P900.00 limit for each participant per day in any seminar/workshop/conference undertaken by any government agency. In compliance with the circular, the NBDB disbursed the amount of P108,000.00 to cover the P1,800.00 allowance of the 60 employees for the two-day event.[7]

Prior to the conduct of the workshop, some of the employees/participants approached Dr. Apolonio to ask whether a part of their allowance, instead of spending the entire amount on the seminar, could be given to them as cash. Dr. Apolonio consulted Rogelio Montealto,[8] then Finance and Administrative Chief of NBDB, about the proposal and the possible legal repercussions of the proposal. Concluding the proposal to be legally sound and in the spirit of the yuletide season, Dr. Apolonio approved the request.[9] Thus, after the end of the workshop, SM gift cheques were distributed to the participants in lieu of a portion of their approved allowance.[10]

Proceedings before the Ombudsman

On August 24, 2001, Nicasio I. Marte, an NBDB Consultant, filed a complaint against Dr. Apolonio and Mr. Montealto before the Ombudsman. The complaint alleged that Dr. Apolonio and Mr. Montealto committed grave misconduct, dishonesty and conduct prejudicial to the best interest of the service for the unauthorized purchase and disbursement of the gift cheques. Mr. Marte alleged that the NBDB's Governing Board never authorized the disbursement of the funds for the purchase of the gift cheques and that the purchases were never stated in Dr.

Apolonio's liquidation report.[11]

In her response, Dr. Apolonio invoked good faith[12] in the purchase of the gift cheques, having in mind the best welfare of the employees who, in the first place, requested the use of part of the budget for distribution to the employees.

On April 3, 2002,[13] Graft Investigation Officer (GIO) Plaridel Oscar J. Bohol found Dr. Apolonio and Mr. Montealto administratively liable for conduct prejudicial to the best interest of the service, but exonerated them from the charges of grave misconduct and dishonesty. GIO Bohol recommended the imposition of suspension for six (6) months and one (1) day without pay.

GIO Bohol's recommendation was not acted favorably by then Acting Ombudsman Margarito Gervacio, Jr. who adopted the recommendation of GIO Julita M. Calderon. GIO Calderon's recommendation was embodied in a memorandum dated August 16, 2002.[14] In her memorandum, GIO Calderon found Dr. Apolonio and Mr. Montealto guilty of gross misconduct and dishonesty, in addition to the charge of conduct grossly prejudicial to the best interest of the service. Consequently, GIO Calderon recommended that Dr. Apolonio and Mr. Montealto be dismissed from the service.[15]

GIO Calderon found that Dr. Apolonio illegally converted the use of her cash advance, which was solely intended for the workshop, for the purchase of the gift cheques. In doing so, she "abused her authority as the Executive Director of NBDB [and] disregarded the authority of the Board." [16] GIO Calderon described Dr. Apolonio's act as a criminal act of technical malversation.[17] Further, even if a clamor among the participants occurred, the clear provisions of Section 89 of Presidential Decree No. (PD) 1445, otherwise known as the "Government Auditing Code of the Philippines," prohibit Dr. Apolonio from releasing the cash advance for a purpose other than that legally authorized.[18] The supposed "noble purpose" for the technical malversation does not negate the illegality of the act.

On August 21, 2002, the Acting Ombudsman approved the findings of GIO Calderon, thereby imposing the penalty of removal against Dr. Apolonio. The Acting Ombudsman likewise denied Dr. Apolonio's motion for reconsideration on September 18, 2002. This prompted Dr. Apolonio to file a petition for review on certiorari in the CA.

Proceedings before the CA

On March 23, 2004, the CA granted the petition, adjudicating the following issues in Dr. Apolonio's favor.

