NATIONAL UNION OF WORKERS IN HOTELS, RESTAURANTS AND ALLIED INDUSTRIES-MANILA PAVILION HOTEL CHAPTER, PETITIONER, VS. SECRETARY OF LABOR AND EMPLOYMENT, BUREAU OF LABOR RELATION...

G.R. No. 181531. July 31, 2009

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

National Union of Workers in Hotels, Restaurants and Allied Industries - Manila Pavilion Hotel Chapter (NUWHRAIN-MPHC), herein petitioner, seeks the reversal of the Court of Appeals November 8, 2007 Decision[1] and of the Secretary of Labor and Employment's January 25, 2008 Resolution[2] in OS-A-9-52-05 which affirmed the Med-Arbiter's Resolutions dated January 22, 2007[3] and March 22, 2007.[4]

A certification election was conducted on June 16, 2006 among the rank-and-file employees of respondent Holiday Inn Manila Pavilion Hotel (the Hotel) with the following results:

EMPLOYEES IN VOTERS' LIST =

353

TOTAL VOTES CAST =

346

NUWHRAIN-MPHC =

151

HIMPHLU =

169

NO UNION =

1

SPOILED =

3

SEGREGATED =

22

In view of the significant number of segregated votes, contending unions, petitioner, NUHWHRAIN-MPHC, and respondent Holiday Inn Manila Pavillion Hotel Labor Union (HIMPHLU), referred the case back to Med-Arbiter

Ma. Simonette Calabocal to decide which among those votes would be opened and tallied. Eleven (11) votes were initially segregated because they were cast by dismissed employees, albeit the legality of their dismissal was still pending before the Court of Appeals. Six other votes were segregated because the employees who cast them were already occupying supervisory positions at the time of the election. Still five other votes were segregated on the ground that they were cast by probationary employees and, pursuant to the existing Collective Bargaining Agreement (CBA), such employees cannot vote. It bears noting early on, however, that the vote of one Jose Gatbonton (Gatbonton), a probationary employee, was counted.

By Order of August 22, 2006, Med-Arbiter Calabocal ruled for the opening of 17 out of the 22 segregated votes, specially those cast by the 11 dismissed employees and those cast by the six supposedly supervisory employees of the Hotel.

Petitioner, which garnered 151 votes, appealed to the Secretary of Labor and Employment (SOLE), arguing that the votes of the probationary employees should have been opened considering that probationary employee Gatbonton's vote was tallied. And petitioner averred that respondent HIMPHLU, which garnered 169 votes, should not be immediately certified as the bargaining agent, as the opening of the 17 segregated ballots would push the number of valid votes cast to 338 (151 + 169 + 1 + 17), hence, the 169 votes which HIMPHLU garnered would be one vote short of the majority which would then become 169.

By the assailed Resolution of January 22, 2007, the Secretary of Labor and Employment (SOLE), through then Acting Secretary Luzviminda Padilla, affirmed the Med-Arbiter's Order. It held that pursuant to Section 5, Rule IX of the Omnibus Rules Implementing the Labor Code on exclusion and inclusion of voters in a certification election, the probationary employees cannot vote, as at the time the Med-Arbiter issued on August 9, 2005 the Order granting the petition for the conduct of the certification election, the six probationary employees were not yet hired, hence, they could not vote.

The SOLE further held that, with respect to the votes cast by the 11 dismissed employees, they could be considered since their dismissal was still pending appeal.

As to the votes cast by the six alleged supervisory employees, the SOLE held that their votes should be counted since their promotion took effect months after the issuance of the above-said August 9, 2005 Order of the Med-Arbiter, hence, they were still considered as rank-and-file.

Respecting Gatbonton's vote, the SOLE ruled that the same could be the basis to include the votes of the other probationary employees, as the records show that during the pre-election conferences, there was no disagreement as to his inclusion in the voters' list, and neither was it timely challenged when he voted on election day, hence, the Election Officer could not then segregate his vote.

