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SECOND DIVISION

[G.R. No. 181531, July 31, 2009]

NATIONAL UNION OF WORKERS IN HOTELS, RESTAURANTS AND ALLIED INDUSTRIES-MANILA PAVILION HOTEL CHAPTER, PETITIONER, VS. SECRETARY OF LABOR AND EMPLOYMENT, BUREAU OF LABOR RELATIONS, HOLIDAY INN MANILA PAVILION HOTEL LABOR UNION AND ACESITE PHILIPPINES HOTEL CORPORATION, RESPONDENTS.

D E C I S I O N

CARPIO MORALES, J.:

National Union of Workers in Hotels, Restaurants and Allied Industries - Manila Pavilion Hotel Chapter (NUWHRAIN-MPHC), herein petitioner, seeks the reversal of the Court of Appeals November 8, 2007 Decision[1] and of the Secretary of Labor and Employment's January 25, 2008 Resolution[2] in OS-A-9-52-05 which affirmed the Med-Arbiter's Resolutions dated January 22, 2007[3] and March 22, 2007.[4]

A certification election was conducted on June 16, 2006 among the rank-and-file employees of respondent Holiday Inn Manila Pavilion Hotel (the Hotel) with the following results:

EMPLOYEES IN VOTERS' LIST	=	353
TOTAL VOTES CAST	=	346
NUWHRAIN-MPHC	=	151
HIMPHLU	=	169
NO UNION	=	1
SPOILED	=	3
SEGREGATED	=	22

In view of the significant number of segregated votes, contending unions, petitioner, NUHWHRAIN-MPHC, and respondent Holiday Inn Manila Pavillion Hotel Labor Union (HIMPHLU), referred the case back to Med-Arbiter Ma. Simonette Calabocal to decide which among those votes would be opened and tallied. Eleven (11) votes were initially segregated because they were cast by dismissed employees, albeit the legality of their dismissal was still pending before the Court of Appeals. Six other votes were segregated because the employees who cast them were already occupying supervisory positions at the time of the election. Still five other votes were segregated on the ground that they were cast by probationary employees and, pursuant to the existing Collective Bargaining Agreement (CBA), such employees cannot vote. It bears noting early on, however, that the vote of one Jose Gatbonton (Gatbonton), a probationary employee, was counted.

By Order of August 22, 2006, Med-Arbiter Calabocal ruled for the opening of 17 out of the 22 segregated votes, specially those cast by the 11 dismissed employees and those cast by the six supposedly supervisory employees of the Hotel.

Petitioner, which garnered 151 votes, appealed to the Secretary of Labor and Employment (SOLE), arguing that the votes of the probationary employees should have been opened considering that probationary employee Gatbonton's vote was tallied. And petitioner averred that respondent HIMPHLU, which garnered 169 votes, should not be immediately certified as the bargaining agent, as the opening of the 17 segregated ballots would push the number of valid votes cast to 338 (151 + 169 + 1 + 17), hence, the 169 votes which HIMPHLU garnered would be one vote short of the majority which would then become 169.

By the assailed Resolution of January 22, 2007, the Secretary of Labor and Employment (SOLE), through then Acting Secretary Luzviminda Padilla, affirmed the Med-Arbiter's Order. It held that pursuant to Section 5, Rule IX of the Omnibus Rules Implementing the Labor Code on exclusion and inclusion of voters in a certification election, the probationary employees cannot vote, as at the time the Med-Arbiter issued on August 9, 2005 the Order granting the petition for the conduct of the certification election, the six probationary employees were not yet hired, hence, they could not vote.

The SOLE further held that, with respect to the votes cast by the 11 dismissed employees, they could be considered since their dismissal was still pending appeal.

As to the votes cast by the six alleged supervisory employees, the SOLE held that their votes should be counted since their promotion took effect months after the issuance of the above-said August 9, 2005 Order of the Med-Arbiter, hence, they were still considered as rank-and-file.

Respecting Gatbonton's vote, the SOLE ruled that the same could be the basis to include the votes of the other probationary employees, as the records show that during the pre-election conferences, there was no disagreement as to his inclusion in the voters' list, and neither was it timely challenged when he voted on election day, hence, the Election Officer could not then segregate his vote.

The SOLE further ruled that even if the 17 votes of the dismissed and supervisory employees were to be counted and presumed to be in favor of petitioner, still, the same would not suffice to overturn the 169 votes garnered by HIMPHLU.

In fine, the SOLE concluded that the certification of HIMPHLU as the exclusive bargaining agent was proper.

Petitioner's motion for reconsideration having been denied by the SOLE by Resolution of March 22, 2007, it appealed to the Court of Appeals.

