

GERARDO A. CARIQUE, PETITIONER, VS. PHILIPPINE SCOUT VETERANS SECURITY AND INVESTIGATION AGENCY, INC., AND/OR RICARDO BONA AND SEVERO SANTIAGO, RESPONDENTS.*G.R. No. 197484. September 16, 2015*

Ponente: DEL CASTILLO, J.

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This Petition for Review on Certiorari[1] assails the November 30, 2010 Decision[2] of the Court of Appeals (CA) in CA-G.R. SP No. 99967, which denied the Petition for Certiorari filed therewith and affirmed the October 30, 2006 Decision[3] of the National Labor Relations Commission (NLRC) dismissing petitioner Gerardo A. Carique's (petitioner) Complaint for illegal dismissal against respondents Philippine Scout Veterans Security and Investigation Agency, Inc. (respondent agency) and/or Ricardo Bona (Bona) and Severo Santiago (Santiago). Also assailed is the June 22, 2011 Resolution[4] of the CA denying petitioner's Motion for Reconsideration.[5]

Antecedent Facts

On November 8, 1990, petitioner was hired as security guard by respondent agency owned by respondent Santiago and managed by respondent Bona. He was thereafter assigned/posted to respondent agency's several clients, the last of which was at National Bookstore - Rosario, Pasig Branch.[6] On October 28, 2002, petitioner was relieved from his post at the National Bookstore - Rosario, Pasig Branch and was replaced by Security Guard Roel Juan pursuant to a rotation policy being implemented by respondent agency.

On May 6, 2003, petitioner filed an illegal dismissal case against respondents before the Labor Arbiter, docketed as NLRC NCR Case No. 00-05-05393-2003. The complaint was subsequently amended to include his claims for illegal deduction, damages and refund of cash bond.[7]

Petitioner alleged that on October 30, 2002, shortly after his relief, he reported to respondent agency's office and inquired about his next assignment. He was, however, informed of the lack of available assignment. He then reported continuously but was repeatedly advised to wait for a new posting. He was thus surprised when on March 9, 2003, he received a memorandum[8] from respondent agency requiring him to explain his Absence Without Leave (AWOL) since November 30, 2002. He submitted an explanation[9] on the charge, but no assignment at all was given to him. On May 5, 2003, he again returned, but was compelled to acknowledge receipt of a memorandum[10] dated April 30, 2003 requiring him to explain his unjustified refusal to accept the posts offered to him and his AWOL. Attached to the memorandum were three Special Security Detail (SSD)[11] which required him to report for assignment at the National Bookstore, SM Bicutan, Taguig on March 11, 2003 and at East Asia Diesel Power Corporation and Country Space Condominium on March 17, 2003. Contending that the SSDs attached to the memorandum were fabricated by respondent agency in order to evade liability, petitioner refused to acknowledge receipt of the said memorandum. These events led him to file an illegal dismissal case against respondents.

Respondents denied having dismissed petitioner, let alone illegally, and alleged that petitioner was relieved from

his post because of a rotation policy being implemented as required by respondent agency's clients; that this lawful practice of relieving security personnel from their posts did not amount to terminating the security personnel from employment but was simply meant to place them on floating status while awaiting a new assignment; that petitioner was offered an assignment for posting at the National Bookstore - SM Bicutan Branch as evidenced by SSD[12] dated March 11, 2003 some five months after his relief; that this offer was, however, refused by petitioner for no known reason; and, that after five days, petitioner was again offered another assignment at the Country Space Condominium at Buendia, Makati as shown in the SSD[13] dated March 17, 2003 but petitioner rejected this second offer anew for no reason at all. Hence, respondents issued a memorandum dated April 30, 2003 requiring petitioner to explain his actions. Two officers of respondent agency, Ermelo Basal (Duty Officer Basal) and Fernando Amor (Investigator General Amor), submitted sworn statements[14] attesting to the fact that the offers for posting were refused by petitioner.

In his reply, petitioner averred that he did not consider the SSDs as valid offers for his posting; that there were apparent discrepancies between the three SSDs submitted by him and the two SSDs presented by respondents; and, that the conflicting entries between the SSDs submitted by him vis-a-vis those submitted by respondents were suggestive of irregularities in their issuances.