First, the Ombudsman does not possess the power to directly impose the penalty of removal against a public official. In reaching this conclusion, the CA cited Section 13(3), Article XI of the Constitution which shows that the Ombudsman only possesses recommendatory functions in the removal, suspension, demotion, fine, censure or prosecution of erring government officials and employees.[19] The CA addressed Section 21 of Republic Act No. (RA) 6770, otherwise known as "The Ombudsman Act of 1989." It held that RA 6770 "cannot rise above the Constitution"[20] and since it conflicts with the provisions of Section 13(3), Article XI, the Ombudsman's authority to impose penalties against public officials or employees remains to be merely recommendatory.[21]

Second, Dr. Apolonio undeniably realigned a portion of the budget allotted for the workshop for the purchase of the gift cheques. The CA noted, however, that not only is there no evidence that Dr. Apolonio pocketed any amount from the realignment, but her decision to purchase the gift cheques was "greatly influenced" by the appeal of the employee/participants. Thus, the CA held that Dr. Apolonio did not intend to violate the law for a corrupt purpose, thereby negating the Ombudsman's findings that she committed grave misconduct.[22]

The CA likewise found that Dr. Apolonio's acts do not constitute dishonesty because it was not shown that she has predisposition to lie, defraud and deceive which are inimical to the interests of the public service.[23] Since she was motivated by the pleas of the employees and in the spirit of the yuletide season, her actions lack an evil or corrupt motive.[24] Dr. Apolonio is, therefore, only liable for conduct prejudicial to the best interest of the service, the conclusion reached and recommended by GIO Bohol. The CA imposed the penalty of suspension for six (6) months, but due to her retirement from the service, the amount corresponding to her salary for six months was deducted from her retirement benefits.[25]

On April 16, 2004, the Ombudsman moved to intervene and reconsider the decision of the CA. Although the CA granted the motion to intervene, it denied the motion for reconsideration in a Resolution dated August 23, 2004.

THE OMBUDSMAN'S ARGUMENTS

In this petition, the Ombudsman maintains that the CA erred when it reversed the former's decision and held Dr. Apolonio only responsible for conduct prejudicial to the best interest of the service. The Ombudsman maintains that Dr. Apolonio is guilty of grave misconduct for intentionally failing to secure proper authorization from the NBDB's Governing Board.[26] That Dr. Apolonio was motivated by "humanitarian considerations" due to the holidays is irrelevant because she "deliberately ignored the limits of her own authority by allowing public funds to be converted to private use[.]"[27] Citing *Ferriols v. Hiam*,[28] the Ombudsman argues that the misappropriation of funds by an accountable officer for "her personal benefit" constitutes dishonesty and serious misconduct prejudicial to the best interest of the service. The Ombudsman further cites Section 168, Title 4, Article 1 of the Government Accounting and Auditing Manual which clearly limits the "[u]se of moneys appropriated solely for the specific purpose for which appropriated, and for no other, except when authorized by law or by a corresponding appropriating body."[29]

The Ombudsman further takes issue with the CA's findings that grave misconduct and dishonesty were not proven because Dr. Apolonio did not gain from the transaction. In support of this assertion, the Ombudsman points to an "apparent dissimilarity in the amounts actually received by the seminar participants"[30] from the amount appropriated for the workshop. Further, Dr. Apolonio herself was a recipient of the gift cheques. Clearly, she profited from the illegal conversion of funds as well.

Addressing the Court's obiter dictum[31] in *Tapiador v. Office of the Ombudsman*,[32] the Ombudsman argues that the case has become moot because it found Dr. Apolonio guilty of conduct prejudicial to the best interest of the service. To be sure, the Ombudsman likewise cited RA 6770 which gives it the authority to "assess and impose commensurate administrative penal[ies.]"[33]

DR. APOLONIO'S ARGUMENTS

Dr. Apolonio supports the CA decision on the limits of the Ombudsman's authority to impose sanctions on public officials, citing Section 13, Article XI of the Constitution and the deliberations of the Constitutional Commission on this provision.[34] According to her, the Constitution only grants the Ombudsman recommendatory powers for the removal of a public official.[35] Thus, RA 6770, which grants the Ombudsman actual powers to directly impose the penalty of removal, is unconstitutional since it gives powers to the Ombudsman not granted by the Constitution itself.[36] Consequently, it was erroneous for the CA to uphold GIO Bohol's decision to impose a six-month suspension on her since the Constitution only grants recommendatory powers to the Ombudsman.

