

**DENNIS A. B. FUNA, PETITIONER, VS. EXECUTIVE SECRETARY
EDUARDO R. ERMITA, OFFICE OF THE PRESIDENT, SEC. LEANDRO R.
MENDOZA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE
DEPARTME...**

G.R. No. 184740. February 11, 2010

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

This is a petition for certiorari, prohibition and mandamus under Rule 65 with prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction, to declare as unconstitutional the designation of respondent Undersecretary Maria Elena H. Bautista as Officer-in-Charge (OIC) of the Maritime Industry Authority (MARINA).

The Antecedents

On October 4, 2006, President Gloria Macapagal-Arroyo appointed respondent Maria Elena H. Bautista (Bautista) as Undersecretary of the Department of Transportation and Communications (DOTC), vice Agustin R. Bengzon. Bautista was designated as Undersecretary for Maritime Transport of the department under Special Order No. 2006-171 dated October 23, 2006.[1]

On September 1, 2008, following the resignation of then MARINA Administrator Vicente T. Suazo, Jr., Bautista was designated as Officer-in-Charge (OIC), Office of the Administrator, MARINA, in concurrent capacity as DOTC Undersecretary.[2]

On October 21, 2008, Dennis A. B. Funa in his capacity as taxpayer, concerned citizen and lawyer, filed the instant petition challenging the constitutionality of Bautista's appointment/designation, which is proscribed by the prohibition on the President, Vice-President, the Members of the Cabinet, and their deputies and assistants to hold any other office or employment.

On January 5, 2009, during the pendency of this petition, Bautista was appointed Administrator of the MARINA vice Vicente T. Suazo, Jr.[3] and she assumed her duties and responsibilities as such on February 2, 2009.[4]

The Case

Petitioner argues that Bautista's concurrent positions as DOTC Undersecretary and MARINA OIC is in violation of Section 13, Article VII of the 1987 Constitution, as interpreted and explained by this Court in *Civil Liberties*

Union v. Executive Secretary,[5] and reiterated in *Public Interest Center, Inc. v. Elma*. [6] He points out that while it was clarified in *Civil Liberties Union* that the prohibition does not apply to those positions held in ex-officio capacities, the position of MARINA Administrator is not ex-officio to the post of DOTC Undersecretary, as can be gleaned from the provisions of its charter, Presidential Decree (P.D.) No. 474,[7] as amended by Executive

Order (EO) No. 125-A.[8] Moreover, the provisions on the DOTC in the Administrative Code of 1987, specifically Sections 23 and 24, Chapter 6, Title XV, Book IV do not provide any ex-officio role for the undersecretaries in any of the department's attached agencies. The fact that Bautista was extended an appointment naming her as OIC of MARINA shows that she does not occupy it in an ex-officio capacity since an ex-officio position does not require any "further warrant or appoint." [9]

Petitioner further contends that even if Bautista's appointment or designation as OIC of MARINA was intended to be merely temporary, still, such designation must not violate a standing constitutional prohibition, citing the rationale in *Achacoso v. Macaraig*. [10] Section 13, Article VII of the 1987 Constitution does not enumerate temporariness as one (1) of the exceptions thereto. And since a temporary designation does not have a maximum duration, it can go on for months or years. In effect, the temporary appointment/designation can effectively circumvent the prohibition. Allowing undersecretaries or assistant secretaries to occupy other government posts would open a Pandora's Box as to let them feast on choice government positions. Thus, in case of vacancy where no permanent appointment could as yet be made, the remedy would be to designate one (1) of the two (2) Deputy Administrators as the Acting Administrator. Such would be the logical course, the said officers being in a better position in terms of knowledge and experience to run the agency in a temporary capacity. Should none of them merit the President's confidence, then the practical remedy would be for Undersecretary Bautista to first resign as Undersecretary in order to qualify her as Administrator of MARINA. As to whether she in fact does not receive or has waived any remuneration, the same does not matter because remuneration is not an element in determining whether there has been a violation of Section 13, Article VII of the 1987 Constitution. [11]

Petitioner likewise asserts the incompatibility between the posts of DOTC Undersecretary and MARINA Administrator. The reason is that with respect to the affairs in the maritime industry, the recommendations of the MARINA may be the subject of counter or opposing recommendations from the Undersecretary for Maritime Transport. In this case, the DOTC Undersecretary for Maritime Transport and the OIC of MARINA have become one (1) and the same person. There is no more checking and counter-checking of powers and functions, and therein lies the danger to the maritime industry. There is no longer a person above the Administrator of MARINA who will be reviewing the acts of said agency because the person who should be overseeing MARINA, the Undersecretary for Maritime Transport, has effectively been compromised. [12]

Finally, petitioner contends that there is a strong possibility in this case that the challenge herein can be rendered moot through the expediency of simply revoking the temporary appointment/designation. But since a similar violation can be committed in the future, there exists a possibility of "evading review," and hence supervening events should not prevent the Court from deciding cases involving grave violation of the 1987 Constitution, as this Court ruled in *Public Interest Center*. Notwithstanding its mootness therefore, should it occur, there is a compelling reason for this case to be decided: the issue raised being "capable of repetition, yet evading review." [13]

