

PETITIONER, VS. COMMISSION ON ELECTIONS AND FLORENCIO P. AGUSTIN, RESPONDENTS.

G.R. No. 171063. March 02, 2007

Ponente: SANDOVAL-GUTIERREZ, J.

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SANDOVAL-GUTIERREZ, J.:

Before us for resolution is a special civil action for certiorari under Rule 65 of the 1997 Rules of Civil Procedure, as amended, assailing the Resolution[1] dated October 25, 2005 and Order[2] dated January 5, 2006 of respondent Commission on Elections (COMELEC) issued in EAC No. 34-2002.

The facts are:

Petitioner Eduard V. Tugade and private respondent Florencio P. Agustin were candidates for the position of Punong Barangay of San Raymundo, Balungao, Pangasinan during the July 15, 2002 synchronized Barangay and Sangguniang Kabataan elections.

The result of the canvass showed that petitioner obtained 246 votes, while private respondent garnered 245 votes, or a margin of only one (1) vote.

Hence, on July 16, 2002, the Barangay Board of Canvassers proclaimed petitioner as the elected Punong Barangay.

On July 23, 2002, private respondent filed with the Municipal Trial Court (MTC) of Balungao, Pangasinan an election protest, docketed as Election Protest Case No. 900. He questioned the results of the votes cast and counted in Precinct No. 60-A/60-A-1.

In his answer with counterclaim, petitioner countered that the conduct and final outcome of the election have been regular, credible and in accordance with the Omnibus Election Code and the Rules and Regulations of the July 15, 2002 synchronized Barangay and Sangguniang Kabataan Elections.

On August 13, 2002, the MTC created a Revision Committee. Its report, based on the election returns and the tally sheets, showed the following:

Florencio P. Agustin - 119

Eduard V. Tugade - 126

TOTAL

245

However, after the segregation and recount of the ballots contained in the sealed envelopes for the candidates in the contested precincts, the following results were obtained:

Florencio P. Agustin - 119

Eduard V. Tugade

- 125

Stray Ballots

- 11

TOTAL

255

Thereafter, the parties, through their Revisors, submitted their respective objections and claims, thus: private respondent objected to three (3) ballots for petitioner (Exhibits "A", "B", "C") and laid claim to one (1) ballot considered as stray by the Board of Canvassers. Petitioner, on the other hand, objected to two (2) ballots counted for private respondent (Exhibits "1" and "2") and laid claim to two (2) ballots (Exhibits "3" and "4"). Later, petitioner withdrew his claim to Exhibit "4".

On September 3, 2002, the MTC rendered its Decision[3] declaring private respondent the duly elected Punong Barangay, thus:

In recapitulation, the votes garnered by each candidate in the contested precincts are as follows:

Precincts Nos. 60-A/60-A-1

Florencio Agustin 119 + 1 = 120

Eduard Tugade

125 - 3 = 122

The final tally, therefore, is:

Precinct Precinct Total

60-A/

61-A/

60-A-1 61-A-1

Florencio Agustin

120

126 246

Eduard Tugade

122

120

242

On the same date, private respondent filed a motion for execution of the MTC Decision pending appeal.

For his part, petitioner, on September 4, 2002, filed a notice of appeal and an opposition to private respondent's motion for execution pending appeal.

On September 9, 2002, the MTC issued an Order denying private respondent's motion. In another Order of the same date, the court ordered the transmittal of the complete records of the case to respondent COMELEC.

On appeal, the COMELEC (Second Division), on October 25, 2005, issued the assailed Resolution[4] declaring a tie between petitioner and private respondent, thus:

Based on the above findings, the total number of votes for protestant-appellee and protestee-appellant is as follows:

Agustin Tugade

Total votes from the uncontested precinct per election return

126

120

Add:

Total votes per physical count from contested precinct

119

125

ADD:

Validated claimed votes 1 2

LESS:

Invalidated votes per COMELEC ruling:

0

1

GRAND TOTAL 246 246

The final tally, therefore, is two hundred forty six (246) votes for protestant-appellee Agustin and two hundred forty six (246) votes for protestee-appellant. The foregoing appreciation therefore shows a tie between the two candidates.

x x x

WHEREFORE, premises considered, the instant appeal is GRANTED. The September 3, 2002 Decision of Acting Presiding Judge Manuel F. Pastor, Jr. of the Municipal Trial Court of Balungao, Pangasinan in Election Protest Case No. 900 declaring protestant-appellee Florencio P. Agustin the winner for the position of Punong Barangay of Barangay San Raymundo, Balungao, Pangasinan during the July 15, 2002 synchronized Barangay and Sangguniang Kabataan elections is hereby REVERSED and SET ASIDE.

The Barangay Board of Canvassers of Barangay San Raymundo, Balungao, Pangasinan is hereby ordered to RECONVENE and, after five (5) days due notice to herein protestee-appellant and protestant-appellee, hold a special public meeting at which it shall proceed to the DRAWING OF LOTS (not tossing of a coin) and shall proclaim as elected Punong Barangay of San Raymundo the candidate who may be favored by luck, pursuant to Section 240 of the Omnibus Election Code.