THE ISSUES IN THIS PETITION

Based on the submissions of the parties, two issues are before us for resolution:

- (1) Does the Ombudsman have the power to directly impose the penalty of removal from office against public officials?
- (2) Do Dr. Apolonio's acts constitute Grave Misconduct?

THE COURT'S RULING

We rule in the Ombudsman's favor and partially grant the petition.

The Ombudsman has the power to directly impose administrative penalties, including removal from office

The Ombudsman has the power to impose the penalty of removal, suspension, demotion, fine, censure, or prosecution of a public officer or employee, in the exercise of its administrative disciplinary authority. The challenge to the Ombudsman's power to impose these penalties, on the allegation that the Constitution only grants it recommendatory powers, had already been rejected by this Court.

The Court first rejected this interpretation in *Ledesma v. Court of Appeals*,^[37] where the Court, speaking through Mm. Justice Ynares-Santiago, held:

The creation of the Office of the Ombudsman is a unique feature of the 1987 Constitution. The Ombudsman and his deputies, as protectors of the people, are mandated to act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations. Foremost among its powers is the authority to investigate and prosecute cases involving public officers and employees, thus:

Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

- (1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

Republic Act No. 6770, otherwise known as The Ombudsman Act of 1989, was passed into law on November 17, 1989 and provided for the structural and functional organization of the Office of the Ombudsman. RA 6770 mandated the Ombudsman and his deputies not only to act promptly on complaints but also to enforce the administrative, civil and criminal liability of government officers and employees in every case where the evidence warrants to promote efficient service by the Government to the people.

The authority of the Ombudsman to conduct administrative investigations as in the present case is settled. Section 19 of RA 6770 provides:

SEC. 19. Administrative Complaints. – The Ombudsman shall act on all complaints relating, but not limited to acts or omissions which:

- (1) Are contrary to law or regulation;
- (2) Are unreasonable, unfair, oppressive or discriminatory;
- (3) Are inconsistent with the general course of an agency's functions, though in accordance with law;

- (4) Proceed from a mistake of law or an arbitrary ascertainment of facts;
- (5) Are in the exercise of discretionary powers but for an improper purpose; or
- (6) Are otherwise irregular, immoral or devoid of justification.

The point of contention is the binding power of any decision or order that emanates from the Office of the Ombudsman after it has conducted its investigation. Under Section 13(3) of Article XI of the 1987 Constitution, it is provided:

Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

x x x x

(3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith. (Emphasis supplied)[38]

Dr. Apolonio's invocation of our obiter dictum in Tapiador was likewise rejected in Ledesma, viz.:

Petitioner insists that the word "recommend" be given its literal meaning; that is, that the Ombudsman's action is only advisory in nature rather than one having any binding effect, citing Tapiador v. Office of the Ombudsman, thus:

Besides, assuming arguendo, that petitioner [was] administratively liable, the Ombudsman has no authority to directly dismiss the petitioner from the government service, more particularly from his position in the BID. Under Section 13, subparagraph (3), of Article XI of the 1987 Constitution, the Ombudsman can only "recommend" the removal of the public official or employee found to be at fault, to the public official concerned.

For their part, the Solicitor General and the Office of the Ombudsman argue that the word "recommend" must be taken in conjunction with the phrase "and ensure compliance therewith." The proper interpretation of the Court's statement in Tapiador should be that the Ombudsman has the authority to determine the administrative liability of a public official or employee at fault, and direct and compel the head of the office or agency concerned to implement the penalty imposed. In other words, it merely concerns the procedural aspect of the Ombudsman's functions and not its jurisdiction.