The SOLE further ruled that even if the 17 votes of the dismissed and supervisory employees were to be counted and presumed to be in favor of petitioner, still, the same would not suffice to overturn the 169 votes garnered by HIMPHLU.

In fine, the SOLE concluded that the certification of HIMPHLU as the exclusive bargaining agent was proper.

Petitioner's motion for reconsideration having been denied by the SOLE by Resolution of March 22, 2007, it appealed to the Court of Appeals.

By the assailed Decision promulgated on November 8, 2007, the appellate court affirmed the ruling of the SOLE. It held that, contrary to petitioner's assertion, the ruling in Airtime Specialist, Inc. v. Ferrer Calleja[5] stating that in a certification election, all rank-and-file employees in the appropriate bargaining unit, whether probationary or

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permanent, are entitled to vote, is inapplicable to the case at bar. For, the appellate court continued, the six probationary employees were not yet employed by the Hotel at the time the August 9, 2005 Order granting the certification election was issued. It thus held that Airtime Specialist applies only to situations wherein the probationary employees were already employed as of the date of filing of the petition for certification election.

Respecting Gatbonton's vote, the appellate court upheld the SOLE's finding that since it was not properly challenged, its inclusion could no longer be questioned, nor could it be made the basis to include the votes of the six probationary employees.

The appellate court brushed aside petitioner's contention that the opening of the 17 segregated votes would materially affect the results of the election as there would be the likelihood of a run-off election in the event none of the contending unions receive a majority of the valid votes cast. It held that the "majority" contemplated in deciding which of the unions in a certification election is the winner refers to the majority of valid votes cast, not the simple majority of votes cast, hence, the SOLE was correct in ruling that even if the 17 votes were in favor of petitioner, it would still be insufficient to overturn the results of the certification election.

Petitioner's motion for reconsideration having been denied by Resolution of January 25, 2008, the present recourse was filed.

Petitioner's contentions may be summarized as follows:

- Inclusion of Jose Gatbonton's vote but excluding the vote of the six other probationary employees violated the principle of equal protection and is not in accord with the ruling in Airtime Specialists, Inc. v. Ferrer-Calleja;

- The time of reckoning for purposes of determining when the probationary employees can be allowed to vote is not August 9, 2005 - the date of issuance by Med-Arbiter Calabocal of the Order granting the conduct of certification elections, but March 10, 2006 - the date the SOLE Order affirmed the Med-Arbiter's Order.

- Even if the votes of the six probationary employees were included, still, HIMPHLU could not be considered as having obtained a majority of the valid votes cast as the opening of the 17 ballots would increase the number of valid votes from 321 to 338, hence, for HIMPHLU to be certified as the exclusive bargaining agent, it should have garnered at least 170, not 169, votes.

Petitioner justifies its not challenging Gatbonton's vote because it was precisely its position that probationary employees should be allowed to vote. It thus avers that justice and equity dictate that since Gatbonton's vote was counted, then the votes of the 6 other probationary employees should likewise be included in the tally.

Petitioner goes on to posit that the word "order" in Section 5, Rule 9 of Department Order No. 40-03 reading "[A]ll employees who are members of the appropriate bargaining unit sought to be represented by the petitioner at the time of the issuance of the order granting the conduct of certification election shall be allowed to vote" refers to an order which has already become final and executory, in this case the March 10, 2002 Order of the SOLE.

Petitioner thus concludes that if March 10, 2006 is the reckoning date for the determination of the eligibility of workers, then all the segregated votes cast by the probationary employees should be opened and counted, they having already been working at the Hotel on such date.

Respecting the certification of HIMPHLU as the exclusive bargaining agent, petitioner argues that the same was not proper for if the 17 votes would be counted as valid, then the total number of votes cast would have been 338, not 321, hence, the majority would be 170; as such, the votes garnered by HIMPHLU is one vote short of the majority for it to be certified as the exclusive bargaining agent.

