

PRIMITIVO P. QUIEM, PETITIONER AND APPELLANT VS. JESUS SERIÑA, VICE-MAYOR OF CAGAYAN DE ORO CITY, IN HIS CAPACITY AS PRESIDING OFFICER OF THE MUNICIPAL BOARD, PIO I. ROA, AUGUST...

G. R. No. 22610. June 30, 1966

Ponente: SANCHEZ, J.

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SANCHEZ, J.:

Contenders for City Secretary in the election held by the Municipal Board[1] of Cagayan de Oro City, at its January 2, 1964 inaugural session, were petitioner Primitivo P. Quiem and respondent Anastacio Abas. A secret ballot was taken. Result: Three councilors voted for petitioner, three for respondent. One councilor abstained-he cast a blank ballot. Because of the tie, Vice-Mayor Jesus Seriña, the presiding officer, voted for petitioner, who thereupon took his oath of office before the Vice-Mayor. The following day, January 3, petitioner took another similar oath before Judge Agustin Antillon of the Cagayan de Oro City Court. The same day, January 3, respondent Abas challenged the validity of the alleged election of petitioner, City Mayor Justiniano R. Borja refused to recognize petitioner as the duly elected secretary. The mayor, on January 7, called the board to a special meeting for 3 o'clock in the afternoon of that day, to discuss, act and resolve Abas' protest. No decision was reached at that meeting or at the session of January 9. The Board agreed to meet again on January 10, at 3:00 p.m. for the same purpose.

On the morning of January 10, petitioner went to court[2] on prohibition with a petition for preliminary injunction to restrain respondents from conducting another balloting before the legality or illegality of petitioner's election is resolved and, after hearing, to grant him "such other remedy as may be just, fair and equitable".

Upon a P1,000 bond, the court, on January 10, promptly issued the writ of preliminary injunction prayed for.

Respondents' answers to the petition raised the question: Was there a failure of election of City Secretary?

Parenthetically, on January 14, the board designated Orlando Bodriguex, one of its stenographers, as Acting Secretary.

On January 20, 1964, the court issued, and petitioner's counsel received, notice of trial for January 30, 1964 at 8:30 a.m.

On January 22, respondent Abas moved to dissolve the writ of preliminary injunction. Petitioner, on January 23, registered his opposition thereto.

On January 30, 1964, the Court, after a preliminary hearing that morning, issued an order, as follows: "the preliminary injunction is hereby DISSOLVED and the petition is hereby DISMISSED, without pronouncement as to costs". The verbal notion to reconsider - after the foregoing order was dictated in open court-was overruled.

Petitioner, on February 10, 1964, came to this Court on certiorari with a prayer for preliminary prohibitory and

preliminary Mandatory injunction,[3] This Court, on February 11, 1964, dismissed the petition for the reason that appeal was the remedy.

Promptly, that is, on February 12, 1964, petitioner registered below his notice of appeal from the order of January 30, 1964 aforesaid and filed a cash bond. On February 13, 1964, the court a quo gave due course to the present appeal.

Thereafter, on February 24, 1964, the board proceeded to the election of the secretary.[4] Respondent Abas garnered 5 affirmative votes and was thereupon declared duly elected. Since then, abas has been performing the functions of secretary.

- Petitioner presses upon us the threshold question that he was denied due process. He complains that the Court did not give him an opportunity "to prove his allegations".[5]

Petitioner, it would seem, misconceives the reach of due process. Nothing in the minutes of the trial held en January 30, 1964 suggests that he ever offered to present any evidence at all. And this, in spite of the fact that he was represented thereat by a number of lawyers. The parties were heard from 3:30 a.m. to 11:50 a.m. on that date.[6] The presumption is that official duty had been regularly performed;[7] that a judge will not do any act contrary to his official duty or omit to do anything which such duty may require;[8] that he will not violate his official oath;[9] and that a judicial proceeding was regular and that all the steps required by law to be taken on a matter, had been so taken.[10]

But, was there any necessity to take evidence? Respondents' affirmative defense to the petition below is that petitioner was not lawfully elected because he did not obtain the required number of votes, and that therefore he lacks a cause of action. The pivotal facts bearing on this issue are not disputed: There was an election; votes were cast therein; the number of votes received by the two candidates were tallied. Solely questions of law are presented. On the issues of law, a preliminary hearing was had, in petitioner's language - in a "question-and-answer method".[11] The merits and demerits of the defense of lack of cause of action was thus openly discussed. This is as it should be. Because, lack of cause of action - a ground for a motion to dismiss -[12] may be pleaded as an affirmative defense, "and a preliminary hearing may be had thereon as if a motion to dismiss had been filed".[13] Sufficiency of the averments in a petition can only be determined by considering the facts averred, and nothing more.[14] Of course, the hearing has to be summary. Prohibition is summary in nature.

