

SECOND DIVISION

[G.R. NO. 150974, June 29, 2007]

**KAPISANAN NG MGA KAWANI NG ENERGY REGULATORY BOARD,
PETITIONER, VS. COMMISSIONER FE B. BARIN, DEPUTY
COMMISSIONERS CARLOS R. ALINDADA, LETICIA V. IBAY,
OLIVER B. BUTALID, AND MARY ANNE B. COLAYCO, OF THE
ENERGY REGULATORY COMMISSION, RESPONDENTS.**

D E C I S I O N

CARPIO, J.:

The Case

This is a special civil action for certiorari and prohibition^[1] of the selection and appointment of employees of the Energy Regulatory Commission (ERC) by the ERC Board of Commissioners.

Petitioner Kapisanan ng mga Kawani ng Energy Regulatory Board (KERB) seeks to declare Section 38 of Republic Act No. 9136 (RA 9136), which abolished the Energy Regulatory Board (ERB) and created the ERC, as unconstitutional and to prohibit the ERC Commissioners from filling up the ERC's plantilla.

The Facts

RA 9136, popularly known as EPIRA (for Electric Power Industry Reform Act of 2001), was enacted on 8 June 2001 and took effect on 26 June 2001. Section 38 of RA 9136 provides for the abolition of the ERB and the creation of the ERC. The pertinent portions of Section 38 read:

Creation of the Energy Regulatory Commission. – There is hereby created an independent, quasi-judicial regulatory board to be named the Energy Regulatory Commission (ERC). For this purpose, the existing Energy Regulatory Board (ERB) created under Executive Order No. 172, as amended, is hereby abolished.

The Commission shall be composed of a Chairman and four (4) members to be appointed by the President of the Philippines. x x x

Within three (3) months from the creation of the ERC, the Chairman shall submit for the approval of the President of the Philippines the new organizational structure and plantilla positions necessary to carry out the powers and functions of the ERC.

x x x x

The Chairman and members of the Commission shall assume office at the beginning of their terms: *Provided, That, if upon the effectivity of this Act, the Commission has not been constituted and the new staffing pattern and plantilla positions have not been approved and filled-up, the current Board and existing personnel of ERB shall continue to hold office.*

The existing personnel of the ERB, if qualified, shall be given preference in the filling up of plantilla positions created in the ERC, subject to existing civil service rules and regulations.

At the time of the filing of this petition, the ERC was composed of Commissioner Fe B. Barin and Deputy Commissioners Carlos R. Alindada, Leticia V. Ibay, Oliver B. Butalid, and Mary Anne B. Colayco (collectively, Commissioners). The Commissioners assumed office on 15 August 2001. Pursuant to Section 38 of RA 9136, the Commissioners issued the proposed Table of Organization, Staffing Pattern, and Salary Structure on 25 September 2001 which the President of the Philippines approved on 13 November 2001. Meanwhile, KERB submitted to the Commissioners its Resolution No. 2001-02 on 13 September 2001. Resolution No. 2001-02 requested the Commissioners for an opportunity to be informed on the proposed plantilla positions with their equivalent qualification standards.

On 17 October 2001, the Commissioners issued the guidelines for the selection and hiring of ERC employees. A portion of the guidelines reflects the Commissioners' view on the selection and hiring of the ERC employees *vis-a-vis* Civil Service rules, thus:

Since R.A. 9136 has **abolished** the Energy Regulatory Board (ERB), it is the view of the Commission that the provisions of Republic Act No. 6656 (An Act to Protect the Security of [Tenure of] Civil Service Officers and Employees in the Implementation of Government Reorganization) will not directly apply to ERC's current efforts to establish a new organization. Civil Service laws, rules and regulations, however, will have suppletory application to the extent possible in regard to the selection and placement of employees in the ERC.^[2] (Emphasis supplied)

On 5 November 2005, KERB sent a letter to the Commissioners stating the KERB members' objection to the Commissioners' stand that Civil Service laws, rules and regulations have suppletory application in the selection and placement of the ERC employees. KERB asserted that RA 9136 did not abolish the ERB or change the ERB's character as an economic regulator of the electric power industry. KERB insisted that RA 9136 merely changed the ERB's name to the ERC and expanded the ERB's functions and objectives. KERB sent the Commissioners yet another letter on 13 November 2001. KERB made a number of requests: (1) the issuance of a formal letter related to the date of filing of job applications, including the use of Civil Service application form no. 212; (2) the creation of a placement/recruitment committee and setting guidelines relative to its functions, without prejudice to existing Civil Service rules and regulations; and (3) copies of the plantilla positions and their corresponding qualification standards duly approved by either the President of the Philippines or the Civil Service Commission (CSC).

Commissioner Barin replied to KERB's letter on 15 November 2001. She stated that Civil Service application form no. 212 and the ERC-prescribed application format are

substantially the same. Furthermore, the creation of a placement/recruitment committee is no longer necessary because there is already a prescribed set of guidelines for the recruitment of personnel. The ERC hired an independent consultant to administer the necessary tests for the technical and managerial levels. Finally, the ERC already posted the plantilla positions, which prescribe higher standards, as approved by the Department of Budget and Management. Commissioner Barin stated that positions in the ERC do not need the prior approval of the CSC, as the ERC is only required to submit the qualification standards to the CSC.

On 5 December 2001, the ERC published a classified advertisement in the Philippine Star. Two days later, the CSC received a list of vacancies and qualification standards from the ERC. The ERC formed a Selection Committee to process all applications.

KERB, fearful of the uncertainty of the employment status of its members, filed the present petition on 20 December 2001. KERB later filed an Urgent Ex Parte Motion to Enjoin Termination of Petitioner ERB Employees on 2 January 2002. However, before the ERC received KERB's pleadings, the Selection Committee already presented its list of proposed appointees to the Commissioners.