Ruling of the Labor Arbiter

In a Decision[15] dated April 30, 2004, the Labor Arbiter declared petitioner to have been illegally dismissed on the ground that respondents repeatedly denied petitioner's demands/requests for assignment/posting. The Labor Arbiter thus ordered respondents to pay petitioner separation pay of P45,000.00, partial backwages of P90,000.00, and to refund petitioner's cash bond in the amount of P17,840.00.

Ruling of the National Labor Relations Commission

In their appeal before the NLRC, respondents averred that the Labor Arbiter gravely erred in relying on petitioner's baseless allegations and disregarding their convincing countervailing evidence consisting of the SSDs and the sworn statements of respondent agency's officers attesting to the fact that petitioner refused to accept his new assignment. Respondents thus sought the invalidation of the Labor Arbiter's award for separation pay, backwages, and the refund of cash bond.

In a Decision[16] dated October 30, 2006, the NLRC granted respondents' appeal and annulled the Labor Arbiter's judgment. The NLRC was convinced that petitioner had refused new assignments. The NLRC found that petitioner never denied having received copies of the SSDs as well as the memorandum asking him to explain his refusal to accept the offered assignments. The NLRC noted that petitioner, far from complying with the memorandum directing him to explain his alleged refusal, chose to ignore the memorandum and instead filed a case against respondents. The NLRC stressed that all that petitioner did was to point out alleged discrepancies and conflicting entries in the SSDs but did not categorically deny that he received these detail orders. The NLRC also noted that petitioner even adopted these documents as part of the evidence he submitted before the Labor Arbiter. The NLRC, thus, concluded that petitioner was not at all dismissed; instead, he rejected the assignments given to him.

In any event, the NLRC ordered the refund of petitioner's cash bond in view of respondents' admission that the cash bond should be remitted upon severance of employment and upon petitioner's manifestation that he was no longer interested to work for respondent agency. The dispositive portion of the NLRC Decision reads:

WHEREFORE, respondents' appeal is hereby GRANTED, the appealed Decision is hereby SET ASIDE and a new one entered dismissing the complaint for lack of merit. Respondents are, however, ordered to refund to complainant his cash bond in the amount of P17,840.00.

SO ORDERED.[17]

Petitioner moved for reconsideration which was denied by the NLRC in its Resolution[18] of June 12, 2007.

Ruling of the Court of Appeals

Via a Petition for Certiorari,[19] petitioner appealed the NLRC Decision to the CA. Petitioner reiterated that he was illegally dismissed and that he continuously pleaded for new assignments but was not given any by respondent agency; that the SSDs issued to him by respondent agency were fabricated and were merely prepared by respondent agency in order to evade liability. Petitioner prayed for the reinstatement of the Labor Arbiter's Decision.

In a Decision[20] dated November 30, 2010, the CA denied the Petition for Certiorari and affirmed the NLRC Decision. The CA ruled that when petitioner was relieved from his post at the National Bookstore Rosario, Pasig Branch on October 28, 2002, he was merely placed on floating status or temporary off-detail and was not dismissed. His floating status did not exceed six months as he was in fact given new assignments within five months from his alleged relief but he refused these new assignments.

Petitioner moved for reconsideration which was denied by the CA in its Resolution[21] of June 22, 2011.

Issue

Hence, this Petition raising the issue of whether petitioner was illegally dismissed.

Petitioner's Arguments

Petitioner maintains that the evidence he adduced before the Labor Arbiter compels the conclusion that he was illegally dismissed, respondents' evidence notwithstanding. Petitioner avers that his 12 years of service with respondent agency as well as the filing the instant complaint, belied any intention on his part to forego or abandon his employment. Petitioner insists that, in any event, he was constructively dismissed because respondent agency's alleged offerings of new assignments did not effectively toll the six-months floating period, because first, his relief did not arise from a bonafide suspension of the company's operation as contemplated in Article 286 of the Labor Code[22] effectively placing him on temporary off-detail for a period not exceeding six months. The reason for his relief, i.e. rotation policy, was for regulatory purpose only and presupposed available assignments under other existing service contracts. Secondly, the new assignments offered to him were temporary reliever positions, and did not reinstate him to his former position with a regular status.

Our Ruling

The Petition is without merit.

We find no cogent reason to depart from the factual finding of both the NLRC and the CA that petitioner was not illegally dismissed. The evidence on record clearly shows that respondents did offer petitioner new assignments. The SSDs and the affidavits executed by Duty Officer Basal and by Investigator General Amor attest to this incontrovertible fact.

