

EN BANC

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

**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 DEPARTMENT OF TRANSPORTATION AND
COMMUNICATIONS, USEC. MARIA ELENA H. BAUTISTA, IN HER
OFFICIAL CAPACITIES AS UNDERSECRETARY OF THE
DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS
AND AS OFFICER-IN-CHARGE OF THE MARITIME INDUSTRY
AUTHORITY (MARINA), RESPONDENTS.**

D E C I S I O N

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
Jas MARINA OIC falls under the***