The familiar safeguards of notice, hearing and opportunity to present his side, were fully accorded petitioner. He was given his day in court. He cannot complain.

- Petitioner next avers that the Vice-Mayor is not a member of the board.

We find this argument less than compelling. By express legal mandate, the Vice-Mayor of Cagayan de Oro City is a member of the board. That city's original charter[15] calls for an appointive Vice-Mayor[16] who "shall be a member of the Municipal Board",[17] "the legislative body of the city".[18] The law amendatory to the Cagayan de Oro charter made the Vice-Mayor elective, and reiterated that he "shall be a member of the Municipal Board".[19]

But then, on June 19, 1959, Congress enacted another statute "making elective" the offices of Mayor, Vice-Mayor and Councilors with the proviso that "the Vice-Mayor shall be the presiding officer of the City Council or Municipal Board in all chartered cities".[20]

Petitioner stresses the fact that this last-named legislative enactment is silent as to whether the Vice-Mayor, the presiding officer, is a member of the board. Upon the premise that what the law does not include, it excludes,

petitioner puts forth the claim that the Vice-Mayor is not a member, but a mere presiding officer of the board.[21]

Petitioner's argument is off the mark. First, it is now a commonplace in our law that implied repeals are not favored. Second, the charter provisions making the Vice-Mayor a member of the board can be harmonized with the later law (Republic Act 2259) naming him the presiding officer thereof. Third, absent is a plain indication from Congress - in the law just adverted to - that the Vice-Mayor has ceased to be a member of the Municipal Board. In this setting, we find no warrant to declare that he has so ceased. Because, Section 9 of Republic Act 2259 stipulates that only when a law is inconsistent therewith shall it be declared thereby repealed. We see no repugnance.

- Having reached the conclusion that the Vice-Mayor of Cagayan de Oro City is a member of the board, our next problem is whether he may vote in the selection of the city secretary. The power to so elect is lodged with the Municipal Board.[22] Logic suggests that, being a board member, the Vice-Mayor is entitled to vote in the election of said official. If other members can vote, why should the Vice-Mayor - also a member - be singled out and refused that right? There is nothing in our statute books which says that simply because he happened to be also the presiding officer, he shall have no right to vote.

True, in *Rivera et al., vs. Villegas*,[23] we held that the Vice-Mayer "possesses in the Municipal Board of Manila no more than the prerogatives and authority of a 'presiding officer' as such" and "to vote in case of tie". But the Manila Vice-Mayor stands on another level. For, the Manila charter, in language indubitable, withheld from the Vice-Mayor the right to vote "except in case of a tie". No such delimitation of powers appears in the Cagayan de Oro charter; it should not be imported therein. Differences in law beget differences in legal effects.

Bagasao, et al., vs. Tumangan[24] is appropriately to be read as controlling on this point. There as here: The Vice-Mayor is a member and the presiding officer of the board; the charter is silent on whether the presiding officer may cast a vote as a member or only in case of a tie. We there held that the Vice-Mayor may "exercise his right to vote as a member on any proposed ordinance, resolution or motion" and that "To limit his right to a vote to a case of deadlock or tie would curtail his right and prerogative as a member of the Municipal Board which is not authorized by the provisions of the charter".

- With what we have stated thus far, we return to the January 2 balloting. Three votes went for petitioner, three for respondent Abas, one abstained. The Vice-Mayor thereupon cast his ballot for petitioner. This vote should be counted, independent of whether his intention was to break a tie or otherwise. For, to vote was his right. The result is that petitioner garnered four votes to Abas' three. But there are eight elective members of the board - the Vice-Mayor and seven councilors - all of whom were present at the balloting.

By law, Section 5, Republic Act 2259, the city secretary "shall be elected by majority vote of the elective city council or municipal board".[25]

Petitioner urges upon us the proposition that the statute just quoted merely requires "a simple majority of a quorum".[26] This, we believe, is a warped construction of the statute. The law exacts a majority vote of the elective board. And the elective board consists of eight members. So that, a majority of at least five votes will carry the day for a candidate. Authorities are not wanting in support of this view.[27] And neither is it short of reason.