We agree with the ratiocination of public respondents. Several reasons militate against a literal interpretation of the subject constitutional provision. Firstly, a cursory reading of Tapiador reveals that the main point of the case was the failure of the complainant therein to present substantial evidence to prove the charges of the administrative case. The statement that made reference to the power of the Ombudsman is, at best, merely an obiter dictum and, as it is unsupported by sufficient explanation, is susceptible to varying interpretations, as what precisely is before us in this case. Hence, it cannot be cited as a doctrinal declaration of this Court nor is it safe from judicial examination.[39]

In denying Tapiador and the reasoning in that case, Ledesma traced the constitutional mandate of the Ombudsman, as expressed in the intent of its framers and the constitutionality of RA 6770, viz.:

The provisions of RA 6770 support public respondents' theory. Section 15 is substantially the same as Section 13, Article XI of the Constitution which provides for the powers, functions and duties of the Ombudsman. We draw attention to subparagraph 3, to wit:

SEC. 15. Powers, Functions and Duties. – The Office of the Ombudsman shall have the following powers, functions and duties:

x x x x

(3) Direct the officer concerned to take appropriate action against a public officer or employee at fault or who neglects to perform an act or discharge a duty required by law, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith; or enforce its disciplinary authority as provided in Section 21 of this Act: Provided, That the refusal by any officer without just cause to comply with an order of the Ombudsman to remove, suspend, demote, fine, censure, or prosecute an officer or employee who is at fault or who neglects to perform an act or discharge a duty required by law shall be a ground for disciplinary action against said officer[.] (Emphasis supplied)

We note that the proviso above qualifies the “order” “to remove, suspend, demote, fine, censure, or prosecute” an officer or employee – akin to the questioned issuances in the case at bar. That the refusal, without just cause, of any officer to comply with such an order of the Ombudsman to penalize an erring officer or employee is a ground for disciplinary action, is a strong indication that the Ombudsman’s “recommendation” is not merely advisory in nature but is actually mandatory within the bounds of law. This should not be interpreted as usurpation by the Ombudsman of the authority of the head of office or any officer concerned. It has long been settled that the power of the Ombudsman to investigate and prosecute any illegal act or omission of any public official is not an exclusive authority but a shared or concurrent authority in respect of the offense charged. By stating therefore that the Ombudsman “recommends” the action to be taken against an erring officer or employee, the provisions in the Constitution and in RA 6770 intended that the implementation of the order be coursed through the proper officer, which in this case would be the head of the BID.

It is likewise apparent that under RA 6770, the lawmakers intended to provide the Office of the Ombudsman with sufficient muscle to ensure that it can effectively carry out its mandate as protector of the people against inept and corrupt government officers and employees. The Office was granted the power to punish for contempt in accordance with the Rules of Court. It was given disciplinary authority over all elective and appointive officials of the government and its subdivisions, instrumentalities and agencies (with the exception only of impeachable officers, members of Congress and the Judiciary). Also, it can preventively suspend any officer under its authority pending an investigation when the case so warrants.

The foregoing interpretation is consistent with the wisdom and spirit behind the creation of the Office of the Ombudsman. The records of the deliberations of the Constitutional Commission reveal the following:

MR. MONSOD:

Madam President, perhaps it might be helpful if we give the spirit and intendment of the Committee. What we wanted to avoid is the situation where it deteriorates into a prosecution arm. We wanted to give the idea of the Ombudsman a chance, with prestige and persuasive powers, and also a chance to really function as a champion of the citizen.

However, we do not want to foreclose the possibility that in the future, The Assembly, as it may see fit, may have to give additional powers to the Ombudsman; we want to give the concept of a pure Ombudsman a chance under the Constitution.

MR. RODRIGO:

Madam President, what I am worried about is if we create a constitutional body which has neither punitive nor prosecutory powers but only persuasive powers, we might be raising the hopes of our people too much and then disappoint them.

MR. MONSOD:

I agree with the Commissioner.

MR. RODRIGO:

Anyway, since we state that the powers of the Ombudsman can later on be implemented by the legislature, why not leave this to the legislature?

MR. MONSOD:

Yes, because we want to avoid what happened in 1973. I read the committee report which recommended the approval of the 27 resolutions for the creation of the office of the Ombudsman, but notwithstanding the explicit purpose enunciated in that report, the implementing law – the last one, P.D. No. 1630 —did not follow the main thrust; instead it created the Tanodbayan, x x x.

x x x x

MR. MONSOD: (reacting to statements of Commissioner Blas Ople):

May we just state that perhaps the honorable Commissioner has looked at it in too much of an absolutist position, The Ombudsman is seen as a civil advocate or a champion of the citizens against the bureaucracy, not against the President. On one hand, we are told he has no teeth and he lacks other things. On the other hand, there is the interpretation that he is a competitor to the President, as if he is being brought up to the same level as the President.