On the other hand, the respondents argue that the requisites of a judicial inquiry are not present in this case. In fact, there no longer exists an actual controversy that needs to be resolved in view of the appointment of respondent Bautista as MARINA Administrator effective February 2, 2009 and the relinquishment of her post as DOTC Undersecretary for Maritime Transport, which rendered the present petition moot and academic. Petitioner's prayer for a temporary restraining order or writ of preliminary injunction is likewise moot and academic since, with this supervening event, there is nothing left to enjoin. [14]

Respondents also raise the lack of legal standing of petitioner to bring this suit. Clear from the standard set in *Public Interest Center* is the requirement that the party suing as a taxpayer must prove that he has sufficient interest in preventing illegal expenditure of public funds, and more particularly, his personal and substantial

interest in the case. Petitioner, however, has not alleged any personal or substantial interest in this case. Neither has he claimed that public funds were actually disbursed in connection with respondent Bautista's designation as MARINA OIC. It is to be noted that respondent Bautista did not receive any salary while she was MARINA OIC. As to the alleged transcendental importance of an issue, this should not automatically confer legal standing on a party.[15]

Assuming for the sake of argument that the legal question raised herein needs to be resolved, respondents submit that the petition should still be dismissed for being unmeritorious considering that Bautista's concurrent designation as MARINA OIC and DOTC Undersecretary was constitutional. There was no violation of Section 13, Article VII of the 1987 Constitution because respondent Bautista was merely designated acting head of MARINA on September 1, 2008. She was designated MARINA OIC, not appointed MARINA Administrator. With the resignation of Vicente T. Suazo, Jr., the position of MARINA Administrator was left vacant, and pending the appointment of permanent Administrator, respondent Bautista was designated OIC in a temporary capacity for the purpose of preventing a hiatus in the discharge of official functions. Her case thus falls under the recognized exceptions to the rule against multiple offices, i.e., without additional compensation (she did not receive any emolument as MARINA OIC) and as required by the primary functions of the office. Besides, Bautista held the position for four (4) months only, as in fact when she was appointed MARINA Administrator on February 2, 2009, she relinquished her post as DOTC Undersecretary for Maritime Transport, in acknowledgment of the proscription on the holding of multiple offices.[16]

As to petitioner's argument that the DOTC Undersecretary for Maritime Transport and MARINA Administrator are incompatible offices, respondents cite the test laid down in *People v. Green*,[17] which held that "[T]he offices must subordinate, one [over] the other, and they must, per se, have the right to interfere, one with the other, before they are compatible at common law." Thus, respondents point out that any recommendation by the MARINA Administrator concerning issues of policy and administration go to the MARINA Board and not the Undersecretary for Maritime Transport. The Undersecretary for Maritime Transport is, in turn, under the direct supervision of the DOTC Secretary. Petitioner's fear that there is no longer a person above the Administrator of MARINA who will be reviewing the acts of said agency (the Undersecretary for Maritime Transport) is, therefore, clearly unfounded.[18]

In his Reply, petitioner contends that respondents' argument on the incompatibility of positions was made on the mere assumption that the positions of DOTC Undersecretary for Maritime Transport and the administratorship of MARINA are "closely related" and is governed by Section 7, paragraph 2, Article IX-B of the 1987 Constitution rather than by Section 13, Article VII. In other words, it was a mere secondary argument. The fact remains that, incompatible or not, Section 13, Article VII still does not allow the herein challenged designation.[19]

The sole issue to be resolved is whether or not the designation of respondent Bautista as OIC of MARINA, concurrent with the position of DOTC Undersecretary for Maritime Transport to which she had been appointed, violated the constitutional proscription against dual or multiple offices for Cabinet Members and their deputies and assistants.

Our Ruling

The petition is meritorious.

Requisites for Judicial Review

The courts' power of judicial review, like almost all other powers conferred by the Constitution, is subject to several limitations, namely: (1) there must be an actual case or controversy calling for the exercise of judicial

power; (2) the person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case, such that he has sustained or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[20] Respondents assert that the second requisite is absent in this case.

Generally, a party will be allowed to litigate only when (1) he can show that he has personally suffered some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.[21] The question on standing is whether such parties have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [22]

In *David v. Macapagal-Arroyo*, [23] summarizing the rules culled from jurisprudence, we held that taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue, provided that the following requirements are met:

(1)

cases involve constitutional issues;

(2)

for taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;

(3)

for voters, there must be a showing of obvious interest in the validity of the election law in question;

(4)

for concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and

(5)

for legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators. [EMPHASIS SUPPLIED.]

Petitioner having alleged a grave violation of the constitutional prohibition against Members of the Cabinet, their deputies and assistants holding two (2) or more positions in government, the fact that he filed this suit as a concerned citizen sufficiently confers him with standing to sue for redress of such illegal act by public officials.

The other objection raised by the respondent is that the resolution of this case had been overtaken by events considering the effectivity of respondent Bautista's appointment as MARINA Administrator effective February 2, 2009 and her relinquishment of her former position as DOTC Undersecretary for Maritime Transport.

A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value. Generally, courts decline jurisdiction over such case or dismiss it on ground of mootness.[24] However, as we held in *Public Interest Center, Inc. v. Elma*, [25] supervening events, whether intended or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution. Even in cases where supervening events had made the cases moot, this Court did not hesitate to resolve the legal or constitutional issues raised to formulate controlling principles to guide the

bench, bar, and public.[26]

As a rule, the writ of prohibition will not lie to enjoin acts already done. However, as an exception to the rule on mootness, courts will decide a question otherwise moot if it is capable of repetition yet evading review.[27] In the present case, the mootness of the petition does not bar its resolution. The question of the constitutionality of the President's appointment or designation of a Department Undersecretary as officer-in-charge of an attached agency will arise in every such appointment.[28]

Undersecretary Bautista's designation
]as MARINA OIC falls under the
] stricter prohibition under Section 13,
]Article VII of the 1987 Constitution.