The law does not exact that a city secretary be drawn from the roll of civil service eligibles. He is to serve during the term of office of the board that elected him.[28] It is not an easy matter to uproot him from his position-because of fixed tenure. The discussions on the floor of Congress reveal that the wording of the statute - Sec. 5, Republic Act 2259 - was arrived at having in mind that a secretary "is supposed to enjoy the confidence of

the body to which he is acting as secretary".[29] How can a secretary enjoy the confidence of the elective municipal board unless the majority of the elective members thereof gives him the nod? If the voting be decided by a mere majority of a quorum present at the meeting, the probability of a secretary being elected by a minority of the elective members is not remote. In this situation, the secretary is not of the confidence of the "body". Really, if it was the intention to limit to a simple majority of the quorum the matter of election, it is the function of Congress - not this Court - to spell out such provision expressly. But, Congress did not. As it is, Congress has chosen to employ in the statute the term "majority vote of the elective" municipal board, no less. We cannot pass the line that circumscribes the Judicial department and tread on legislative ground. Therefore, a vote of five is necessary to elect a secretary.

At any rate, this point offers no area for genuine dispute. No quorum is involved. Because all - not a mere quorum - of the eight elective board members were actually present at the January 2 balloting. And five still is the required majority.

- In our opinion, the controlling legal issue here is whether the blank ballot, as petitioner claims,[30] is to be recorded as a vote for petitioner. For, if it be so counted, petitioner's votes will be five to Abas' three. Contrariwise, the voting stands four to three, with the result that there was a failure of election.

We are here reminded that the post of city secretary is filled by election, by members of the board as individual electors. Election is defined as: "Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society".[31] When Congress took it upon itself to provide for a city secretary, by election, it is to be presumed that it had in mind the word election in common and approved usage and the normal contemporary workings of an election to an office. [32] Under our system of elections, abstention is not a vote. For, implicit in a vote for an office is a deliberate, positive act, such as by viva voce or secret ballot. As Bouvier puts it, we cannot "go beyond the ballot to ascertain the intention of the voter." [33]

Indeed, we cannot speculate on a voter's Intention; we cannot here rightfully assume the role of mind readers. Imponderables there could be, considerations there might be, which stay the hand of a voter from writing the name of one candidate or the other, (tee who casts a blank ballot chooses not to stand up and be counted. His blank ballot is but an expression of lack of intention. It evidences nothing, except that he throws away his vote. To consider a blank ballot as a vote for one candidate as against the other, is to dignify deviation from truth. Blank ballot in a contested election is thus a nullity. It cannot be tallied.

To be sure, authorities are not wanting which would show that abstention could be counted in a voting. Thus, in *Cromarty vs. Leonard, et al.*, 216 N.Y.S. 2d., 619, the county executive submitted to the Board of Supervisors (the legislative and policy determining body) the name of a person whom he proposed for the office of County Attorney. The vote thereon was five in favor, four opposed, and one not voting. The chairman ruled that petitioner's abstention should be counted as a negative vote. The county executive - who had a casting vote in case of tie - then voted to approve the appointment of his nominee. A divided court held that abstention should be counted as a negative vote, that a tie was thus created, and that the county executive's vote resulted in the adoption of the resolution approving the appointment. This and cases of similar import,[34] and others where abstention is counted in the affirmative,[35] are of little help here. They do not parallel the factual situation in our case. There, the positions involved are not contested. A board member just had to say "yes" or "no" or keep silent as to the sole nominee. Not so here, where two are candidates for the same post. The elector is called upon not to adhere but to make a choice.

Illuminating is the decision in *People, ex rel. Floyd, vs. Conklin*, 7 Hun. 138, cited in the same *Cromarty* case, where the statute incorporating a savings institution required the vote of a majority of the trustees present, for the

election of an officer. At a meeting, twelve trustees being present, six voted for relator, four for defendant, one for a third person and one cast no vote. Held: No choice, since affirmative positive action by a majority of the trustees present was contemplated by the statute, and "it could not be presumed that the trustee not Toting 'practically voted' for relator".[36] As Dillon[37] aptly observed, "the weight of authority, and, as we think, the better view is, that the blank ballot (cast by a member of a city council at an election for an officer) is a mere nullity: that it cannot be counted for or against either of the candidates voted for".