The Election Officer of Balungao, Pangasinan is hereby directed to implement this Resolution. In the accomplishment thereof, he is hereby authorized to appoint new members of the Barangay Board of

Canvassers in the event that some members are already unavailable or to convene a new Barangay Board of Canvassers altogether in the absence of the old one.

SO ORDERED.

On November 11, 2005, petitioner filed a motion for reconsideration with respondent COMELEC En Banc.

On January 5, 2006, petitioner's motion for reconsideration was denied because of his failure (1) to file the same within the five-day reglementary period under Section 2, Rule 19, COMELEC Rules of Procedure; (2) to pay the required motion fees prescribed under Section 7(f), Rule 40 of the same Rules, as amended by Comelec Minute Resolution No. 02-0130 dated September 18, 2003; (3) to verify the motion in accordance with Section 3, Rule 19, of the same Rules; and (4) to file with the COMELEC the required number of copies of his motion,[5] pursuant to Section 1, Rule 7, also of the same Rules.

Hence, the present petition based on the following ground:

THE QUESTIONED RESOLUTION DATED OCTOBER 25, 2005 AND THE ORDER DATED JANUARY 5, 2006 OF RESPONDENT COMMISSION, WITH DUE RESPECT, ARE NOT IN ACCORD WITH THE LAW OR WITH THE APPLICABLE DECISIONS OF THIS HONORABLE SUPREME COURT.

In his Comment,[6] private respondent contends that this petition for certiorari should be dismissed because it does not allege facts showing grave abuse of discretion amounting to lack or in excess of jurisdiction on the part of respondent COMELEC. The petition only states a general and sweeping statement that the assailed Resolution and Order "are not in accord with the law or with the applicable decisions."

The petition must fail.

In certiorari proceedings, questions of fact are not generally permitted, the inquiry being limited essentially to whether or not the respondent tribunal had acted without or in excess of its jurisdiction or with grave abuse of discretion.[7] Here, petitioner is questioning respondent COMELEC's conclusion that there is a "tie between the two candidates." Definitely, this is a factual issue.

Grave abuse of discretion is committed when an act is 1) done contrary to the Constitution, the law or jurisprudence, or 2) executed "whimsically or arbitrarily" in a manner "so patent and so gross as to amount to an evasion of a positive duty or a virtual refusal to perform the duty enjoined,"[8] as where the power is exercised in an arbitrary and despotic manner because of passion or personal hostility.[9] An act of a court or tribunal may constitute grave abuse of discretion when the same is performed in a capricious or whimsical exercise of judgment amounting to lack of jurisdiction.

Such act is wanting in the present case.

Moreover, it is relevant to state that respondent COMELEC En Banc, in ordering the immediate implementation of the Resolution issued by its Second Division for the drawing of lots of the herein parties, acted in accordance with Section 240 of Batas Pambansa 881, otherwise known as the Omnibus Election Code of the Philippines which provides:

Sec. 240. Election resulting in tie. - Whenever it shall appear from the canvass that two or more candidates have received an equal and highest number of votes, or in cases where two or more candidates are to be elected for the same position and two or more candidates received the same number of votes for the last place in the number to be elected, the board of canvassers, after recording this fact in its minutes, shall by resolution, upon five days notice to all the tied candidates, hold a special public meeting at which the board of canvassers shall proceed to the drawing of lots of the candidates who have tied and shall proclaim as elected the candidates who

may be favored by luck, and the candidates so proclaimed shall have the right to assume office in the same manner as if he had been elected by plurality of vote. The board of canvassers shall forthwith make a certificate stating the name of the candidate who had been favored by luck and his proclamation on the basis thereof.

Nothing in this section shall be construed as depriving a candidate of his right to contest the election.

WHEREFORE, the petition is DISMISSED. Costs against petitioner.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio-Morales, Tinga, Chico-Nazario, Garcia, Velasco, Jr. and Nachura, JJ., concur.
Callejo, Sr., and Azcuna, J., on official leave.

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- [1] Penned by Commissioners Mehol K. Sadain and Florentino A. Tuason, Jr. of the Comelec (Second Division).
- [2] Penned by Chairman Benjamin S. Abalos and Commissioners Rufino S.B. Javier, Mehol K. Sadain, Florentino A. Tuason, Jr., Resurreccion Z. Borra, and Romeo A. Brawner of the Comelec En Banc.
- [3] Rollo, pp. 30-34.
- [4] Id., pp. 12-26.
- [5] Id., Order dated January 5, 2006, pp. 28- 29.
- [6] Id., pp. 51- 55.
- [7] Quiambao v. Court of Appeals, G.R. No. 128305, March 28, 2005, 454 SCRA 17.
- [8] Pablo-Gualberto v. Gualberto V., G.R. No. 154994, June 28, 2005, 461 SCRA 450.
- [9] Angeles v. Secretary of Justice, G.R. No. 142612, July 29, 2005, 465 SCRA 106. G.R. No. 171063

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