Resolution of the present controversy hinges on the correct application of Section 13, Article VII of the 1987 Constitution, which provides:

Sec. 13. The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure. They shall not, during said tenure, directly or indirectly practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the Government or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office.

On the other hand, Section 7, paragraph (2), Article IX-B reads:

Sec. 7. x x x

Unless otherwise allowed by law or the primary functions of his position, no appointive official shall hold any other office or employment in the Government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries.

In *Civil Liberties Union*, a constitutional challenge was brought before this Court to nullify EO No. 284 issued by then President Corazon C. Aquino on July 25, 1987, which included Members of the Cabinet, undersecretaries and assistant secretaries in its provisions limiting to two (2) the positions that appointive officials of the Executive Department may hold in government and government corporations. Interpreting the above provisions in the light of the history and times and the conditions and circumstances under which the Constitution was framed, this Court struck down as unconstitutional said executive issuance, saying that it actually allows them to hold multiple offices or employment in direct contravention of the express mandate of Section 13, Article VII of the 1987 Constitution prohibiting them from doing so, unless otherwise provided in the 1987 Constitution itself.

Noting that the prohibition imposed on the President and his official family is all-embracing, the disqualification was held to be absolute, as the holding of "any other office" is not qualified by the phrase "in the Government" unlike in Section 13, Article VI prohibiting Senators and Members of the House of Representatives from holding "any other office or employment in the Government"; and when compared with other officials and employees such as members of the armed forces and civil service employees, we concluded thus:

These sweeping, all-embracing prohibitions imposed on the President and his official family, which prohibitions are not similarly imposed on other public officials or employees such as the Members of Congress, members of the civil service in general and members of the armed forces, are proof of the intent of the 1987 Constitution to treat the President and his official family as a class by itself and to impose upon said class stricter prohibitions.

Such intent of the 1986 Constitutional Commission to be stricter with the President and his official family was also succinctly articulated by Commissioner Vicente Foz after Commissioner Regalado Maambong noted during the floor deliberations and debate that there was no symmetry between the Civil Service prohibitions, originally found in the General Provisions and the anticipated report on the Executive Department. Commissioner Foz Commented, "We actually have to be stricter with the President and the members of the Cabinet because they exercise more powers and, therefore, more checks and restraints on them are called for because there is more possibility of abuse in their case."

Thus, while all other appointive officials in the civil service are allowed to hold other office or employment in the government during their tenure when such is allowed by law or by the primary functions of their positions, members of the Cabinet, their deputies and assistants may do so only when expressly authorized by the Constitution itself. In other words, Section 7, Article IX-B is meant to lay down the general rule applicable to all elective and appointive public officials and employees, while Section 13, Article VII is meant to be the exception applicable only to the President, the Vice-President, Members of the Cabinet, their deputies and assistants.

x x x x

Since the evident purpose of the framers of the 1987 Constitution is to impose a stricter prohibition on the President, Vice-President, members of the Cabinet, their deputies and assistants with respect to holding multiple offices or employment in the government during their tenure, the exception to this prohibition must be read with equal severity. On its face, the language of Section 13, Article VII is prohibitory so that it must be understood as intended to be a positive and unequivocal negation of the privilege of holding multiple government offices or employment. Verily, wherever the language used in the constitution is prohibitory, it is to be understood as intended to be a positive and unequivocal negation. The phrase "unless otherwise provided in this Constitution" must be given a literal interpretation to refer only to those particular instances cited in the Constitution itself, to wit: the Vice-President being appointed as a member of the Cabinet under Section 3, par. (2), Article VII; or acting as President in those instances provided under Section 7, pars. (2) and (3), Article VII; and, the Secretary of Justice being ex-officio member of the Judicial and Bar Council by virtue of Section 8 (1), Article VIII.[29] [EMPHASIS SUPPLIED.]

Respondent Bautista being then the appointed Undersecretary of DOTC, she was thus covered by the stricter prohibition under Section 13, Article VII and consequently she cannot invoke the exception provided in Section 7, paragraph 2, Article IX-B where holding another office is allowed by law or the primary functions of the position. Neither was she designated OIC of MARINA in an ex-officio capacity, which is the exception recognized in Civil Liberties Union.

The prohibition against holding dual or multiple offices or employment under Section 13, Article VII of the 1987 Constitution was held inapplicable to posts occupied by the Executive officials specified therein, without additional compensation in an ex-officio capacity as provided by law and as required by the primary functions of said office. The reason is that these posts do not comprise "any other office" within the contemplation of the constitutional prohibition but are properly an imposition of additional duties and functions on said officials.[30] Apart from their bare assertion that respondent Bautista did not receive any compensation when she was OIC of MARINA, respondents failed to demonstrate clearly that her designation as such OIC was in an ex-officio capacity as required by the primary functions of her office as DOTC Undersecretary for Maritime Transport.

