EN BANC

[G.R. No. 123708, June 19, 1997]

CIVIL SERVICE COMMISSION AND PHILIPPINE AMUSEMENT AND GAMING CORPORATION, PETITIONERS, VS. RAFAEL M. SALAS, RESPONDENT.

D E C I S I O N

REGALADO, J.:

The present petition for review on *certiorari* seeks to nullify the decision of the Court of Appeals, dated September 14, 1995, in CA-G.R. SP No. 38319 which set aside Resolution No. 92-1283 of the Civil Service Commission (CSC) and ordered the reinstatement of herein private respondent Rafael M. Salas with full back wages for having been illegally dismissed by the Philippine Amusement and Gaming Corporation (PAGCOR), but without prejudice to the filing of administrative charges against him if warranted.[1]

The records disclose that on October 7, 1989, respondent Salas was appointed by the PAGCOR Chairman as Internal Security Staff (ISS) member and assigned to the casino at the Manila Pavilion Hotel. However, his employment was terminated by the Board of Directors of PAGCOR on December 3, 1991, allegedly for loss of confidence, after a covert investigation conducted by the Intelligence Division of PAGCOR. The summary of intelligence information claimed that respondent was allegedly engaged in proxy betting as detailed in the affidavits purportedly executed by two customers of PAGCOR who claimed that they were used as gunners on different occasions by respondent. The two polygraph tests taken by the latter also yielded corroborative and unfavorable results.

On December 23, 1991, respondent Salas submitted a letter of appeal to the Chairman and the Board of Directors of PAGCOR, requesting reinvestigation of the case since he was not given an opportunity to be heard, but the same was denied. On February 17, 1992, he appealed to the Merit Systems Protection Board (MSPB) which denied the appeal on the ground that, as a confidential employee, respondent was not dismissed from the service but his term of office merely expired. On appeal, the CSC issued Resolution No. 92-1283 which affirmed the decision of the MSPB.[2]

Respondent Salas initially went to this Court on a petition for certiorari assailing the propriety of the questioned CSC resolution. However, in a resolution dated August 15, 1995,[3] the case was referred to the Court of Appeals pursuant to Revised Administrative Circular No. 1-95 which took effect on June 1, 1995.

On September 14, 1995, the court of Appeals rendered its questioned decision with the finding that herein respondent Salas is not a confidential employee, hence he may not be dismissed on the ground of loss of confidence. In so ruling, the appellate court applied the "proximity rule" enunciated in the case of Griño, et al. vs. Civil

Service Commission, et al.[4]. It likewise held that Section 16 of Presidential Decree No. 1869 has been superseded and repealed by Section 2(1), Article IX-B of the 1987 Constitution.

Hence this appeal, which is premised on and calls for the resolution of the sole determinative issue of whether or not respondent Salas is a confidential employee.

Petitioners aver that respondent Salas, as a member of the Internal Security Staff of PAGCOR, is a confidential employee for several reasons, viz.:

> (1) Presidential Decree No. 1869 which created the Philippine Amusement and Gaming Corporation expressly provides under Section 16 thereof that all employees of the casinos and related services shall be classified as confidential appointees;
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> (2) In the case of the Philippine Amusement and Gaming Corporation vs. Court of Appeals, et al.,[5] The Supreme Court has classified PAGCOR employees as confidential appointees;
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> (3) CSC Resolution No. 91-830, dated July 11, 1991, has declared employees in casinos and related services as confidential appointees by operation of law; and
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> (4) Based on his functions as a member of the ISS, private respondent occupies a confidential position.

Whence, according to petitioners, respondent Salas was not dismissed from the service but, instead, his term of office had expired. They additionally contend that the Court of Appeals erred in applying the "proximity rule" because even if Salas occupied one of the lowest rungs in the organizational ladder of PAGCOR, he performed the functions of one of the most sensitive positions in the corporation.

On the other hand, respondent Salas argues that it is the actual nature of an employee's functions, and not his designation or title, which determines whether or not a position is primarily confidential, and that while Presidential Decree No. 1869 may have declared all PAGCOR employees to be confidential appointees, such executive pronouncement may be considered as a mere initial determination of the classification of positions which is not conclusive in case of conflict, in light of the ruling enunciated in Tria vs. Sto. Tomas, et al.[6]

We find no merit in the petition and consequently hold that the same should be, as it is hereby, denied.

