

## SECOND DIVISION

[ G.R. No. 165132, March 07, 2012 ]

**OFFICE OF THE OMBUDSMAN, PETITIONER, VS. NELLIE R.  
APOLONIO, RESPONDENT.**

### DECISION

**BRION, J.:**

Through a petition for review on *certiorari*,<sup>[1]</sup> petitioner Office of the Ombudsman (*Ombudsman*) seeks the reversal of the decision<sup>[2]</sup> dated March 23, 2004 of the Court of Appeals (CA) in CA-G.R. SP No. 73357 and the resolution dated August 23, 2004, which dismissed the Ombudsman's Motion for Reconsideration. The assailed decision annulled and set aside the decision of the Ombudsman dated August 16, 2002<sup>[3]</sup> (docketed as OMB ADM-0-01-0405), finding Dr. Nellie R. Apolonio guilty of grave misconduct and dishonesty.

### THE FACTUAL ANTECEDENTS

Dr. Apolonio served as the Executive Officer of the National Book Development Board (NBDB) from 1996 to August 26, 2002. As NBDB's executive officer, Dr. Apolonio supervised NBDB's Secretariat and managed its day-to-day affairs.<sup>[4]</sup>

In December 2000, NBDB's Governing Board approved the conduct of a Team Building Seminar Workshop for its officers and employees. The workshop was scheduled to be a two-day event, to be held on December 20-21, 2000.<sup>[5]</sup>

On March 29, 1995, the Department of Budget and Management (DBM) issued National Budget Circular No. 442<sup>[6]</sup> prescribing a P900.00 limit for each participant per day in any seminar/workshop/conference undertaken by any government agency. In compliance with the circular, the NBDB disbursed the amount of P108,000.00 to cover the P1,800.00 allowance of the 60 employees for the two-day event.<sup>[7]</sup>

Prior to the conduct of the workshop, some of the employees/participants approached Dr. Apolonio to ask whether a part of their allowance, instead of spending the entire amount on the seminar, could be given to them as cash. Dr. Apolonio consulted Rogelio Montealto,<sup>[8]</sup> then Finance and Administrative Chief of NBDB, about the proposal and the possible legal repercussions of the proposal. Concluding the proposal to be legally sound and in the spirit of the yuletide season, Dr. Apolonio approved the request.<sup>[9]</sup> Thus, after the end of the workshop, SM gift cheques were distributed to the participants in lieu of a portion of their approved allowance.<sup>[10]</sup>

## ***Proceedings before the Ombudsman***

On August 24, 2001, Nicasio I. Marte, an NBDB Consultant, filed a complaint against Dr. Apolonio and Mr. Montealto before the Ombudsman. The complaint alleged that Dr. Apolonio and Mr. Montealto committed grave misconduct, dishonesty and conduct prejudicial to the best interest of the service for the unauthorized purchase and disbursement of the gift cheques. Mr. Marte alleged that the NBDB's Governing Board never authorized the disbursement of the funds for the purchase of the gift cheques and that the purchases were never stated in Dr. Apolonio's liquidation report.<sup>[11]</sup>

In her response, Dr. Apolonio invoked good faith<sup>[12]</sup> in the purchase of the gift cheques, having in mind the best welfare of the employees who, in the first place, requested the use of part of the budget for distribution to the employees.

On April 3, 2002,<sup>[13]</sup> Graft Investigation Officer (GIO) Plaridel Oscar J. Bohol found Dr. Apolonio and Mr. Montealto administratively liable for conduct prejudicial to the best interest of the service, but exonerated them from the charges of grave misconduct and dishonesty. GIO Bohol recommended the imposition of suspension for six (6) months and one (1) day without pay.