MARINA was created by virtue of P.D. No. 474 issued by President Ferdinand E. Marcos on June 1, 1974. It is mandated to undertake the following:

(a)

Adopt and implement a practicable and coordinated Maritime Industry Development Program which shall

include, among others, the early replacement of obsolescent and uneconomic vessels; modernization and expansion of the Philippine merchant fleet, enhancement of domestic capability for shipbuilding, repair and maintenance; and the development of reservoir of trained manpower;

(b)

Provide and help provide the necessary; (i) financial assistance to the industry through public and private financing institutions and instrumentalities; (ii) technological assistance; and (iii) in general, a favorable climate for expansion of domestic and foreign investments in shipping enterprises; and

(c)

Provide for the effective supervision, regulation and rationalization of the organizational management, ownership and operations of all water transport utilities, and other maritime enterprises.[31]

The management of MARINA is vested in the Maritime Administrator, who shall be directly assisted by the Deputy Administrator for Planning and a Deputy Administrator for Operations, who shall be appointed by the President for a term of six (6) years. The law likewise prescribes the qualifications for the office, including such "adequate training and experience in economics, technology, finance, law, management, public utility, or in other phases or aspects of the maritime industry," and he or she is entitled to receive a fixed annual salary.[32] The Administrator shall be directly responsible to the Maritime Industry Board, MARINA's governing body, and shall have powers, functions and duties as provided in P.D. No. 474, which provides, under Sections 11 and 12, for his or her general and specific functions, respectively, as follows:

Sec. 11. General Powers and Functions of the Administrator. -- Subject to the general supervision and control of the Board, the Administrators shall have the following general powers, functions and duties;

- To implement, enforce and apply the policies, programs, standards, guidelines, procedures, decisions and rules and regulations issued, prescribed or adopted by the Board pursuant to this Decree;
- To undertake researches, studies, investigations and other activities and projects, on his own initiative or upon instructions of the Board, and to submit comprehensive reports and appropriate recommendations to the Board for its information and action;
- To undertake studies to determine present and future requirements for port development including navigational aids, and improvement of waterways and navigable waters in consultation with appropriate agencies;
- To pursue continuing research and developmental programs on expansion and modernization of the merchant fleet and supporting facilities taking into consideration the needs of the domestic trade and the need of regional economic cooperation schemes; and
- To manage the affairs of the Authority subject to the provisions of this Decree and applicable laws, orders, rules and regulations of other appropriate government entities.

Sec. 12. Specific Powers and Functions of the Administrator. -- In addition to his general powers and functions, the Administrator shall;

- Issue Certificate of Philippine Registry for all vessels being used in Philippine waters, including fishing vessels covered by Presidential Decree No. 43 except transient civilian vessels of foreign registry, vessels owned and/or operated by the Armed Forces of the Philippines or by foreign governments for military purposes, and bancas, sailboats and other watercraft which are not motorized, of less than three gross tons;
- Provide a system of assisting various officers, professionals, technicians, skilled workers and seamen to be gainfully employed in shipping enterprises, priority being given to domestic needs;

- In collaboration and coordination with the Department of Labor, to look into, and promote improvements in the working conditions and terms of employment of the officers and crew of vessels of Philippine registry, and of such officers and crew members who are Philippine citizens and employed by foreign flag vessels, as well as of personnel of other shipping enterprises, and to assist in the settlement of disputes between the shipowners and ship operators and such officers and crew members and between the owner or manager of other shipping enterprises and their personnel;
- To require any public water transport utility or Philippine flag vessels to provide shipping services to any coastal areas in the country where such services are necessary for the development of the area, to meet emergency sealift requirements, or when public interest so requires;
- Investigate by itself or with the assistance of other appropriate government agencies or officials, or experts from the private sector, any matter within its jurisdiction, except marine casualties or accidents which shall be undertaken by the Philippine Coast Guard;
- Impose, fix, collect and receive in accordance with the schedules approved by the Board, from any shipping enterprise or other persons concerned, such fees and other charges for the payment of its services;
- Inspect, at least annually, the facilities of port and cargo operators and recommend measures for adherence to prescribed standards of safety, quality and operations;
- Approve the sale, lease or transfer of management of vessels owned by Philippine Nationals to foreign owned or controlled enterprises;
- Prescribe and enforce rules and regulations for the prevention of marine pollution in bays, harbors and other navigable waters of the Philippines, in coordination with the government authorities concerned;
- Establish and maintain, in coordination with the appropriate government offices and agencies, a system of regularly and promptly producing, collating, analyzing and disseminating traffic flows, port operations, marine insurance services and other information on maritime matters;
- Recommend such measures as may be necessary for the regulation of the importation into and exportation from the Philippines of vessels, their equipment and spare parts;
- Implement the rules and regulations issued by the Board of Transportation;
- Compile and codify all maritime laws, orders, rules and regulations, decisions in leasing cases of courts and the Authority's procedures and other requirements relative to shipping and other shipping enterprises, make them available to the public, and, whenever practicable to publish such materials;
- Delegate his powers in writing to either of the Deputy Administrators or any other ranking officials of the Authority; Provided, That he informs the Board of such delegation promptly; and
- Perform such other duties as the Board may assign, and such acts as may be necessary and proper to implement this Decree.