The relevant issues for resolution then are first, whether employees on probationary status at the time of the

certification elections should be allowed to vote, and second, whether HIMPHLU was able to obtain the required majority for it to be certified as the exclusive bargaining agent.

On the first issue, the Court rules in the affirmative.

The inclusion of Gatbonton's vote was proper not because it was not questioned but because probationary employees have the right to vote in a certification election. The votes of the six other probationary employees should thus also have been counted. As Airtime Specialists, Inc. v. Ferrer-Calleja holds:

> In a certification election, all rank and file employees in the appropriate bargaining unit, whether probationary or permanent are entitled to vote. This principle is clearly stated in Art. 255 of the Labor Code which states that the "labor organization designated or selected by the majority of the employees in an appropriate bargaining unit shall be the exclusive representative of the employees in such unit for purposes of collective bargaining." Collective bargaining covers all aspects of the employment relation and the resultant CBA negotiated by the certified union binds all employees in the bargaining unit. Hence, all rank and file employees, probationary or permanent, have a substantial interest in the selection of the bargaining representative. The Code makes no distinction as to their employment status as basis for eligibility in supporting the petition for certification election. The law refers to "all" the employees in the bargaining unit. All they need to be eligible to support the petition is to belong to the "bargaining unit." (Emphasis supplied)

Rule II, Sec. 2 of Department Order No. 40-03, series of 2003, which amended Rule XI of the Omnibus Rules Implementing the Labor Code, provides:

> Rule II
> Section 2. Who may join labor unions and workers' associations. - All persons employed in commercial, industrial and agricultural enterprises, including employees of government owned or controlled corporations without original charters established under the Corporation Code, as well as employees of religious, charitable, medical or educational institutions whether operating for profit or not, shall have the right to self-organization and to form, join or assist labor unions for purposes of collective bargaining: provided, however, that supervisory employees shall not be eligible for membership in a labor union of the rank-and-file employees but may form, join or assist separate labor unions of their own. Managerial employees shall not be eligible to form, join or assist any labor unions for purposes of collective bargaining. Alien employees with valid working permits issued by the Department may exercise the right to self-organization and join or assist labor unions for purposes of collective bargaining if they are nationals of a country which grants the same or similar rights to Filipino workers, as certified by the Department of Foreign Affairs.
>
> For purposes of this section, any employee, whether employed for a definite period or not, shall beginning on the first day of his/her service, be eligible for membership in any labor organization.
>
> All other workers, including ambulant, intermittent and other workers, the self-employed, rural workers and those without any definite employers may form labor organizations for their mutual aid and protection and other legitimate purposes except collective bargaining. (Emphasis supplied)

The provision in the CBA disqualifying probationary employees from voting cannot override the Constitutionally-protected right of workers to self-organization, as well as the provisions of the Labor Code and its Implementing Rules on certification elections and jurisprudence thereon.

A law is read into, and forms part of, a contract. Provisions in a contract are valid only if they are not contrary to law, morals, good customs, public order or public policy.[6]

Rule XI, Sec. 5 of D.O. 40-03, on which the SOLE and the appellate court rely to support their position that probationary employees hired after the issuance of the Order granting the petition for the conduct of certification election must be excluded, should not be read in isolation and must be harmonized with the other provisions of

D.O. Rule XI, Sec. 5 of D.O. 40-03, viz:

> Rule XI
>
> x x x x
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> Section 5. Qualification of voters; inclusion-exclusion. - All employees who are members of the appropriate bargaining unit sought to be represented by the petitioner at the time of the issuance of the order granting the conduct of a certification election shall be eligible to vote. An employee who has been dismissed from work but has contested the legality of the dismissal in a forum of appropriate jurisdiction at the time of the issuance of the order for the conduct of a certification election shall be considered a qualified voter, unless his/her dismissal was declared valid in a final judgment at the time of the conduct of the certification election. (Emphasis supplied)
>
> x x x x
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> Section 13. Order/Decision on the petition. - Within ten (10) days from the date of the last hearing, the Med-Arbiter shall issue a formal order granting the petition or a decision denying the same. In organized establishments, however, no order or decision shall be issued by the Med-Arbiter during the freedom period.
>
> The order granting the conduct of a certification election shall state the following:
>
> (a)
>
> the name of the employer or establishment;
>
> (b)
>
> the description of the bargaining unit;
>
> (c)
>
> a statement that none of the grounds for dismissal enumerated in the succeeding paragraph exists;
>
> (d)
>
> the names of contending labor unions which shall appear as follows: petitioner union/s in the order in which their petitions were filed, forced intervenor, and no union; and
>
> (e)
>
> a directive upon the employer and the contending union(s) to submit within ten (10) days from receipt of the order, the certified list of employees in the bargaining unit, or where necessary, the payrolls covering the members of the bargaining unit for the last three (3) months prior to the issuance of the order. (Emphasis supplied)
>
> x x x x
>
> Section 21. Decision of the Secretary. - The Secretary shall have fifteen (15) days from receipt of the entire records of the petition within which to decide the appeal. The filing of the memorandum of appeal from the order or decision of the Med-Arbiter stays the holding of any certification election.
>
> The decision of the Secretary shall become final and executory after ten (10) days from receipt thereof by the parties. No motion for reconsideration of the decision shall be entertained. (Emphasis supplied)

In light of the immediately-quoted provisions, and prescinding from the principle that all employees are, from the first day of their employment, eligible for membership in a labor organization, it is evident that the period of reckoning in determining who shall be included in the list of eligible voters is, in cases where a timely appeal has

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been filed from the Order of the Med-Arbiter, the date when the Order of the Secretary of Labor and Employment, whether affirming or denying the appeal, becomes final and executory.

The filing of an appeal to the SOLE from the Med-Arbiter's Order stays its execution, in accordance with Sec. 21, and rationally, the Med-Arbiter cannot direct the employer to furnish him/her with the list of eligible voters pending the resolution of the appeal.

During the pendency of the appeal, the employer may hire additional employees. To exclude the employees hired after the issuance of the Med-Arbiter's Order but before the appeal has been resolved would violate the guarantee that every employee has the right to be part of a labor organization from the first day of their service.

In the present case, records show that the probationary employees, including Gatbonton, were included in the list of employees in the bargaining unit submitted by the Hotel on May 25, 2006 in compliance with the directive of the Med-Arbiter after the appeal and subsequent motion for reconsideration have been denied by the SOLE, rendering the Med-Arbiter's August 22, 2005 Order final and executory 10 days after the March 22, 2007 Resolution (denying the motion for reconsideration of the January 22 Order denying the appeal), and rightly so. Because, for purposes of self-organization, those employees are, in light of the discussion above, deemed eligible to vote.

A certification election is the process of determining the sole and exclusive bargaining agent of the employees in an appropriate bargaining unit for purposes of collective bargaining. Collective bargaining, refers to the negotiated contract between a legitimate labor organization and the employer concerning wages, hours of work and all other terms and conditions of employment in a bargaining unit.[7]

The significance of an employee's right to vote in a certification election cannot thus be overemphasized. For he has considerable interest in the determination of who shall represent him in negotiating the terms and conditions of his employment.

Even if the Implementing Rules gives the SOLE 20 days to decide the appeal from the Order of the Med-Arbiter, experience shows that it sometimes takes months to be resolved. To rule then that only those employees hired as of the date of the issuance of the Med-Arbiter's Order are qualified to vote would effectively disenfranchise employees hired during the pendency of the appeal. More importantly, reckoning the date of the issuance of the Med-Arbiter's Order as the cut-off date would render inutile the remedy of appeal to the SOLE.

But while the Court rules that the votes of all the probationary employees should be included, under the particular circumstances of this case and the period of time which it took for the appeal to be decided, the votes of the six supervisory employees must be excluded because at the time the certification elections was conducted, they had ceased to be part of the rank and file, their promotion having taken effect two months before the election.