In the end, we say that the situation remains as it was: Petitioner received four votes, respondent Abas three. Petitioner is one vote short of the required majority. He failed to be elected. He has no cause of action.

Viewed in the light of the undisputed facts and the law, the order of the court a quo of January 20, 1964 dissolving the preliminary Injunction and dismissing the petition, is hereby affirmed. No costs. So ordered.

Concepcion, C.J., Barrera, Dizon, Regala, Makalintal, Bengzon J.P., and Zaldivar, JJ., concur.

[1] Hereinafter referred to simply as the Board.

[2] Case No. 2297, Court of First Instance of Misamis Oriental, entitled "Primitive P. Quiem, petitioner, versus Jesus Serina, etc., et al.", the present case.

[3] Primitivo P. Quiea vs. Hon. Bernardo Teves, etc., et al., L-22436.

[4] Section 4, Rule 39 of the Rules of Court: "Unless otherwise ordered by the court, a judgment in an action for injunction *** shall not be stayed after its rendition and before an appeal is taken or during the pendency of an appeal."

[5] Petitioner's brief, p. 7.

[6] Record on Appeal, p. 59.

[7] Sec. 5 (m), Rule 131, Rules of Court.

[8] 31A C.J.S. pp. 322-325.

[9] I Jones on Evidence, 2nd ed.,p. 224.

[10] Ongsiako vs. Natividad, 79 Phil., pp. 3, 6.

[11] Petitioner's brief, p. 6.

[12] Sec. I (g), Bule 16, Rules of Court.

[13] Sec. 5, id.

[14] I Martin, Rules of Court (with notes and comments), 1963 ed., p. 444.

[15] Republic Act 521, approved on June 15, 1950.

[16] Id., Sec. 8 - The Vice-Mayor is to be appointed by the President with the consent of the Commission on Appointments.

[17] Ibid., Sec. 8, par. 2; emphasis supplied.

[18] Ibid., Sec. 11.

[19] Republic Act 1325 (approved on June 16, 1955), Sec. 1 amending Sec. 8, R.A. 521.

[20] Republic Act 2259, Secs. 1 and 3; *Italic supplied.*

[21] Petitioner's brief, pp. 16-17.

[22] Sec. 5, Republic Act 2259.

[23] G. R. No. L-17835, May 31, 1962.

[24] 104 Phil., *italics in opinion supplied.*

[25] *Italics supplied.* Cagayan de Oro charter does not make any provision for the manner of election. And Cagayan de Oro is not exempted from the operation of Republic Act 2259.

[26] Petitioner's brief, p. 18.

[27] "Under a by-law of a social corporation providing that an assessment could be made by a majority of the executive committee, which consisted of 20 members, 5 of whom constituted a quorum, by a 'majority of the committee' was meant a majority of the whole committee, and not a majority of a quorum of 5." *Rogers vs. Boston Club*, 91 N.E., 321, 322, 325, 205 Mass. 261, 28 L.R.A., N.S., 743, cited in *Words and Phrases*, Permanent Ed., vol. 26, p. 135.

"The provision of Town Law that a 'majority of the board' shall constitute quorum means majority of officers constituting town board, not majority of residuum resulting from vacancies, disqualifications or absences." *Town Law*, sec. 63. *Application of Crosby*, 36 N.Y.S. 2d 301, 303, 178 Misc. 746. *Id.*, p. 138.

[28] Sec. 13, Republic Act 521.

[29] Congressional Record (Senate), 4th Congress, Second Session, Vol. II, Jan. - March, 1959, p. 45; *italics supplied.*

[30] Petitioner's brief, p. 19.

[31] *Bouvier's Law Dictionary*, Vol. I, 3rd Revision, p. 979.

[32] *Crawford, Statutory Construction*, 19W ed., p. 369, footnote.

[33] *Bouvier's Law Dictionary*, *supra*, p. 994, citing *Loubat vs. Le Roy*, 15 Abb. N. C. (N.Y.) 16.

[34] To the same effect, *Young vs. Yates*, 47 P. 1004, and others, cited in the opinion in the *Cromarty* case, p. 622 et seq.

[35] *Drummond vs. Dillon*, 25 N.E. 136, and others, cited in the same *Cromarty* case, p. 626.

[36] *Croarty vs. Leonard*, *supra*, at p. 627.

[37] *II Dillon, Municipal Corporations*, (5th ed.) p. 855.

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