In their Comment, the Commissioners describe the status of the ERB employees' appointment in the ERC as follows:

As of February 1, 2002, of the two hundred twelve (212) ERB employees, one hundred thirty eight [sic] (138) were rehired and appointed to ERC plantilla positions and sixty six (66) opted to retire or be separated from the service. Those who were rehired and those who opted to retire or be separated constituted about ninety six (96%) percent of the entire ERB employees. The list of the ERB employees appointed to new positions in the ERC is attached hereto as Annex 1. Only eight (8) ERB employees could not be appointed to new positions due to the reduction of the ERC plantilla and the absence of positions appropriate to their respective qualifications and skills. The appropriate notice was issued to each of them informing them of their separation from the service and assuring them of their entitlement to "separation pay and other benefits in accordance with existing laws."^[3]

The Issues

KERB raises the following issues before this Court:

1. Whether Section 38 of RA 9136 abolishing the ERB is constitutional; and
2. Whether the Commissioners of the ERC were correct in disregarding and considering merely supplementary in character the protective mantle of RA 6656 as to the ERB employees or petitioner in this case.^[4]

The Ruling of the Court

The petition has no merit.

We disregard the procedural defects in the petition, such as KERB's personality to file the petition on behalf of its alleged members and Elmar Agir's authority to institute the action, because of the demands of public interest.^[5]

Constitutionality of the ERB's Abolition and the ERC's Creation

All laws enjoy the presumption of constitutionality. To justify the nullification of a law, there must be a clear and unequivocal breach of the Constitution. KERB failed to show any breach of the Constitution.

A public office is created by the Constitution or by law or by an officer or tribunal to which the power to create the office has been delegated by the legislature.^[6] The power to create an office carries with it the power to abolish. President Corazon C. Aquino, then exercising her legislative powers, created the ERB by issuing Executive Order No. 172 on 8 May 1987.

The question of whether a law abolishes an office is a question of legislative intent. There should not be any controversy if there is an explicit declaration of abolition in the law itself.^[7] Section 38 of RA 9136 explicitly abolished the ERB. However, abolition of an office and its related positions is different from removal of an incumbent from his office. Abolition and removal are mutually exclusive concepts. From a legal standpoint, there is no occupant in an abolished office. Where there is no occupant, there is no tenure to speak of. Thus, impairment of the constitutional guarantee of security of tenure does not arise in the abolition of an office. On the other hand, removal implies that the office and its related positions subsist and that the occupants are merely separated from their positions.^[8]

A valid order of abolition must not only come from a legitimate body, it must also be made in good faith. An abolition is made in good faith when it is not made for political or personal reasons, or when it does not circumvent the constitutional security of tenure of civil service employees.^[9] Abolition of an office may be brought about by reasons of economy, or to remove redundancy of functions, or a clear and explicit constitutional mandate for such termination of employment.^[10] Where one office is abolished and replaced with another office vested with similar functions, the abolition is a legal nullity.^[11] When there is a void abolition, the incumbent is deemed to have never ceased holding office.

KERB asserts that there was no valid abolition of the ERB but there was merely a reorganization done in bad faith. Evidences of bad faith are enumerated in Section 2 of Republic Act No. 6656 (RA 6656),^[12] Section 2 of RA 6656 reads:

No officer or employee in the career service shall be removed except for a valid cause and after due notice and hearing. A valid cause for removal exists when, pursuant to a *bona fide* reorganization, a position has been abolished or rendered redundant or there is a need to merge, divide, or consolidate positions in order to meet the exigencies of the service, or other lawful causes allowed by the Civil Service Law. The existence of any

or some of the following circumstances may be considered as evidence of bad faith in the removals made as a result of reorganization, giving rise to a claim for reinstatement or reappointment by an aggrieved party:

- (a) Where there is a significant increase in the number of positions in the new staffing pattern of the department or agency concerned;
- (b) Where an office is abolished and another performing substantially the same functions is created;
- (c) Where incumbents are replaced by those less qualified in terms of status of appointment, performance and merit;
- (d) Where there is a reclassification of offices in the department or agency concerned and the reclassified offices perform substantially the same function as the original offices;
- (e) Where the removal violates the order of separation provided in Section 3 hereof

KERB claims that the present case falls under the situation described in Section 2(b) of RA 6656. We thus need to compare the provisions enumerating the powers and functions of the ERB and the ERC to see whether they have substantially the same functions. Under Executive Order No. 172, the ERB has the following powers and functions:

SEC. 3. Jurisdiction, Powers and Functions of the Board. -¹ When warranted and only when public necessity requires, the Board may regulate the business of importing, exporting, re-exporting, shipping, transporting, processing, refining, marketing and distributing energy resources. Energy resource means any substance or phenomenon which by itself or in combination with others, or after processing or refining or the application to it of technology, emanates, generates or causes the emanation or generation of energy, such as but not limited to, petroleum or petroleum products, coal, marsh gas, methane gas, geothermal and hydroelectric sources of energy, uranium and other similar radioactive minerals, solar energy, tidal power, as well as non-conventional existing and potential sources.

The Board shall, upon proper notice and hearing, exercise the following, among other powers and functions:

- (a) Fix and regulate the prices of petroleum products;
- (b) Fix and regulate the rate schedule or prices of piped gas to be charged by duly franchised gas companies which distribute gas by means of underground pipe system;
- (c) Fix and regulate the rates of pipeline concessionaires under the provisions of Republic Act No. 387, as amended, otherwise known as the "Petroleum Act of 1949," as amended by Presidential Decree No. 1700;