

ABELARDO P. ABEL, PETITIONER, VS. PHILEX MINING CORPORATION, REPRESENTED BY FERNANDO AGUSTIN, RESPONDENT.

G.R. NO. 178976. July 31, 2009

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

Assailed in this petition for review on certiorari is the January 22, 2007 Decision of the Court of Appeals in CA-G.R. SP No. 91988 denying due course to and dismissing petitioner's petition for certiorari which assailed the January 31, 2005 Decision of the National Labor Relations Commission (NLRC) in NLRC NCR CA No. 037631-03 that petitioner was legally dismissed from service on the grounds of loss of trust and confidence and gross and habitual neglect of duty.

By his claim, petitioner was first hired by respondent in January, 1988. He was eventually assigned to respondent's Legal Department as a Contract Claims Assistant, a position he occupied for five years prior to his transfer to the Mine Engineering and Draw Control Department wherein he was appointed Unit Head in early 2002.[1]

Sometime in September, 2002, petitioner was implicated in an irregularity occurring in the subsidence area of respondent's mine site at Pacdal, Tuba, Benguet. Petitioner's co-worker Danilo R. Lupega (Lupega), a Subsidence Checker at the mine site who was himself under administrative investigation for what came to be known as the "subsidence area anomaly," executed an affidavit[2] which read in relevant part:

- That as a Subsidence Checker, I was strict in monitoring the trips of ANSECA contract [sic] for their backfilling operations, seeing to it that every truck is to be fully loaded with backfills;
- That I noticed that there were many instances when the ANSECA trucks were not fully loaded and, likewise, the bucket of the back-hoe machine was not fully/properly loaded;
- That I reported my unusual observations to Crispin Y. Tabogader and he replied, "Sige sasabihin ko kay Ben Garcia." (Alright, I will tell Ben Garcia.), project manager of ANSECA;
- That I remember reporting also the matter to Robert L. Montes, but I heard no response from him;
- That for some days, the back-hoe operator had fully loaded the ANSECA trucks but the irregular practice of not fully loading the same had been continued;
- That when my reports seemed unacted [sic] by Crispin Y. Tabogader & Robert L. Montes because I still observe [sic] the continuance of the irregularity of the loading operations, I went at [sic] the office of the Contract Committee to report the matter, and when I was there, I reported it to Abelardo P. Abel, and he told me, "mauna ka na at susunod na lang ako at maghahanap pa ako ng sasakyan." (Go ahead, I will follow when I find a ride.). So I went ahead and kept on waiting but Abel did not show up at the Subsidence Area;

x x x x

- That sometime in 2001, I was then on 2[nd] shift duty eating my dinner at a little past 7:00 PM when the telephone rang. I lifted the phone receiver and the caller was asking for Didith, whom I knew was the ANSECA Accountant. I told the caller to re-dial the phone number and after he had done it, I was tempted to lift the phone receiver and I heard the caller telling Didith, "Si Abel ito, paano na yung usapan natin?" (This is Abel. What happened to our deal?), and Didith answered that, "O sige, huwag kang mag-alala, ipapaalam ko sa Cebu" (Alright, do not worry. I will take it up with our Cebu office.), then I put back the phone receiver on its place;

- That again sometime in 2001, I was then on 1[st] shift duty when the telephone rang. I lifted the receiver and the caller said, "Open pit watcher, sa ANSECA nga" (To ANSECA please.), and I answered "I-dial mo ulit" (Please dial again.), and I immediately put the receiver down on its place. When he re-dialed and was answered by ANSECA, I was again tempted to lift the phone receiver and I heard the caller saying, "Si Abel ito, paano na yung usapan natin[?]" (This is Abel. What happened to our deal?), and the ANSECA accountant replied, "O sige, hintayin mo ako sa bangko at magwiwithdraw ako." (Alright, wait for me at the bank. I will come to make the withdrawal.). That this was only the conversation I heard between the two because I already put down the phone receiver. (Italics and translations supplied)

The incidents alleged in Lupega's affidavit supposedly took place when petitioner was still a Contract Claims Assistant at respondent's Legal Department.