GIO Bohol's recommendation was not acted favorably by then Acting Ombudsman Margarito Gervacio, Jr. who adopted the recommendation of GIO Julita M. Calderon. GIO Calderon's recommendation was embodied in a memorandum dated August 16, 2002.<sup>[14]</sup> In her memorandum, GIO Calderon found Dr. Apolonio and Mr. Montealto guilty of gross misconduct and dishonestly, in addition to the charge of conduct grossly prejudicial to the best interest of the service. Consequently, GIO Calderon recommended that Dr. Apolonio and Mr. Montealto be dismissed from the service.<sup>[15]</sup>

GIO Calderon found that Dr. Apolonio illegally converted the use of her cash advance, which was solely intended for the workshop, for the purchase of the gift cheques. In doing so, she "abused her authority as the Executive Director of NBDB [and] disregarded the authority of the Board."<sup>[16]</sup> GIO Calderon described Dr. Apolonio's act as a criminal act of technical malversation.<sup>[17]</sup> Further, even if a clamor among the participants occurred, the clear provisions of Section 89 of Presidential Decree No. (PD) 1445, otherwise known as the "Government Auditing Code of the Philippines," prohibit Dr. Apolonio from releasing the cash advance for a purpose other than that legally authorized.<sup>[18]</sup> The supposed "noble purpose" for the technical malversation does not negate the illegality of the act.

On August 21, 2002, the Acting Ombudsman approved the findings of GIO Calderon, thereby imposing the penalty of removal against Dr. Apolonio. The Acting Ombudsman likewise denied Dr. Apolonio's motion for reconsideration on September 18, 2002. This prompted Dr. Apolonio to file a petition for review on *certiorari* in the CA.

## ***Proceedings before the CA***

On March 23, 2004, the CA granted the petition, adjudicating the following issues in

Dr. Apolonio's favor.

First, the Ombudsman does not possess the power to directly impose the penalty of removal against a public official. In reaching this conclusion, the CA cited Section 13(3), Article XI of the Constitution which shows that the Ombudsman only possesses recommendatory functions in the removal, suspension, demotion, fine, censure or prosecution of erring government officials and employees.<sup>[19]</sup> The CA addressed Section 21 of Republic Act No. (RA) 6770, otherwise known as "The Ombudsman Act of 1989." It held that RA 6770 "cannot rise above the Constitution"<sup>[20]</sup> and since it conflicts with the provisions of Section 13(3), Article XI, the Ombudsman's authority to impose penalties against public officials or employees remains to be merely recommendatory.<sup>[21]</sup>

*Second*, Dr. Apolonio undeniably realigned a portion of the budget allotted for the workshop for the purchase of the gift cheques. The CA noted, however, that not only is there no evidence that Dr. Apolonio pocketed any amount from the realignment, but her decision to purchase the gift cheques was "greatly influenced" by the appeal of the employee/participants. Thus, the CA held that Dr. Apolonio did not intend to violate the law for a corrupt purpose, thereby negating the Ombudsman's findings that she committed grave misconduct.<sup>[22]</sup>

The CA likewise found that Dr. Apolonio's acts do not constitute dishonesty because it was not shown that she has predisposition to lie, defraud and deceive which are inimical to the interests of the public service.<sup>[23]</sup> Since she was motivated by the pleas of the employees and in the spirit of the yuletide season, her actions lack an evil or corrupt motive.<sup>[24]</sup> Dr. Apolonio is, therefore, only liable for conduct prejudicial to the best interest of the service, the conclusion reached and recommended by GIO Bohol. The CA imposed the penalty of suspension for six (6) months, but due to her retirement from the service, the amount corresponding to her salary for six months was deducted from her retirement benefits.<sup>[25]</sup>

On April 16, 2004, the Ombudsman moved to intervene and reconsider the decision of the CA. Although the CA granted the motion to intervene, it denied the motion for reconsideration in a Resolution dated August 23, 2004.

### **THE OMBUDSMAN'S ARGUMENTS**

In this petition, the Ombudsman maintains that the CA erred when it reversed the former's decision and held Dr. Apolonio only responsible for conduct prejudicial to the best interest of the service. The Ombudsman maintains that Dr. Apolonio is guilty of grave misconduct for intentionally failing to secure proper authorization from the NBDB's Governing Board.<sup>[26]</sup> That Dr. Apolonio was motivated by "humanitarian considerations" due to the holidays is irrelevant because she "deliberately ignored the limits of her own authority by allowing public funds to be converted to private use[.]"<sup>[27]</sup> Citing *Ferriols v. Hiam*,<sup>[28]</sup> the Ombudsman argues that the misappropriation of funds by an accountable officer for "her personal benefit" constitutes dishonesty and serious misconduct prejudicial to the best interest of the service. The Ombudsman further cites Section 168, Title 4, Article 1 of the Government Accounting and Auditing Manual which clearly limits the "[u]se of moneys appropriated solely for the specific purpose for which appropriated, and for

no other, except when authorized by law or by a corresponding appropriating body.”  
[29]