This Court is not unmindful of the rule that the employer has the burden of proving that the employee's termination was for a valid or authorized cause. However, before the employer is tasked to discharge this burden, it is incumbent upon the employee to prove by substantial evidence the fact that he was indeed illegally dismissed from employment.[23] Illegal dismissal must be established by positive and overt acts clearly indicative of a manifest intention to dismiss. This critical affirmative fact must be proved by the party alleging the same with substantial evidence as required by the nature of this case.[24] Mere allegation is neither proof nor evidence.[25]

Here, we find that petitioner anchored his claims on unfounded and unproven allegations. No positive or direct evidence was adduced to show that he was indeed illegally dismissed from employment, either factually or constructively. If anything, the evidence on record showed that petitioner was relieved from his last assignment because of the implementation of a rotation policy by respondent agency which was requested by its clients; and that as correctly found by the CA, petitioner, from that point on, was considered on floating status or on temporary off-detail which is not an unusual occurrence for security guards given that their assignments primarily depend on the contracts entered into by the agency with third parties.[26] Placing petitioner on floating or off-detail status for not more than six months is not prohibited by law and did not amount to dismissal.[27]

Petitioner's insistence that he was not given any new assignment after his relief was not corroborated by any evidence. Significantly, both the NLRC and the CA noted that petitioner never denied or disputed having received copies of the SSDs directing him to report to his new assignments. Indeed, the duty officer who issued the SSDs attested that petitioner was offered postings on March 11, 2003 and on March 17, 2003, but were refused by petitioner without any justifiable reason. The respondent agency's investigator general corroborated this fact in an Affidavit where he affirmed that he was present when the assignments were offered to petitioner, but that petitioner turned these down. Petitioner never denied or contested these assertions. If at all, he simply shrugged off the SSDs, claiming that these SSDs were fabricated and contained inaccurate and falsified entries. Confronted with these conflicting claims, this Court finds no difficulty in upholding the claims of the duty officer and the investigator general because these claims square with the facts on record.

Petitioner also avers that his alleged refusal to accept his new assignment is utterly immaterial to the resolution of the issue on the validity of the rotation policy implemented by respondents. In fine, petitioner assails the propriety of the rotation policy being implemented by respondent agency, claiming that this did not toll the allowable six-months floating period, on account of which he must be deemed to have retained the regular status he enjoyed in his former assignments.

Notably, these issues are raised for the first time on appeal. In fact, it was only in his motion for reconsideration[28] before the CA where he belatedly insisted that assuming that he received the SSDs, his receipt thereof would not mean that he was not illegally dismissed as the new assignments embodied in the detail orders were only "reliever" or temporary positions meant to defeat his right to security of tenure. Needless to say, issues and arguments not raised before the original tribunal cannot be raised for the first time on appeal.[29] To entertain this new theory for the first time on appeal is unfair to the other party[30] and is offensive to the rudimentary rules of fair play, justice and due process.[31]

At any rate, even if timely raised, such arguments will not hold. The implementation of the rotation policy by respondent agency is within the ambit of management prerogative. The employer has the inherent right to regulate all aspects of employment, according to his own discretion and judgment, including the right to transfer an employee as long as the transfer is not unreasonable, inconvenient, prejudicial and does not involve a demotion in rank or a diminution of the employee's salaries, benefits, and other privileges.[32] In the absence of evident bad faith or a manifest intent to circumvent the factors and conditions just mentioned, this Court is not prepared to invalidate respondents' stance that this policy reflects the essence of security planning and the importance of discouraging familiarity between security personnel and the premises they are guarding. Thus, we here reiterate that contracts for security services may stipulate that the clients may request the agency for the replacement of the guard/s assigned to it even for want of cause[33] and that such replaced security guard/s could be placed on temporary "off-detail" or "floating status" which is the period of time when such security guard/s are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one.[34]

As a matter of record, respondent agency had been consistently rotating its security guards. Petitioner had been assigned and periodically transferred to different clients since 1992; and there is no indication in the records that petitioner resisted or opposed these postings. Petitioner therefore had effectively consented to this rotation policy, hence, he cannot now claim that such rotation policy was an assault on his right to security of tenure. Petitioner is therefore estopped from denouncing such rotation policy as an infraction of his right to security of tenure.