In compliance with respondent's directive to respond to Lupega's charges, petitioner wrote a letter to Fernando Agustin (Agustin), respondent's Vice President for Operations, denying Lupega's allegations of extortion from Anseca Development Corporation (ANSECA) and failure to report the incidents of underloading of ANSECA's trucks during backfilling operations. Petitioner averred that Lupega was only seeking to deflect his own responsibility for the irregularities then occurring at the mine site.[3]

An investigation was promptly launched by respondent's officers by conducting several fact-finding meetings for the purpose. Petitioner attended the meetings but claimed that he was neither asked if he needed the assistance of counsel nor allowed to properly present his side.[4]

By Memorandum dated December 7, 2002,[5] respondent's Administrative Division, Litigation and Investigation Section found petitioner guilty of (1) fraud resulting in loss of trust and confidence and (2) gross neglect of duty, and was meted out the penalty of dismissal from employment effective December 8, 2002.[6]

Petitioner thus filed a complaint for illegal dismissal with the NLRC against respondent, represented by Agustin, with claims for annual vacation leave pay for 2001 and 2002.[7]

Respondent, admitting that it dismissed petitioner, contended that the decision was preceded by regular and proper proceedings, all attended by petitioner; that petitioner had agreed to submit his case for decision; that it lost almost P9,000,000 from the subsidence area anomaly; and that Crispin Y. Tabogader, Jr. (Tabogader), Subsidence Area Head, Robert L. Montes, Draw Control Superintendent, and Eduardo R. Garcia, Jr., Mine Engineering and Draw Control Department Manager, had all been dismissed for their involvement in the anomaly.[8]

By Decision of September 19, 2003,[9] the Labor Arbiter, ruling that petitioner was dismissed illegally, disposed as follows:

WHEREFORE, premises considered, judgment is hereby rendered finding respondents guilty of illegal dismissal.

Respondents must reinstate complainant to his former or equivalent position without loss of seniority rights and other privileges and to pay him full backwages reckoned from the time his compensation was effectively withheld from him up to the time of his actual reinstatement, which as of this writing amount to One Hundred

Sixty Nine Thousand Four Hundred Fifty Eight Pesos and Thirty Four Centavos (P169,458.34).

The Labor Arbiter found that respondent failed to prove by substantial evidence the alleged fraud committed by petitioner, explaining that the telephone conversations between petitioner and Didith Caballero of ANSECA would not suffice to lay the basis for respondent's loss of trust and confidence in petitioner.

On the charge of gross negligence, the Labor Arbiter held that no negligence was present as respondent itself admitted that petitioner reported the underloading to Tabogader, who was then in charge of the subsidence area where the alleged anomaly was happening.

On respondent's appeal, the NLRC reversed the decision of the Labor Arbiter by Decision dated January 31, 2005,[10] finding that petitioner was guilty of gross and habitual neglect of duty as he continually reported ANSECA's backfilling operations as "okay" per his inspection notwithstanding the gross underloading; and that he did not act on Lupega's report concerning certain irregularities. To the NLRC, petitioner's failure to perform his duty of inspecting ANSECA's operations and vacillation on certain matters during the company investigation, among other things, constituted sufficient basis for respondent's loss of trust and confidence.

Petitioner's Motion for Reconsideration having been denied by Resolution of July 7, 2005,[11] he appealed to the Court of Appeals via certiorari.[12]

As reflected early on, the appellate court denied due course to, and dismissed, petitioner's appeal by Decision dated January 22, 2007,[13] upon a finding that what petitioner was questioning were the findings of fact and conclusions of the NLRC which would, at most, constitute errors of law and not abuse of discretion correctable by certiorari. It likewise found that petitioner failed to substantiate the grave abuse of discretion imputed to the NLRC, he not having demonstrated how the NLRC decided in a manner contrary to the constitution, law or jurisprudence, or how it acted whimsically, capriciously, or arbitrarily out of malice, ill will, or personal bias.