With respect to the argument that he is a toothless animal, we would like to say that we are promoting the concept in its form at the present, but we are also saying that he can exercise such powers and functions as may be provided by law in accordance with the direction of the thinking of Commissioner Rodrigo. We did not think that at this time we should prescribe this, but we leave it up to Congress at some future time if it feels that it may need to designate what powers the Ombudsman need in order that he be more effective. This is not foreclosed.

So, his is a reversible disability, unlike that of a eunuch; it is not an irreversible disability. (Emphasis supplied)

It is thus clear that the framers of our Constitution intended to create a stronger and more effective Ombudsman, independent and beyond the reach of political influences and vested with powers that are not merely persuasive in character. The Constitutional Commission left to Congress to empower the Ombudsman with prosecutorial functions which it did when RA 6770 was enacted. In the case of *Uy v. Sandiganbayan*, it was held:

Clearly, the Philippine Ombudsman departs from the classical Ombudsman model whose function is merely to receive and process the people's complaints against corrupt and abusive government personnel. The Philippine Ombudsman, as protector of the people, is armed with the power to prosecute erring public officers and employees, giving him an active role in the enforcement of laws on anti-graft and corrupt practices and such other offenses that may be committed by such officers and employees. The legislature has vested him with broad powers to enable him to implement his own actions. x x x. [emphasis and underscoring ours, citations excluded][40]

The conclusion reached by the Court in *Ledesma* is clear: the Ombudsman has been statutorily granted the right to impose administrative penalties on erring public officials. That the Constitution merely indicated a "recommendatory" power in the text of Section 13(3), Article XI of the Constitution did not deprive Congress of its plenary legislative power to vest the Ombudsman powers beyond those stated.

We affirmed and consistently applied this ruling in the cases of *Gemma P. Cabalit v. Commission on*

Audit-Region VII,[41] Office of the Ombudsman v. Masing,[42] Office of the Ombudsman v. Court of Appeals,[43] Office of the Ombudsman v. Laja,[44] Office of the Ombudsman v. Court of Appeals,[45] Office of the Ombudsman v. Lucero,[46] and Office of the Ombudsman v. Court of Appeals.[47]

To be sure, in the most recent case of Gemma P. Cabalit v. Commission on Audit-Region VII,[48] this Court reiterated the principle behind the grant of such powers to the Ombudsman, viz.:

The provisions in R.A. No. 6770 taken together reveal the manifest intent of the lawmakers to bestow on the Office of the Ombudsman full administrative disciplinary authority. These provisions cover the entire gamut of administrative adjudication which entails the authority to, inter alia, receive complaints, conduct investigations, hold hearings in accordance with its rules of procedure, summon witnesses and require the production of documents, place under preventive suspension public officers and employees pending an investigation, determine the appropriate penalty imposable on erring public officers or employees as warranted by the evidence, and, necessarily, impose the said penalty. Thus, it is settled that the Office of the Ombudsman can directly impose administrative sanctions. (emphasis ours, citations excluded)

Contrary to the Ombudsman's submissions, however, Dr. Apolonio is guilty of simple misconduct, not grave misconduct or conduct prejudicial to the best interest of the service

We disagree with both the CA's and the Ombudsman's findings. Instead, we find Dr. Apolonio guilty of simple misconduct.

At the outset, the Court notes that no questions of fact are raised in these proceedings. Both the Ombudsman and Dr. Apolonio concede that the latter appropriated funds intended for the workshop to a purpose other than the one stated and approved by the NBDB. Therefore, the only issue to be determined is whether the purchase of the gift cheques constitutes a grave misconduct or, as found by the CA, conduct prejudicial to the best interest of the service. As already stated, we find Dr. Apolonio guilty of neither, and instead hold her liable for simple misconduct.