With the creation of the Ministry (now Department) of Transportation and Communications by virtue of EO No. 546, MARINA was attached to the DOTC for policy and program coordination on July 23, 1979. Its regulatory function was likewise increased with the issuance of EO No. 1011 which abolished the Board of Transportation and transferred the quasi-judicial functions pertaining to water transportation to MARINA. On January 30, 1987, EO No. 125 (amended by EO No. 125-A) was issued reorganizing the DOTC. The powers and functions of the department and the agencies under its umbrella were defined, further increasing the responsibility of MARINA to the industry. Republic Act No. 9295, otherwise known as the "The Domestic Shipping Development Act of 2004,"[33] further strengthened MARINA's regulatory powers and functions in the shipping sector.

Given the vast responsibilities and scope of administration of the Authority, we are hardly persuaded by respondents' submission that respondent Bautista's designation as OIC of MARINA was merely an imposition of additional duties related to her primary position as DOTC Undersecretary for Maritime Transport. It appears that the DOTC Undersecretary for Maritime Transport is not even a member of the Maritime Industry Board, which includes the DOTC Secretary as Chairman, the MARINA Administrator as Vice-Chairman, and the following as members: Executive Secretary (Office of the President), Philippine Ports Authority General Manager, Department of National Defense Secretary, Development Bank of the Philippines General Manager, and the Department of Trade and Industry Secretary.[34]

Finally, the Court similarly finds respondents' theory that being just a "designation," and temporary at that, respondent Bautista was never really "appointed" as OIC Administrator of MARINA, untenable. In *Binamira v. Garrucho, Jr.*,[35] we distinguished between the terms appointment and designation, as follows:

Appointment may be defined as the selection, by the authority vested with the power, of an individual who is to exercise the functions of a given office. When completed, usually with its confirmation, the appointment results in security of tenure for the person chosen unless he is replaceable at pleasure because of the nature of his office. Designation, on the other hand, connotes merely the imposition by law of additional duties on an incumbent official, as where, in the case before us, the Secretary of Tourism is designated Chairman of the Board of Directors of the Philippine Tourism Authority, or where, under the Constitution, three Justices of the Supreme Court are designated by the Chief Justice to sit in the Electoral Tribunal of the Senate or the House of Representatives. It is said that appointment is essentially executive while designation is legislative in nature.

Designation may also be loosely defined as an appointment because it likewise involves the naming of a particular person to a specified public office. That is the common understanding of the term. However, where the person is merely designated and not appointed, the implication is that he shall hold the office only in a temporary capacity and may be replaced at will by the appointing authority. In this sense, the designation is considered only an acting or temporary appointment, which does not confer security of tenure on the person named.[36] [emphasis supplied.]

Clearly, respondents' reliance on the foregoing definitions is misplaced considering that the above-cited case addressed the issue of whether petitioner therein acquired valid title to the disputed position and so had the right to security of tenure. It must be stressed though that while the designation was in the nature of an acting and temporary capacity, the words "hold the office" were employed. Such holding of office pertains to both appointment and designation because the appointee or designate performs the duties and functions of the office. The 1987 Constitution in prohibiting dual or multiple offices, as well as incompatible offices, refers to the holding of the office, and not to the nature of the appointment or designation, words which were not even found in Section 13, Article VII nor in Section 7, paragraph 2, Article IX-B. To "hold" an office means to "possess or occupy" the same, or "to be in possession and administration,"[37] which implies nothing less than the actual discharge of the functions and duties of the office.

The disqualification laid down in Section 13, Article VII is aimed at preventing the concentration of powers in the Executive Department officials, specifically the President, Vice-President, Members of the Cabinet and their deputies and assistants. Civil Liberties Union traced the history of the times and the conditions under which the Constitution was framed, and construed the Constitution consistent with the object sought to be accomplished by adoption of such provision, and the evils sought to be avoided or remedied. We recalled the practice, during the Marcos regime, of designating members of the Cabinet, their deputies and assistants as members of the governing bodies or boards of various government agencies and instrumentalities, including government-owned or controlled corporations. This practice of holding multiple offices or positions in the government led to abuses by unscrupulous public officials, who took advantage of this scheme for purposes of self-enrichment. The blatant

betrayal of public trust evolved into one of the serious causes of discontent with the Marcos regime. It was therefore quite inevitable and in consonance with the overwhelming sentiment of the people that the 1986 Constitutional Commission would draft into the proposed Constitution the provisions under consideration, which were envisioned to remedy, if not correct, the evils that flow from the holding of multiple governmental offices and employment.[38] Our declaration in that case cannot be more explicit:

But what is indeed significant is the fact that although Section 7, Article IX-B already contains a blanket prohibition against the holding of multiple offices or employment in the government subsuming both elective and appointive public officials, the Constitutional Commission should see it fit to formulate another provision, Sec. 13, Article VII, specifically prohibiting the President, Vice-President, members of the Cabinet, their deputies and assistants from holding any other office or employment during their tenure, unless otherwise provided in the Constitution itself.

Evidently, from this move as well as in the different phraseologies of the constitutional provisions in question, the intent of the framers of the Constitution was to impose a stricter prohibition on the President and his official family in so far as holding other offices or employment in the government or elsewhere is concerned.[39] [emphasis supplied.]

Such laudable intent of the law will be defeated and rendered sterile if we are to adopt the semantics of respondents. It would open the veritable floodgates of circumvention of an important constitutional disqualification of officials in the Executive Department and of limitations on the President's power of appointment in the guise of temporary designations of Cabinet Members, undersecretaries and assistant secretaries as officers-in-charge of government agencies, instrumentalities, or government-owned or controlled corporations.