His Motion for Reconsideration having been denied by Resolution of July 6, 2007,[14] petitioner comes before this Court via the present Petition for Review on Certiorari.

Petitioner argues that respondent's lone witness Lupega offered no proof of the alleged incidents of underloading of the trucks of ANSECA during backfilling operations; that he nevertheless reported the supposed underloading to Tabogader who subsequently told him that the problem had been solved; that it was not his principal duty to inspect the actual loading of every truck of ANSECA as he was in fact only spending about 20% of his time on the field; that the charge of fraud based on the purported extortion attempt was not proven; and that assuming he was negligent in handling the reported underloading, the penalty of dismissal was too harsh given his length of service and untarnished record.[15]

Respondent counters that petitioner raises questions of fact or evidentiary matters which are improper in a petition for review on certiorari; and that the findings of the NLRC are supported by substantial evidence.[16]

The petition is impressed with merit.

While it is well-established that the jurisdiction of the Court in cases brought before it via a petition for review on certiorari is limited to reviewing errors of law,[17] excepted therefrom is where, as in the present case, the findings of the NLRC contradict those of the Labor Arbiter, then the Court, in the exercise of its equity jurisdiction, may look into the records of the case and reexamine the questioned findings.[18]

The heart of the controversy is the validity of petitioner's dismissal, which hinges on the satisfaction of two substantive requirements, viz: (1) the dismissal must be for any of the causes provided for in Article 282 of the Labor Code; and (2) the employee was accorded due process, basic of which is the opportunity to be heard and to

defend himself.[19]

The law mandates that the burden of proving the validity of the termination of employment rests with the employer. Failure to discharge this evidentiary burden would necessarily mean that the dismissal was not justified and, therefore, illegal. Unsubstantiated suspicions, accusations, and conclusions of employers do not provide legal justification for dismissing employees. In case of doubt, such cases should be resolved in favor of labor pursuant to the social justice policy of labor laws and the Constitution.[20]

This burden of proof was clarified in *Community Rural Bank of San Isidro (N.E.), Inc. v. Paez*[21] to mean substantial evidence:

The Labor Code provides that an employer may terminate the services of an employee for just cause and this must be supported by substantial evidence. The settled rule in administrative and quasi-judicial proceedings is that proof beyond reasonable doubt is not required in determining the legality of an employer's dismissal of an employee, and not even a preponderance of evidence is necessary as substantial evidence is considered sufficient. Substantial evidence is more than a mere scintilla of evidence or relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds, equally reasonable, might conceivably opine otherwise.

In this case, respondent dismissed petitioner on the following grounds: (1) fraud resulting in loss of trust and confidence and (2) gross neglect of duty.

Respecting the first ground, Article 282(c) of the Labor Code allows an employer to terminate the services of an employee for loss of trust and confidence:

ART. 282. Termination by employer. - An employer may terminate an employment for any of the following causes:

x x x x

c) Fraud or willful breach by the employee of the trust reposed in him by his employer or his duly authorized representative.

The first requisite for dismissal on the ground of loss of trust and confidence is that the employee concerned must be holding a position of trust and confidence. Verily, the Court must first determine if petitioner holds such a position.

There are two classes of positions of trust.[22] The first class consists of managerial employees. They are defined as those vested with the powers or prerogatives to lay down management policies and to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees or effectively recommend such managerial actions.[23] The second class consists of cashiers, auditors, property custodians, etc.. They are defined as those who, in the normal and routine exercise of their functions, regularly handle significant amounts of money or property.[24]

In this case, petitioner was a Contract Claims Assistant at respondent's Legal Department at the time he allegedly committed the acts which led to its loss of trust and confidence. It is not the job title but the actual work that the employee performs.[25] It was part of petitioner's responsibilities to monitor the performance of respondent's contractors in relation to the scope of work contracted out to them.[26]

Respondent relies on petitioner's reports regarding his inspection of the work accomplishment of such contractors. As a result of his monitoring the enforcement of respondent's contracts which involve large sums of money, petitioner may well be considered an employee with a position of trust analogous to those falling under the second class. A position where a person is entrusted with confidence on delicate matters, or with the custody, handling or

care and protection of the employer's property is one of trust and confidence.[27]