In *Civil Service Commission v. Ledesma*,[49] the Court defined misconduct as "a transgression of some established and definite rule of action, more particularly, unlawful behavior or gross negligence by a public officer." We further stated that misconduct becomes grave if it "involves any of the additional elements of corruption, willful intent to violate the law or to disregard established rules, which must be established by substantial evidence." [50] Otherwise, the misconduct is only simple.[51] Therefore, "[a] person charged with grave misconduct may be held liable for simple misconduct if the misconduct does not involve any of the additional elements to qualify the misconduct as grave." [52]

In *Civil Service Commission v. Ledesma*,[53] respondent was found guilty of simple misconduct by this Court when she accepted amounts meant for the payment of Environmental Compliance Certificates and failed to account for P460.00. The Court noted that "[d]ismissal and forfeiture of benefits, however, are not penalties imposed for all infractions, particularly when it is a first offense." [54] Despite evidence of misconduct in her case, the Court emphasized that "[t]here must be substantial evidence that grave misconduct or some other grave offense meriting dismissal under the law was committed." [55]

Further, in *Monico K. Imperial, Jr. v. Government Service Insurance System*,[56] the Court considered Imperial's act of approving the salary loans of eight employees "who lacked the necessary contribution requirements" under GSIS Policy and Procedural Guidelines No. 153-99 as simple misconduct. It refused to categorize the act as grave

misconduct because no substantial evidence was adduced to prove the elements of “corruption,” “clear intent to violate the law” or “flagrant disregard of established rule” that must be present to characterize the misconduct as grave.

As in the cases of *Civil Service Commission v. Ledesma*[57] and *Imperial*, Dr. Apolonio’s use of the funds to purchase the gift cheques cannot be said to be grave misconduct.

First, Dr. Apolonio’s actions were not attended by a willful intent to violate the law or to disregard established rules. Although the Court agrees that Dr. Apolonio’s acts contravene the clear provisions of Section 89 of PD 1445, otherwise known as the “Government Auditing Code of the Philippines,” such was not attended by a clear intent to violate the law or a flagrant disregard of established rules.[58] Several circumstances militate in favor of this conclusion.

Dr. Apolonio merely responded to the employees’ clamor to utilize a portion of the workshop budget as a form of Christmas allowance. To ensure that she was not violating any law, Dr. Apolonio even consulted Mr. Montealto, then Finance and Administrative Chief of the NBDB, on the possible legal repercussions of the proposal. Likewise, aside from receiving the same benefit, there is no evidence in the record that Dr. Apolonio unlawfully appropriated in her favor any amount from the approved workshop budget. Therefore, we see no willful intent in Dr. Apolonio’s actions.

Second, we disagree with the Ombudsman’s insinuations that Dr. Apolonio’s acts may be considered technical malversation and, therefore, constitute a crime. In *Parungao v. Sandiganbayan, et al.*,[59] the Court held that in the absence of a law or ordinance appropriating the public fund allegedly technically malversed for another public purpose, an accused did not commit technical malversation as set out in Article 220 of the Revised Penal Code.[60] In that case, the Court acquitted Oscar P. Parungao (then a municipal treasurer) of the charges of technical malversation even though he used funds allotted (by a Department of Environment and Natural Resources circular) for the construction of a road project and re-allocated it to the labor payroll of different barangays in the municipality. The Court held that since the budget for the construction of the road was not appropriated by a law or by an ordinance for that specified public purpose, the re-allocation of the budget for use as payroll was not technical malversation.

Similarly, in this case, the budget allocation for the workshop was neither appropriated by law nor by ordinance since DBM National Budget Circular No. 442 is not a law or an ordinance. Even if it had been, however, it must be noted that DBM National Budget Circular No. 442 only prescribed the amounts to be used for any workshop, conference or seminar. It did not appropriate the specific amounts to be used in the event in question.

Therefore, when Dr. Apolonio approved the purchase of the gift cheques using a portion of the workshop’s budget, her act did not amount to technical malversation. Moreover, if her acts did, in fact, constitute technical malversation, the Ombudsman ought to have filed a criminal case against her for violation of Article 220 of the Revised Penal Code.