As to respondents' contention that the concurrent positions of DOTC Undersecretary for Maritime Transport and MARINA OIC Administrator are not incompatible offices, we find no necessity for delving into this matter. Incompatibility of offices is irrelevant in this case, unlike in the case of PCGG Chairman Magdangal Elma in *Public Interest Center, Inc. v. Elma*.^[40] Therein we held that Section 13, Article VII is not applicable to the PCGG Chairman or to the Chief Presidential Legal Counsel, as he is not a cabinet member, undersecretary or assistant secretary.^[41]

WHEREFORE, the petition is GRANTED. The designation of respondent Ma. Elena H. Bautista as Officer-in-Charge, Office of the Administrator, Maritime Industry Authority, in a concurrent capacity with her position as DOTC Undersecretary for Maritime Transport, is hereby declared UNCONSTITUTIONAL for being violative of Section 13, Article VII of the 1987 Constitution and therefore, NULL and VOID.

No costs.

SO ORDERED.

Puno, C.J., Carpio, Velasco, Jr., Nachura, Leonardo-De Castro, Brion, Peralta, Bersamin, Del Castillo, Abad, Perez, and Mendoza, JJ., concur.

Corona, J., no part.

Carpio Morales, J., please see concurring opinion.

[1] Rollo, pp. 99 and 101.

[2] *Id.* at 100.

[3] *Id.* at 102.

[4]Id. at 103-104.

[5] G.R. Nos. 83896 and 83815, February 22, 1991, 194 SCRA 317.

[6] G.R. No. 138965, June 30, 2006, 494 SCRA 53.

[7]PROVIDING FOR THE REORGANIZATION OF MARITIME FUNCTIONS IN THE PHILIPPINES, CREATING THE MARITIME INDUSTRY AUTHORITY, AND FOR OTHER PURPOSES, approved on June 1, 1974.

[8] Approved on April 13, 1987.

[9] Rollo, pp. 14-27.

[10] G.R. No. 93023, March 13, 1991, 195 SCRA 235.

[11] Rollo, pp. 34-37.

[12] Id. at 38-40.

[13] Id. at 40-42.

[14] Id. at 86-87.

[15] Id. at 88-89.

[16] Id. at 90-93.

[17] 13 Sickels 295, 58 N.Y. 295, 1874 WL 11282 (N.Y.).

[18] Id. at 93-95.

[19] Id. at 127-128.

[20] Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc., G.R. Nos. 160261-160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403 and 160405, November 10, 2003, 415 SCRA 44, 133 citing Angara v. Electoral Commission, 63 Phil. 139 (1936).

[21] Tolentino v. COMELEC, 465 Phil. 385, 402 (2004).

[22] Kilosbayan, Incorporated v. Morato, G.R. No. 118910, July 17, 1995, 246 SCRA 540, 562-563, citing Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962).

[23] G.R. No. 171396 and six (6) other cases, May 3, 2006, 489 SCRA 160, 220-221.

[24] David v. Macapagal-Arroyo, supra at 213-214, citing Province of Batangas v. Romulo, G.R. No. 152774, May 27, 2004, 429 SCRA 736, Banco Filipino Savings and Mortgage Bank v. Tuazon, Jr., G.R. No. 132795, March 10, 2004, 425 SCRA 129, Vda. de Dabao v. Court of Appeals, G.R. No. 116526, March 23, 2004, 426 SCRA 91; Paloma v. Court of Appeals, G.R. No. 145431, November 11, 2003, 415 SCRA 590, Royal Cargo Corporation v. Civil Aeronautics Board, G.R. Nos. 103055-56, January 26, 2004, 421 SCRA 21 and Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756.

[25] G.R. No. 138965, June 30, 2006, 494 SCRA 53.

[26] Id. at 58, citing Province of Batangas v. Romulo, supra at 757 and Chavez v. Public Estates Authority, 433 Phil. 506, 522 (2002).

[27] Pimentel, Jr. v. Ermita, G.R. No. 164978, October 13, 2005, 472 SCRA 587, 593, citing Tolentino v. Commission on Elections, G.R. No. 148334, January 21, 2004, 420 SCRA 438, Gil v. Benipayo, G.R. No. 148179, June 26, 2001 (Unsigned Resolution), Chief Supt. Acop v. Secretary Guingona, Jr., 433 Phil. 62 (2002), Viola v. Hon. Alunan III, 343 Phil. 184 (1997) and Alunan III v. Mirasol, 342 Phil. 467 (1997).

[28] Id. at 593.

[29] Civil Liberties Union v. Executive Secretary, supra at 328-329, 331.

[30] Id. at 331-332.

[31] P.D. No. 474, Sec. 2.

[32] Id., Secs. 8 and 9.

[33] AN ACT PROMOTING THE DEVELOPMENT OF PHILIPPINE DOMESTIC SHIPPING, SHIPBUILDING, SHIP REPAIR AND SHIP BREAKING, ORDAINING REFORMS IN GOVERNMENT POLICIES TOWARDS SHIPPING IN THE PHILIPPINES, AND FOR OTHER PURPOSES, approved on May 3, 2004.

[34] Reference: 2006 MARINA Annual Report, sourced from the Internet at <http://www.marina.gov.ph/services/results.aspx?k=MARINA%20annual%20report&start1=1>>.

[35] G.R. No. 92008, July 30, 1990, 188 SCRA 154.

[36] Id. at 158-159.

[37] BLACK'S LAW DICTIONARY, Eighth Edition, p. 749.