Neither may petitioner claim that the new assignments offered to him were "reliever" positions that were irregular in nature as those new assignments allegedly interrupted or temporarily halted his regular employment, because even if his employment was regular or had been temporarily halted, the employment is nonetheless deemed regular if the employee has rendered at least one year of service.[35] More importantly, the primary standard for determining regular employment is the reasonable connection between the activity performed by the employee vis-a-vis the business or trade of the employer.[36] Here, the new assignment/s offered as "reliever assignments" were not merely temporary assignment/s but regular ones as the assignment/s were necessary to and essential in the usual business of respondent agency. In that context, petitioner's repeated refusal of the new assignments offered to him was not justified.

All told, the Labor Arbiter erred in finding that petitioner was illegally dismissed, no substantial evidence having been adduced to sustain this finding. On the other hand, both the NLRC and the CA correctly found that petitioner was not dismissed but that petitioner instead unjustifiably refused to accept the new assignments offered to him. His conduct or action negated his claim that he was illegally dismissed.

WHEREFORE, this Petition is DENIED. The November 30, 2010 Decision and the June 22, 2011 Resolution of the Court of Appeals in CA-G.R. SP No. 99967 are AFFIRMED. No pronouncement as to costs.

SO ORDERED.

Carpio, (Chairperson), Perez,[*] Mendoza, and Leonen, JJ., concur.

[*] Per Special Order No. 2191 dated September 16, 2015.

[**] Also referred to as Severeno and Severino in some parts of the records.

[1] Rollo, pp. 10-31.

[2] CA rollo, pp. 153-162; penned by Associate Justice Noel G. Tijam and concurred in by Associate Justices Marlene Gonzales-Sison and Danton Q. Bueser.

[3] Id. at 107-112; penned by Commissioner Perlita B. Velasco and concurred in by Commissioner Romeo L. Go.

[4] Id. at 184-185.

[5] Id. at 163-168.

[6] Memorandum for Assignment dated April 15, 1999, id. at 57.

[7] Id. at 53-54; 17.

[8] Id. at 27.

[9] Id. at 28.

[10] Id. at 29.

[11] SSD dated March 17, 2003 requiring petitioner to report for assignment to East Asia Diesel Power Corporation, id. at 30; SSD dated March 17, 2003 requiring petitioner to report for assignment to Country Space Condominium, id. at 31; and SSD dated March 11, 2003 requiring petitioner to report for assignment to National Bookstore, SM Bicutan Branch, id. at 32.

[12] Id. at 58.

[13] Id. at 59.

[14] Id. at 60, 78.

[15] Id. at 80-87, penned by Labor Arbiter Aliman D. Mangandog.

[16] Id. at 107-112.

[17] Id. at 111.

[18] Id. at 119-120.

[19] Id. at 2-16.

[20] Id. at 153-162.

[21] Id. at 184-185.

[22] ART. 286. When employment not deemed terminated. — The bonafide suspension of the operation of a business or undertaking for a period not exceeding six (6) months, or the fulfillment by the employee of a military or civic duty shall not terminate employment.

In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty.

[23] Cañedo v. Kampilan Security and Detective Agency, Inc., G.R. No. 179326, July 31, 2013, 702 SCRA 647, 658.

[24] Noblejas v. Italian Maritime Academy Phils., Inc., G.R. No. 207888, June 9, 2014, 725 SCRA 570, 580-581.

[25] Villanueva v. Philippine Daily Inquirer, Inc., 605 Phil. 926, 937 (2009).

[26] Sentinel Security Agency, Inc. v. National Labor Relations Commission, 356 Phil. 434, 443 (1998).

[27] Leopard Security and Investigation Agency v. Quitoy, G.R. No. 186344, February 20, 2013, 691 SCRA 440, 449.

[28] CA rollo, pp. 163-168.

[29] Magnolia Dairy Products Corporation v. National Labor Relations Commission, 322 Phil. 508, 516 (1996).

[30] Balitaosan v. The Secretary of Education, 457 Phil. 300, 304 (2003).

[31] Morales v. Metropolitan Bank, and Trust Company, G.R. No. 182475, November 21, 2012, 686 SCRA 132, 148.

[32] Peckson v. Robinsons Supermarket Corporation, G.R. No. 198534, July 3, 2013, 700 SCRA 668, 679-682.

[33] Salvaloya v. National Labor Relations Commission, 650 Phil. 543, 557 (2010).

[34] Id.

[35] *The Peninsula Manila v. Alipio*, 577 Phil. 420, 428 (2008).

[36] *Philippine Telegraph and Telephone Co. v. National Labor Relations Commission*, 338 Phil. 1093, 1106 (1997).

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