We cannot likewise agree with the CA’s findings that Dr. Apolonio’s acts constitute merely as conduct prejudicial to the best interest of the service. In *Manuel v. Judge Calimag, Jr.*,[61] we held, viz.:

Misconduct in office has been authoritatively defined by Justice Tuazon in *Lacson v. Lopez* in these words: “Misconduct in office has a definite and well-understood legal meaning. By uniform legal definition, it is a misconduct such as affects his performance of his duties as an officer and not such only as affects his character as a private individual. In such cases, it has been said at all times, it is necessary to separate the character of the man from the character of the officer x x x[.] It is settled that misconduct, misfeasance, or malfeasance warranting removal from office of an officer must have direct relation to and be connected with the

performance of official duties amounting either to maladministration or willful, intentional neglect and failure to discharge the duties of the office x x x[.] More specifically, in *Buenaventura v. Benedicto*, an administrative proceeding against a judge of the court of first instance, the present Chief Justice defines misconduct as referring ‘to a transgression of some established and definite rule of action, more particularly, unlawful behavior or gross negligence by the public officer.’” [emphasis supplied, citations excluded]

Therefore, if a nexus between the public official’s acts and functions is established, such act is properly referred to as misconduct. In *Dr. Apolonio’s* case, this nexus is clear since the approval of the cash advance was well within her functions as NBDB’s executive officer.[62]

Contrast her situation, for example with the case of *Cabalitan v. Department of Agrarian Reform*,[63] where we held that “the offense committed by the employee in selling fake Unified Vehicular Volume Program exemption cards to his officemates during office hours was not grave misconduct, but conduct prejudicial to the best interest of the service.” Further contrast *Dr. Apolonio’s* case with *Mariano v. Roxas*,[64] where “the Court held that the offense committed by a [CA] employee in forging some receipts to avoid her private contractual obligations, was not misconduct but conduct prejudicial to the best interest of the service because her acts had no direct relation to or connection with the performance of her official duties.”

CONCLUSION

Thus, we hold that *Dr. Apolonio* is guilty of simple misconduct. Although her actions do not amount to technical malversation, she did violate Section 89 of PD 1445 when she approved the cash advance that was not authorized by the NBDB’s Governing Board. Further, since the approval of the cash advance was an act done pursuant to her functions as executive officer, she is not merely guilty of conduct prejudicial to the best interest of the service.

WHEREFORE, we PARTIALLY GRANT the Office of the Ombudsman’s petition for review on certiorari, and MODIFY the decision of the Court of Appeals in CA-G.R. SP No. 73357. We find *Dr. Nellie R. Apolonio* GUILTY of SIMPLE MISCONDUCT. In the absence of any showing that this is her second offense for simple misconduct, we impose the penalty of SUSPENSION for SIX MONTHS against *Dr. Apolonio*,[65] but due to her retirement from the service, we order the amount corresponding to her six-month salary to be deducted from her retirement benefits.

No pronouncement as to costs.

SO ORDERED.

Carpio, (Chairperson), Perez, Sereno, and Reyes, JJ., concur.

[1] Filed under Rule 45 of the Rules of Court; rollo pp. 11-37.

[2] Penned by Justice Rodrigo V. Cosico, and concurred in by Justices Sergio L. Pestaño and Rosalinda Asuncion-Vicente; id. at 43-51.

[3] Signed by Acting Ombudsman Margarito Gervacio, Jr. on August 21, 2002; id. at 176-182.

[4] Id. at 44. See also Republic Act No. 8047, otherwise known as “An Act Providing for the Development of the Book Publishing Industry Through the Formulation and Implementation of a National Book Policy and a National Book Development Plan.”

Sec. 9. The Secretariat. – The Board shall have a permanent Secretariat under an Executive Officer, who shall be appointed by the Board.

The authority and responsibility for the day-to-day management and direction of the operations of the affairs of the Board shall be vested in the Executive Officer.

[5] Supra.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Id. at 45.

[11] Ibid.

[12] Ibid.

[13] Id. at 53-67.

[14] Id. at 68-74.

[15] Id. at 74.

[16] Id. at 45.

[17] Id. at 71.

[18] Id. at 71–72. Section 89. Limitations on cash advance. – No cash advance shall be given unless for a legally authorized specific purpose.