The second requisite is that there must be an act that would justify the loss of trust and confidence.[28] Loss of trust and confidence, to be a valid cause for dismissal, must be based on a willful breach of trust and founded on clearly established facts. The basis for the dismissal must be clearly and convincingly established but proof beyond reasonable doubt is not necessary.[29] Respondent's evidence against petitioner fails to meet this standard. Its lone witness, Lupega, did not support his affidavit and testimony during the company investigation with any piece of evidence at all. No other employee working at respondent's mine site attested to the truth of any of his statements. Standing alone, Lupega's account of the subsidence area anomaly could hardly be considered substantial evidence. And while there is no concrete showing of any ill motive on the part of Lupega to falsely accuse petitioner, that Lupega himself was under investigation when he implicated petitioner in the subsidence area anomaly makes his uncorroborated version suspect.

The Labor Arbiter correctly found that the alleged telephone conversations between petitioner and Didith Caballero of ANSECA would not suffice to lay the basis for respondent's loss of trust and confidence in petitioner. The relevant paragraphs of Lupega's affidavit[30] are restated below for convenience:

- That sometime in 2001, I was then on 2[nd] shift duty eating my dinner at a little past 7:00 PM when the telephone rang. I lifted the phone receiver and the caller was asking for Didith, whom I knew was the ANSECA Accountant. I told the caller to re-dial the phone number and after he had done it, I was tempted to lift the phone receiver and I heard the caller telling Didith, "Si Abel ito, paano na yung usapan natin?" (This is Abel. What happened to our deal?), and Didith answered that, "O sige, huwag kang mag-alala, ipapaalam ko sa Cebu" (Alright, do not worry. I will take it up with our Cebu office.), then I put back the phone receiver on its place;

- That again sometime in 2001, I was then on 1[st] shift duty when the telephone rang. I lifted the receiver and the caller said, "Open pit watcher, sa ANSECA nga" (To ANSECA please.), and I answered "I-dial mo ulit" (Please dial again.), and I immediately put the receiver down on its place. When he re-dialed and was answered by ANSECA, I was again tempted to lift the phone receiver and I heard the caller saying, "Si Abel ito, paano na yung usapan natin?" (This is Abel. What happened to our deal?), and the ANSECA accountant replied, "O sige, hintayin mo ako sa bangko at magwiwithdraw ako." (Alright, wait for me at the bank. I will come to make the withdrawal.). That this was only the conversation I heard between the two because I already put down the phone receiver. (Italics and translations supplied)

Even assuming that the foregoing conversations attributed to petitioner and Didith Caballero of ANSECA took place, they do not amply establish petitioner's involvement in a scheme to defraud respondent. Lupega's account is only one piece of a huge puzzle. There are yet too many missing pieces. The purported telephone conversations fail to convince the Court that they constitute such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that petitioner attempted to extort money from ANSECA in connection with its backfilling operations to the prejudice of respondent. To doubt is to rule in favor of labor.

With regard to the second ground for petitioner's dismissal, Article 282(b) of the Labor Code provides:

ART. 282. An employer may terminate an employment for any of the following causes:

x x x x

(b) Gross and habitual neglect by the employee of his duties.

To warrant removal from service, the negligence should not merely be gross but also habitual.[31] Gross negligence implies a want or absence of or failure to exercise even slight care or diligence, or the entire absence of care. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them.[32] Habitual

neglect implies repeated failure to perform one's duties for a period of time, depending upon the circumstances. The single or isolated act of negligence does not constitute a just cause for the dismissal of the employee.[33]

In this case, respondent faulted petitioner for his supposed inaction on Lupega's report regarding the alleged incidents of underloading of ANSECA's trucks during backfilling operations. Respondent considered petitioner's referral of the matter to Tabogader improper because his immediate superior was Gil C. Pagulayan, Contract and Claim Section Head.[34]

Respondent's arguments fail to persuade. To the Court, petitioner's referral of the matter to Tabogader, who was then the Subsidence Area Head, hardly indicates gross negligence as it in fact belies the total absence of care or thoughtless disregard of consequences. Petitioner's subsequent inaction was brought about by Tabogader's assurance that the problem had been solved, which respondent does not contest.