By the assailed Decision promulgated on November 8, 2007, the appellate court affirmed the ruling of the SOLE. It held that, contrary to petitioner's assertion, the ruling in *Airtime Specialist, Inc. v. Ferrer Calleja*[5] stating that in a certification election, all rank-and-file employees in the appropriate bargaining unit, whether probationary or permanent, are entitled to vote, is inapplicable to the case at bar. For, the appellate court continued, the six probationary employees were not yet

employed by the Hotel at the time the August 9, 2005 Order granting the certification election was issued. It thus held that *Airtime Specialist* applies only to situations wherein the probationary employees were already employed as of the date of filing of the petition for certification election.

Respecting Gatbonton's vote, the appellate court upheld the SOLE's finding that since it was not properly challenged, its inclusion could no longer be questioned, nor could it be made the basis to include the votes of the six probationary employees.

The appellate court brushed aside petitioner's contention that the opening of the 17 segregated votes would materially affect the results of the election as there would be the likelihood of a run-off election in the event none of the contending unions receive a majority of the valid votes cast. It held that the "majority" contemplated in deciding which of the unions in a certification election is the winner refers to the majority of valid votes cast, not the simple majority of votes cast, hence, the SOLE was correct in ruling that even if the 17 votes were in favor of petitioner, it would still be insufficient to overturn the results of the certification election.

Petitioner's motion for reconsideration having been denied by Resolution of January 25, 2008, the present recourse was filed.

Petitioner's contentions may be summarized as follows:

1. Inclusion of Jose Gatbonton's vote but excluding the vote of the six other probationary employees violated the principle of equal protection and is not in accord with the ruling in *Airtime Specialists, Inc. v. Ferrer-Calleja*;

2. The time of reckoning for purposes of determining when the probationary employees can be allowed to vote is not August 9, 2005 - the date of issuance by Med-Arbiter Calabocal of the Order granting the conduct of certification elections, but March 10, 2006 - the date the SOLE Order affirmed the Med-Arbiter's Order.

3. Even if the votes of the six probationary employees were included, still, HIMPHLU could not be considered as having obtained a majority of the valid votes cast as the opening of the 17 ballots would increase the number of valid votes from 321 to 338, hence, for HIMPHLU to be certified as the exclusive bargaining agent, it should have garnered at least 170, not 169, votes.

Petitioner justifies its not challenging Gatbonton's vote because it was precisely its position that probationary employees should be allowed to vote. It thus avers that justice and equity dictate that since Gatbonton's vote was counted, then the votes of the 6 other probationary employees should likewise be included in the tally.

Petitioner goes on to posit that the word "order" in Section 5, Rule 9 of Department Order No. 40-03 reading "[A]ll employees who are members of the appropriate bargaining unit sought to be represented by the petitioner at the time of the issuance of the order granting the conduct of certification election shall be allowed to vote" refers to an order which has already become final and executory, in this case the March 10, 2002 Order of the SOLE.

Petitioner thus concludes that if March 10, 2006 is the reckoning date for the determination of the eligibility of workers, then all the segregated votes cast by the probationary employees should be opened and counted, they having already been working at the Hotel on such date.

Respecting the certification of HIMPHLU as the exclusive bargaining agent, petitioner argues that the same was not proper for if the 17 votes would be counted as valid, then the total number of votes cast would have been 338, not 321, hence, the majority would be 170; as such, the votes garnered by HIMPHLU is one vote short of the majority for it to be certified as the exclusive bargaining agent.

The relevant issues for resolution then are *first*, whether employees on probationary status at the time of the certification elections should be allowed to vote, and *second*, whether HIMPHLU was able to obtain the required majority for it to be certified as the exclusive bargaining agent.

On the first issue, the Court rules in the affirmative.

The inclusion of Gatbonton's vote was proper not because it was not questioned but because probationary employees have the right to vote in a certification election. The votes of the six other probationary employees should thus also have been counted. As *Airtime Specialists, Inc. v. Ferrer-Calleja* holds:

> In a certification election, **all rank and file employees in the appropriate bargaining unit, whether probationary or permanent are entitled to vote**. This principle is clearly stated in Art. 255 of the Labor Code which states that the "labor organization designated or selected by the majority of the employees in an appropriate bargaining unit shall be the exclusive representative of the employees in such unit for purposes of collective bargaining." Collective bargaining covers all aspects of the employment relation and the resultant CBA negotiated by the certified union binds all employees in the bargaining unit. Hence, all rank and file employees, probationary or permanent, have a substantial interest in the selection of the bargaining representative. **The Code makes no distinction as to their employment status as basis for eligibility in supporting the petition for certification election. The law refers to "all" the employees in the bargaining unit. All they need to be eligible to support the petition is to belong to the "bargaining unit."** (Emphasis supplied)

Rule II, Sec. 2 of Department Order No. 40-03, series of 2003, which amended Rule XI of the Omnibus Rules Implementing the Labor Code, provides:

Rule II

> Section 2. **Who may join labor unions and workers' associations**. - All persons employed in commercial, industrial and agricultural enterprises, including employees of government owned or controlled corporations without original charters established under the Corporation