[19] Id. at 48.

[20] Id. at 189.

[21] Id. at 48.

[22] Id. at 49-50.

[23] Id. at 50.

[24] Ibid.

[25] Id. at 50-51.

[26] Id. at 24.

[27] Id. at 25.

[28] A.M. Nos. P-90-414 & P-90-531, August 9, 1993, 225 SCRA 205.

[29] Rollo, p. 26.

[30] Id. at 29.

[31] Id. at 30-31.

[32] G.R. No. 129124, March 15, 2002, 379 SCRA 322.

- [33] Rollo, p. 31.
- [34] Id. at 95.
- [35] Id. at 96.
- [36] Id. at 98.
- [37] G.R. No. 161629, July 29, 2005, 465 SCRA 437.
- [38] Id. at 446-448.
- [39] Id. at 448-449.
- [40] Id. at 449-453.
- [41] G.R. Nos. 180236, 180341, & 180342, January 17, 2012.
- [42] G.R. Nos. 165416, 165584, & 165731, January 22, 2008, 542 SCRA 253.
- [43] G.R. No. 168079, July 17, 2007, 527 SCRA 798, 806-807.
- [44] G.R. No. 169241, May 2, 2006, 488 SCRA 574.
- [45] G.R. No. 160675, June 16, 2006, 491 SCRA 92, 108.
- [46] G.R. No. 168718, November 24, 2006, 508 SCRA 106, 112-113.
- [47] G.R. No. 167844, November 22, 2006, 507 SCRA 593, 610.
- [48] Supra note 41.
- [49] G.R. No. 154521, September 30, 2005, 471 SCRA 589, 603, citing *Bureau of Internal Revenue v. Organo*, G.R. No. 149549, February 26, 2004, 424 SCRA 9, and *Castelo v. Florendo*, A.M. No. P-96-1179, October 10, 2003, 413 SCRA 219.
- [50] *Civil Service Commission v. Ledesma*, supra, at 603, citing *Civil Service Commission v. Lucas*, 361 Phil. 486 (1999); and *Landrito v. Civil Service Commission*, G.R. Nos. 104304-05, June 22, 1993, 223 SCRA 564.
- [51] *Santos v. Rasalan*, G.R. No. 155749, February 8, 2007, 515 SCRA 97.
- [52] *Civil Service Commission v. Ledesma*, supra note 49, at 603.
- [53] Ibid.
- [54] Id. at 611.
- [55] Ibid.
- [56] G.R. No. 191224, October 4, 2011.
- [57] Supra note 49.
- [58] *Monico K. Imperial, Jr. v. Government Service Insurance System*, supra note 56.
- [59] 274 Phil. 451 (1991).
- [60] Art. 220. Illegal use of public funds or property. — Any public officer who shall apply any public fund or property under his administration to any public use other than for which such fund or property were appropriated

by law or ordinance shall suffer the penalty of prision correccional in its minimum period or a fine ranging from one-half to the total of the sum misapplied, if by reason of such misapplication, any damage or embarrassment shall have resulted to the public service. In either case, the offender shall also suffer the penalty of temporary special disqualification.

[61] 367 Phil. 162, 166 (1999), cited in *Largo v. Court of Appeals*, G.R. No. 177244, November 20, 2007, 537 SCRA 721, 730-731.

[62] RA 8047, otherwise known as “An Act Providing for the Development of the Book Publishing Industry Through the Formulation and Implementation of a National Book Policy and a National Book Development Plan.”

Sec. 9. The Secretariat. – The Board shall have a permanent Secretariat under an Executive Officer, who shall be appointed by the Board.

The authority and responsibility for the day-to-day management and direction of the operations of the affairs of the Board shall be vested in the Executive Officer.

[63] G.R. No. 162805, January 23, 2006, 479 SCRA 452, 456 and 461, cited in *Largo v. Court of Appeals*, supra note 61, at 733.

[64] 434 Phil. 742, 751 (2002), cited in *Largo v. Court of Appeals*, supra, at 733.

[65] Pursuant to 52(B)(2), Rule IV, Revised Uniform Rules on Administrative Cases in the Civil Service.

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