AT ALL EVENTS, even assuming that there was some lapse in judgment on the part of petitioner in the way he handled the report of Lupega, the same does not amount to habitual neglect as petitioner did not repeatedly fail to perform his duties for a period of time. Respondent has not cited other similar shortcomings of petitioner to show habituality.

There being no just cause for the termination of petitioner's employment, the compelling conclusion is that he was dismissed illegally. While it is unnecessary at this point to delve into the requirement of procedural due process, the Court shall nevertheless discuss it in view of its importance.

In *R.B. Michael Press v. Galit*,^[35] the Court had occasion to reiterate that under the twin notice requirement, the employees must be given two notices before their employment could be terminated: (1) a first notice to apprise the employees of their fault, and (2) a second notice to communicate to the employees that their employment is being terminated. To this, the Court added:

Not to be taken lightly, of course, is the hearing or opportunity for the employee to defend himself personally or by counsel of his choice.

The procedure for this twin notice and hearing requirement was thoroughly explained in *King of Kings Transport v. Mamac*^[36] in this wise:

(1) The first written notice to be served on the employees should contain the specific causes or grounds for termination against them, and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. "Reasonable opportunity" under the Omnibus Rules means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. This should be construed as a period of at least five (5) calendar days from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint. Moreover, in order to enable the employees to intelligently prepare their explanation and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. A general description of the charge will not suffice. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Art. 282 is being charged against the employees.

(2) After serving the first notice, the employers should schedule and conduct a hearing or conference wherein the employees will be given an opportunity to (1) explain and clarify their defenses to the charge against them; (2) present evidence in support of their defenses; and (3) rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, the conference or hearing could be used by the parties as an opportunity to come to an amicable settlement.

(3) After determining that termination of employment is justified, the employers shall serve the employees a written notice of termination indicating that: (1) all circumstances involving the charge against the employees have been considered; and (2) grounds have been established to justify the severance of their employment.

A careful examination of the disciplinary procedure adopted by respondent which led to the dismissal of petitioner shows that respondent did not satisfy the first written notice requirement.

Albeit the September 17, 2002 Notice to Explain^[37] of respondent to petitioner required him to show cause why he should not be meted out any disciplinary sanction for his involvement in the subsidence area anomaly per Lupega's allegations, there was clearly no intimation therein that petitioner could be terminated from employment. No such intention to dismiss petitioner can be inferred from the general tenor of the notice. Neither did it apprise petitioner as to which among the grounds under Article 282 of the Labor Code was being charged against him. No mention whatsoever was made of either loss of trust and confidence or gross and habitual neglect of duty.

The Court cannot overemphasize that the first written notice to the employee bears heavily upon his intelligent preparation for his defense. It enables him to squarely address the accusations against him and guides him in deciding whether to consult a union official or lawyer, or gather data and evidence.

The Court is not unmindful of the equally important right of respondent as employer under the Constitution to be protected in its property and interest. The particular circumstances attendant in this case, however, convince the Court that the supreme penalty of dismissal upon petitioner is not justified. The law regards the workers with compassion. Even where a worker has committed an infraction of company rules and regulations, a penalty less punitive than dismissal may suffice. This is not only because of the law's concern for the workingman. There is, in addition, his family to consider. Unemployment brings untold hardships and sorrows on those dependent upon the wage-earner.^[38]

In fine, petitioner, although not entirely faultless, was dismissed without just cause and procedural due process. Consequently, he is entitled to reinstatement and full backwages. If, however, reinstatement is no longer possible due to the strained relations between petitioner and respondent, separation pay should instead be paid equivalent to one month salary for every year of service, in addition to full backwages.

Finally, petitioner's claims for annual vacation leave pay for 2001 and 2002 must be denied in light of his failure to prove the bases therefor.