The Ombudsman further takes issue with the CA’s findings that grave misconduct and dishonesty were not proven because Dr. Apolonio did not gain from the transaction. In support of this assertion, the Ombudsman points to an “apparent dissimilarity in the amounts actually received by the seminar participants”<sup>[30]</sup> from the amount appropriated for the workshop. Further, Dr. Apolonio herself was a recipient of the gift cheques. Clearly, she profited from the illegal conversion of funds as well.

Addressing the Court’s obiter dictum<sup>[31]</sup> in *Tapiador v. Office of the Ombudsman*,<sup>[32]</sup> the Ombudsman argues that the case has become moot because it found Dr. Apolonio guilty of conduct prejudicial to the best interest of the service. To be sure, the Ombudsman likewise cited RA 6770 which gives it the authority to “assess and impose commensurate administrative penalt[ies.]”<sup>[33]</sup>

### **DR. APOLONIO’S ARGUMENTS**

Dr. Apolonio supports the CA decision on the limits of the Ombudsman’s authority to impose sanctions on public officials, citing Section 13, Article XI of the Constitution and the deliberations of the Constitutional Commission on this provision.<sup>[34]</sup> According to her, the Constitution only grants the Ombudsman recommendatory powers for the removal of a public official.<sup>[35]</sup> Thus, RA 6770, which grants the Ombudsman actual powers to directly impose the penalty of removal, is unconstitutional since it gives powers to the Ombudsman not granted by the Constitution itself.<sup>[36]</sup> Consequently, it was erroneous for the CA to uphold GIO Bohol’s decision to impose a six-month suspension on her since the Constitution only grants recommendatory powers to the Ombudsman.

### **THE ISSUES IN THIS PETITION**

Based on the submissions of the parties, two issues are before us for resolution:

- (1) Does the Ombudsman have the power to directly impose the penalty of removal from office against public officials?
- (2) Do Dr. Apolonio’s acts constitute Grave Misconduct?

### **THE COURT’S RULING**

We rule in the Ombudsman’s favor and partially grant the petition.

***The Ombudsman has the power to directly impose administrative penalties, including removal from office***

The Ombudsman has the power to impose the penalty of removal, suspension,

demotion, fine, censure, or prosecution of a public officer or employee, in the exercise of its administrative disciplinary authority. The challenge to the Ombudsman's power to impose these penalties, on the allegation that the Constitution only grants it recommendatory powers, had already been rejected by this Court.

The Court first rejected this interpretation in *Ledesma v. Court of Appeals*,<sup>[37]</sup> where the Court, speaking through Mme. Justice Ynares-Santiago, held:

The creation of the Office of the Ombudsman is a unique feature of the 1987 Constitution. The Ombudsman and his deputies, as protectors of the people, are mandated to act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations. Foremost among its powers is the authority to investigate and prosecute cases involving public officers and employees, thus:

Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

Republic Act No. 6770, otherwise known as The Ombudsman Act of 1989, was passed into law on November 17, 1989 and provided for the structural and functional organization of the Office of the Ombudsman. RA 6770 mandated the Ombudsman and his deputies not only to act promptly on complaints but also to enforce the administrative, civil and criminal liability of government officers and employees in every case where the evidence warrants to promote efficient service by the Government to the people.

**The authority of the Ombudsman to conduct administrative investigations as in the present case is settled.** Section 19 of RA 6770 provides:

SEC. 19. *Administrative Complaints.* – The Ombudsman shall act on all complaints relating, but not limited to acts or omissions which:

(1) Are contrary to law or regulation;

(2) Are unreasonable, unfair, oppressive or discriminatory;

(3) Are inconsistent with the general course of an agency's functions, though in accordance with law;