[38] Civil Liberties Union v. Executive Secretary, supra at 326-327.

[39] Id. at 327.

[40] Supra note 6.

[41] Id. at 62.

CONCURRING OPINION

CARPIO MORALES, J.:

I concur with Justice Martin Villarama, Jr. in his ponencia declaring unconstitutional the designation of respondent Maria Elena Bautista (Bautista) as Officer-in-Charge (OIC) of the Office of the Administrator of the Maritime Industry Authority (MARINA) in a concurrent capacity with her position as Undersecretary for Maritime Transport of the Department of Transportation and Communications (DOTC).

A quick rundown of the facts shows that Bautista was appointed as DOTC Undersecretary in October 2006 and was designated as OIC Administrator of MARINA on September 1, 2008. On January 5, 2009, she was appointed as Administrator of MARINA, the duties and responsibilities of which position she assumed on February 2, 2009 following her relinquishment of the position of DOTC Undersecretary.

Bautista thus now claims mootness of the case. A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value. Aside from the formulation of controlling principles, the grave violation of the Constitution, and the

susceptibility of recurrence as pointed out by Justice Villarama, there is the presence of practical use or value to impel the Court to take cognizance of this case.

Its mootness notwithstanding, the present petition which involves the issue of holding dual positions still calls for a resolution, for there remains the practical use or value of identifying whether one was a de facto or de jure officer in terms of the legal signification of the public officer's acts, remuneration and accountability.

Bautista, during her tenure as OIC Administrator of MARINA, cannot be considered as a de jure officer due to the unconstitutionality of the designation. At best, she can be regarded as a de facto officer in such capacity from September 1, 2008 until she assumed her subsequent appointment as MARINA Administrator on February 2, 2009.

National Amnesty Commission v. Commission on Audit[1] espouses the view that one who was not appointed but merely designated to act as such cannot be considered as a de facto officer. To sustain this view, however, would place in limbo the legal effects of a designated officer's acts and would negate the *raison d'être* of the de facto doctrine which is basically to protect the sanctity of dealings by the public with persons whose ostensible authority emanates from the State.[2] To deduce that Bautista, as a designated OIC Administrator, was not a de facto officer would effectively categorize her as an intruder or a mere volunteer, which she was not because she had a color of right or authority.

A de facto officer need not show that she was elected or "appointed in its strict sense," for a showing of a color of right to the office suffices.

Designation may be loosely defined as an appointment because it likewise involves the naming of a particular person to a specified public office.[3] In fact, even without a known appointment or election, the de facto doctrine comes into play if the duties of the office were exercised under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.[4]

I submit that the pronouncement in National Amnesty Commission comes in the form of an obiter dictum[5] since it was not necessary to the disposition of that case where the Court disallowed the payment of honoraria to the representatives of the ex-officio members of the National Amnesty Commission and ruled that the restrictions[6] covering the ex-officio members apply with equal force to their representatives since the representative cannot have a better right than his or her principal.

Civil Liberties Union vis-à-vis Public Interest Center

With respect to the legal complexion of Bautista's position as DOTC Undersecretary, there is a need to explore the implication of nullifying the holding of a second position.

Where a person is prohibited from holding two offices at the same time, his appointment or election to a second office may operate to vacate the first or he may be ineligible for the second.[7]

The proposition that a person shall be declared ineligible for the second position was followed in Civil Liberties Union v. Executive Secretary[8] where the Court ordered certain cabinet members, except those who were no longer occupying the positions complained of, "to immediately relinquish their other offices or employment, as herein defined, in the government, including government-owned and controlled corporations and their subsidiaries." [9]

Under this principle, Bautista would only be directed to relinquish the post of MARINA Administrator, if still being occupied, and concentrate on her functions as DOTC Undersecretary.

The other proposition - that a person who assumes a second and incompatible office is deemed to have resigned from the first office - was applied in *Public Interest Center, Inc. v. Elma*[10] where the Court, by Resolution of March 5, 2007, clarified that the ruling did not render both appointments void. It held that "[f]ollowing the common-law rule on incompatibility of offices, respondent Elma had, in effect, vacated his first office as PCGG Chairman when he accepted the second office"[11] as Chief Presidential Legal Counsel.

Under this rule, Bautista would be deemed to have vacated her first office as DOTC Undersecretary when she accepted the post of OIC Administrator of MARINA.

The Implications of the Two Propositions

Upon a closer examination of *Public Interest Center, Inc.* which espouses the ipso facto vacancy rule, there appears a vacuity in such a situation where the Court nullifies the appointment to a second office for being unconstitutional and likewise deems the first office as having been vacated. In the end, the public officer is left without an office.

In the present case, Bautista eventually voluntarily gave up her first post when she was subsequently appointed as MARINA Administrator, after five months of concurrently discharging the functions of an appointed DOTC Undersecretary and a designated MARINA Officer-in-Charge. It bears noting that what is being nullified is her designation and not the subsequent appointment as Administrator. Her current position as MARINA Administrator was conferred not by virtue of the assailed designation but by the subsequent appointment which effectively stands. Thus, notwithstanding the implication of *Public Interest Center*, the scenario of vacancy will not occur in this peculiar case.