WHEREFORE, the assailed Decision of the Court of Appeals is REVERSED and SET ASIDE. Respondent is ordered to reinstate petitioner to his former position or its equivalent without loss of seniority rights and privileges, and to pay him full backwages inclusive of allowances and other benefits or their monetary equivalent, from the time of his dismissal until his actual reinstatement; or, if reinstatement is no longer feasible, to give him separation pay equivalent to at least one month salary for every year of service, computed from the time of engagement up to the finality of this decision.

SO ORDERED.

Quisumbing, (Chairperson), Chico-Nazario,^[*] Leonardo-De Castro,^[**] and Peralta,^[***] JJ. , concur.

[*] Additional member per Special Order No. 658.

[**] Additional member per Special Order No. 635.

[***] Additional member per Special Order No. 664.

- [1] NLRC Records, Vol. I, p. 9.
- [2] Id. at 22-24.
- [3] Id. at 27.
- [4] Id. at 10-11.
- [5] Id. at 36-40.
- [6] Id. at 41.
- [7] Id. at 1.
- [8] Vide Position Paper for Respondent, id. at 42-52.
- [9] Id. at 127-137.
- [10] NLRC Records, Vol. II, pp. 614-623.
- [11] Id. at 641-642.
- [12] CA rollo, pp. 2-21.
- [13] Id. at 234-243; penned by Associate Justice Jose L. Sabio, Jr., with the concurrence of Associate Justices Jose C. Reyes, Jr. and Myrna Dimaranan Vidal.
- [14] Id. at 276.
- [15] Vide Petition, rollo, pp. 10-42.
- [16] Vide Respondent's Comment, id. at 194-199.
- [17] Go v. Court of Appeals, G.R. No. 158922, May 28, 2004, 430 SCRA 358, 364.
- [18] Jo v. National Labor Relations Commission, G.R. No. 121605, February 2, 2000, 324 SCRA 437, 445.
- [19] Petron Corporation v. National Labor Relations Commission, G.R. No. 154532, October 27, 2006, 505 SCRA 596, 609.
- [20] Times Transportation Co., Inc. v. National Labor Relations Commission, G.R. Nos. 148500-01, November 29, 2006, 508 SCRA 435, 443.
- [21] G.R. No. 158707, November 27, 2006, 508 SCRA 245, 257-258.
- [22] Mabeza v. National Labor Relations Commission, G.R. No. 118506, April 18, 1997, 271 SCRA 670, 682.
- [23] Ibid.
- [24] Ibid.
- [25] Bristol Myers Squibb (Phils.), Inc. v. Baban, G.R. No. 167449, December 17, 2008.
- [26] Vide rollo, pp. 181-183.
- [27] Vide Panday v. National Labor Relations Commission, G.R. No. 67664, May 20, 1992, 209 SCRA 122, 125.
- [28] Vide Equitable Banking Corporation v. National Labor Relations Commission, G.R. No. 102467, June 13, 1997, 273 SCRA 352, 376.

[29] *Garcia v. National Labor Relations Commission*, G.R. No. 113774, April 15, 1998, 289 SCRA 36, 46.

[30] *Supra* note 2.

[31] *Union Motor Corporation v. National Labor Relations Commission*, G.R. No. 159738, December 9, 2004, 445 SCRA 683, 694.

[32] *Philippine Aeolus Automotive United Corporation v. National Labor Relations Commission*, 387 Phil. 250, 263 (2000).

[33] *Genuino Ice Co., Inc. v. Magpantay*, G.R. No. 147790, June 27, 2006, 493 SCRA 195, 205-206.

[34] *Vide* NLRC Records, Vol. I, p. 39.

[35] G.R. No. 153510, February 13, 2008, 545 SCRA 23, 35.

[36] G.R. No. 166208, June 29, 2007, 526 SCRA 116, 125-126.

[37] NLRC Records, Vol. I, p. 64.

[38] *National Labor Relations Commission v. Salgarino*, G.R. No. 164376, July 31, 2006, 497 SCRA 361, 383.

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