As to whether HIMPHLU should be certified as the exclusive bargaining agent, the Court rules in the negative. It is well-settled that under the so-called "double majority rule," for there to be a valid certification election, majority of the bargaining unit must have voted AND the winning union must have garnered majority of the valid votes cast.

Prescinding from the Court's ruling that all the probationary employees' votes should be deemed valid votes while that of the supervisory employees should be excluded, it follows that the number of valid votes cast would increase - from 321 to 337. Under Art. 256 of the Labor Code, the union obtaining the majority of the valid votes cast by the eligible voters shall be certified as the sole and exclusive bargaining agent of all the workers in the appropriate bargaining unit. This majority is 50% + 1. Hence, 50% of 337 is 168.5 + 1 or at least 170.

HIMPHLU obtained 169 while petitioner received 151 votes. Clearly, HIMPHLU was not able to obtain a majority vote. The position of both the SOLE and the appellate court that the opening of the 17 segregated ballots will not materially affect the outcome of the certification election as for, so they contend, even if such member were all in favor of petitioner, still, HIMPHLU would win, is thus untenable.

It bears reiteration that the true importance of ascertaining the number of valid votes cast is for it to serve as basis for computing the required majority, and not just to determine which union won the elections. The opening of the segregated but valid votes has thus become material. To be sure, the conduct of a certification election has a two-fold objective: to determine the appropriate bargaining unit and to ascertain the majority representation of the bargaining representative, if the employees desire to be represented at all by anyone. It is not simply the determination of who between two or more contending unions won, but whether it effectively ascertains the will of the members of the bargaining unit as to whether they want to be represented and which union they want to represent them.

Having declared that no choice in the certification election conducted obtained the required majority, it follows that a run-off election must be held to determine which between HIMPHLU and petitioner should represent the rank-and-file employees.

A run-off election refers to an election between the labor unions receiving the two (2) highest number of votes in a certification or consent election with three (3) or more choices, where such a certified or consent election results in none of the three (3) or more choices receiving the majority of the valid votes cast; provided that the total number of votes for all contending unions is at least fifty percent (50%) of the number of votes cast.[8] With 346 votes cast, 337 of which are now deemed valid and HIMPHLU having only garnered 169 and petitioner having obtained 151 and the choice "NO UNION" receiving 1 vote, then the holding of a run-off election between HIMPHLU and petitioner is in order.

WHEREFORE, the petition is GRANTED. The Decision dated November 8, 2007 and Resolution dated January 25, 2008 of the Court of Appeals affirming the Resolutions dated January 22, 2007 and March 22, 2007, respectively, of the Secretary of Labor and Employment in OS-A-9-52-05 are ANNULLED and SET ASIDE.

The Department of Labor and Employment-Bureau of Labor Relations is DIRECTED to cause the holding of a run-off election between petitioner, National Union of Workers in Hotels, Restaurants and Allied Industries-Manila Pavilion Hotel Chapter (NUWHRAIN-MPC), and respondent Holiday Inn Manila Pavilion Hotel Labor Union (HIMPHLU).

SO ORDERED.

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

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

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

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

[1] CA rollo, pp. 194-203. Penned by Associate Justice Remedios A. Salazar Fernando and concurred in by Associate Justices Rosalinda Asuncion Vicente and Enrico A. Lanzanas..

[2] Id. at 237-238. Penned by Associate Justice Remedios A. Salazar Fernando and concurred in by Associate Justices Rosalinda Asuncion Vicente and Enrico A. Lanzanas.

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[3] Id. at 19-23.

[4] Id. at 24-25.

[5] 180 SCRA 749

[6] Civil Code, Art. 1306.

[7] Honda Phils, Inc. v. Samahan ng Malayang Manggagawa sa Honda, G.R. No. 145561, June 15, 2005, 460 SCRA 186.

[8] Department Order No. 40-03, series of 2003.

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