With respect to the proposition under *Civil Liberties Union* - ineligibility for the second position only - the only peculiarity of the present case is that the reverse thing transpired in the meantime, with Bautista giving up the Undersecretary position and accepting the subsequent regular appointment as MARINA Administrator. The supposed continued validity of her position as DOTC Undersecretary has been rendered nugatory by her voluntary relinquishment of said position.

Further quandary lies in the five-month interregnum.

On the one hand, following the *Public Interest Center* rule that deems her first office vacated upon her holding of a second position, Bautista had become a de facto DOTC Undersecretary from September 1, 2008 (when she assumed the position of MARINA OIC Administrator) until she resigned therefrom. On the other hand, following the *Civil Liberties Union* rule that merely deems her ineligible for the second position, Bautista remained a de jure DOTC Undersecretary during her entire tenure as such.

IN FINE, I submit that the two cases provide sound formulations for two distinct situations. The *Civil Liberties Union* rule applies to cases involving dual or multiple positions under Section 13 of Article VII of the Constitution[12] while the *Public Interest Center* rule covers those under .[13]

The *Civil Liberties Union* formulation rendering the public officer ineligible for the second position comes into play, since Bautista was a department undersecretary, a position covered by the prohibition under Section 13, Article VII of the Constitution. This principle underscores the primacy of the "President, Vice-President, the Members of the Cabinet, and their deputies or assistants" as a class by itself, necessitating the disallowance of any implied vacancy in such offices.

The *Public Interest Center* rule of implied resignation does not apply since it speaks of "incompatibility of office" which is irrelevant in determining a violation of Section 13, Article VII of the Constitution.

It has also been observed that the rule of ipso facto vacancy of a public office by acceptance of a second public office does not apply where, under applicable constitutional or statutory provisions, the holder of a public office is rendered ineligible for a specified time for a second public office; under such circumstances it is the second office which is considered vacant rather than the first office.[14]

I, therefore, vote to GRANT the petition and further declare that Bautista was a de facto officer during her brief stint as MARINA OIC Administrator and a de jure DOTC Undersecretary during her entire tenure as such.

Concluding Words

The present case, in which the constitutional question posed is no longer an uncharted sea, should once again remind all civil servants of the rationale behind the general rule against the holding of multiple positions.

One manifest purpose of a restriction on multiple holdings is to prevent offices of public trust from accumulating in a single person.[15] Indeed, no one can claim a monopoly of skills.

Being head of an executive department is no mean job. It is more than a full-time job, requiring full attention, specialized knowledge, skills and expertise. If maximum benefits are to be derived from a department head's ability and expertise, he should be allowed to attend to his duties and responsibilities without the distraction of other governmental offices or employment. He should be precluded from dissipating his efforts, attention and energy among too many positions of responsibility, which may result in haphazardness and inefficiency. Surely the advantages to be derived from this concentration of attention, knowledge and expertise, particularly at this stage of our national and economic development, far outweigh the benefits, if any, that may be gained from a department head spreading himself too thin and taking in more than what he can handle.[16]

The same norm holds true to that of a DOTC Undersecretary for Maritime Transport. Now as always, the country cannot afford to have a public official who cannot devote full time on the crucial problems, contemporary or longstanding, not to mention the perennial sea tragedies, that have beleaguered the maritime industry, an industry that is "indubitably imbued with national interest." [17]

[1] G.R. No. 156982, September 8, 2004, 437 SCRA 655, 670.

[2] Vide *Topacio v. Ong*, G.R. No. 179895, December 18, 2008, 574 SCRA 817, 830.

[3] *Binamira v. Garrucho, Jr.*, G.R. No. 92008, July 30, 1990, 188 SCRA 154, 159, where the person is merely designated and not appointed, the implication is that he shall be hold the office only in a temporary capacity and may be replaced at will by the appointing authority.

[4] Vide *Lino Luna v. Rodriguez and De los Angeles*, 37 Phil. 186, 192 (1917).

[5] An obiter dictum has been defined as an opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it. It is a remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent. (*Delta Motors Corporation v. Court of Appeals*, G.R. No. 121075, July 24, 1997, 276 SCRA 212, 223).

[6] With respect to the exception enunciated in the *Civil Liberties Union* case allowing posts occupied by the Executive officials specified therein without additional compensation in an ex-officio capacity as provided by law and as required by the primary functions of said officials' office.

[7] *HECTOR DE LEON & HECTOR DE LEON, JR., THE LAW ON PUBLIC OFFICERS AND ELECTION*

LAW. 45 (2000).

[8] G.R. No. 83896, February 22, 1991, 194 SCRA 317.

[9] Id. at 339.

[10] G.R. No. 138965, June 30, 2006, 494 SCRA 53.

[11] G.R. No. 138965, March 5, 2007, 517 SCRA 336, 339.

[12] SECTION 13. The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure.
x x x.

[13] SECTION 7. No elective official shall be eligible for appointment or designation in any capacity to any public office or position during his tenure.

Unless otherwise allowed by law or by the primary functions of his position, no appointive official shall hold any other office or employment in the Government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries.

[14] 63C Am. Jur. 2d §61 p. 504, that is, not merely on the ground of the incompatibility of office.

[15] Supra note 7 at 45.

[16] Civil Liberties Union v. Executive Secretary, supra note 8 at 339.

[17] Trans-Asia Shipping Lines, Inc.-Unlicensed Crews Employees Union - Assisted Labor Unions (Tasli-Alu) v. Court of Appeals, G.R. No. 145428, July 7, 2004, 433 SCRA 610, 621.

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