Section 2, Rule XX of the Revised Civil Service Rules, promulgated pursuant to the provisions of Section 16(e) of Republic Act No. 2260 (Civil Service Act of 1959), which was then in force when Presidential Decree No. 1869 creating the Philippine Amusement and Gaming Corporation was passed, provided that "upon recommendation of the Commissioner, the President may declare a position as policy-determining, primarily confidential, or highly technical in nature." It appears that Section 16 of Presidential Decree No. 1869 was predicated thereon, with the

text thereof providing as follows:

> "All positions in the corporation, whether technical, administrative, professional or managerial are exempt from the provisions of the Civil Service Law, rules and regulations, and shall be governed only by the personnel management policies set by the Board of Directors. All employees of the casinos and related services shall be classified as 'confidential' appointees."

On the strength of this statutory declaration, petitioner PAGCOR terminated the services of respondent Salas for lack of confidence after it supposedly found that the latter was engaged in proxy betting. In upholding the dismissal of respondent Salas, the CSC ruled that he is considered a confidential employee by operation of law, hence there is no act of dismissal to speak of but a mere expiration of a confidential employee's term of office, such that a complaint for illegal dismissal will not prosper in this case for lack of legal basis.

In reversing the decision of the CSC, the Court of Appeals opined that the provisions of Section 16 of Presidential Decree No. 1869 may no longer be applied in the case at bar because the same is deemed to have been repealed in its entirety by Section 2(1), Article IX-B of the 1987 Constitution.[7] This is not completely correct. On this point, we approve the more logical interpretation advanced by the CSC to the effect that "Section 16 of PD 1869 insofar as it exempts PAGCOR positions from the provisions of Civil Service Law and Rules has been amended, modified or deemed repealed by the 1987 Constitution and Executive Order No. 292 (Administrative Code of 1987)."

However, the same cannot be said with respect to the last portion of Section 16 which provides that "all employees of the casino and related services shall be classified as 'confidential appointees.'" While such executive declaration emanated merely from the provisions of Section 2, Rule XX of the implementing rules of the Civil Service Act of 1959, the power to declare a position as policy-determining, primarily confidential or highly technical as defined therein has subsequently been codified and incorporated in Section 12(9), Book V of Executive Order No. 292 or the Administrative Code of 1987.[8] This later enactment only serves to bolster the validity of the categorization made under Section 16 of Presidential Decree No. 1869. Be that as it may, such classification is not absolute and all-encompassing.

Prior to the passage of the aforestated Civil Service Act of 1959, there were two recognized instances when a position may be considered primarily confidential: Firstly, when the President, upon recommendation of the Commissioner of Civil Service, has declared the position to be primarily confidential; and, secondly in the absence of such declaration, when by the nature of the functions of the office there exists "close intimacy" between the appointee and appointing power which insures freedom of intercourse without embarrassment or freedom from misgivings of betrayals of personal trust or confidential matters of state.[9]

At first glance, it would seem that the instant case falls under the first category by virtue of the express mandate under Section 16 of Presidential Decree No. 1869. An

in-depth analysis, however, of the second category evinces otherwise.

When Republic Act No. 2260 was enacted on June 19, 1959, Section 5 thereof provided that "the non-competitive or unclassified service shall be composed of positions expressly declared by law to be in the non-competitive or unclassified service or those which are policy-determining, primarily confidential, or highly technical in nature." In the case of Piñero, et al. vs. Hechanova, et al.,[10] the Court obliged with a short discourse there on how the phrase "in nature" came to find its way into the law, thus:

> "The change from the original wording of the bill (expressly declared by law x x x to be policy-determining, etc.) to that finally approved and enacted ('or which are policy-determining, etc. in nature') came about because of the observations of Senator Tañada, that as originally worded the proposed bill gave Congress power to declare by fiat of law a certain position as primarily confidential or policy-determining, which should not be the case. The Senator urged that since the Constitution speaks of positions which are 'primarily confidential, policy-determining, or highly technical in nature', it is not within the power of Congress to declare what positions are primarily confidential or policy-determining. 'It is the nature alone of the position that determines whether it is policy-determining or primarily confidential.' Hence, the Senator further observed, the matter should be left to the 'proper implementation of the laws, depending upon the nature of the position to be filled', and if the position is 'highly confidential' then the President and the Civil Service Commissioner must implement the law.
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> To a question of Senator Tolentino, 'But in positions that involved both confidential matters and matters which are routine, x x x who is going to determine whether it is primarily confidential?' Senator Tañada replied:
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> 'SENATOR TAÑADA: Well, at the first instance, it is the appointing power that determines that: the nature of the position. In case of conflict then it is the Court that determines whether the position is primarily confidential or not" (Italics in the original text).

Hence the dictum that, at least since the enactment of the Civil Service Act of 1959, it is the nature of the position which finally determines whether a position is primarily confidential, policy-determining or highly technical. And the court in the aforecited case explicitly decreed that executive pronouncements, such as Presidential Decree No. 1869, can be no more than initial determinations that are not conclusive in case of conflict. It must be so, or else it would then lie within the discretion of the Chief Executive to deny to any officer, by executive fiat, the protection of Section 4, Article XII (now Section 2[3], Article IX-B) of the Constitution.[11] In other words, Section 16 of Presidential Decree No. 1869 cannot be given a literally stringent application without compromising the constitutionally protected right of an employee to security of tenure.

The doctrinal ruling enunciated in Piñero finds support in the 1935 Constitution and was reaffirmed in the 1973 Constitution, as well as in the implementing rules of Presidential Decree No. 807, or the Civil Service Decree of the Philippines.[12] It

may well be observed that both the 1935 and 1973 Constitutions contain the provision, in Section 2, Article XII-B thereof, that "appointments in the Civil Service, except as to those which are policy-determining, primarily confidential, or highly technical in nature, shall be made only according to merit and fitness, to be determined as far as practicable by competitive examination." Corollarily, Section 5 of Republic Act No. 2260 states that "the non-competitive or unclassified service shall be composed of positions expressly declared by law to be in the non-competitive or unclassified service or those which are policy-determining, primarily confidential, or highly technical in nature." Likewise, Section 1 of the General Rules in the implementing rules of Presidential Decree No. 807 states that "appointments in the Civil Service, except as to those which are the policy-determining, primarily confidential, or highly technical in nature, shall be made only according to merit and fitness to be determined as far as practicable by competitive examination." Let it here be emphasized, as we have accordingly italicized them, that these fundamental laws and legislative or executive enactments all utilized the phrase "in nature" to describe the character of the positions being classified.

The question that may now be asked is whether the Piñero doctrine -- to the effect that notwithstanding any statutory classification to the contrary, it is still the nature of the position, as may be ascertained by the court in case of conflict, which finally determines whether a position is primarily confidential, policy-determining or highly technical -- is still controlling with the advent of the 1987 Constitution and the Administrative Code of 1987,[13] Book V of which deals specifically with the Civil Service Commission, considering that from these later enactments, in defining positions which are policy-determining, primarily confidential or highly technical, the phrase "in nature" was deleted.[14]

We rule in the affirmative. The matter was clarified and extensively discussed during the deliberations in the plenary session of the 1986 Constitutional Commission on the Civil Service provisions, to wit:

> "MR. FOZ. Which department of government has the power or authority to determine whether a position is policy-determining or primarily confidential or highly technical?
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> FR. BERNAS: The initial decision is made by the legislative body or by the executive department, but the final decision is done by the court. The Supreme Court has constantly held that whether or not a position is policy-determining, primarily confidential or highly technical, it is determined not by the title but by the nature of the task that is entrusted to it. For instance, we might have a case where a position is created requiring that the holder of that position should be a member of the Bar and the law classifies this position as highly technical. However, the Supreme Court has said before that a position which requires mere membership in the Bar is not a highly technical position. Since the term 'highly technical' means something beyond the ordinary requirements of the profession, it is always a question of fact.
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> MR. FOZ. Does not Commissioner Bernas agree that the general rule should be that the merit system or the competitive system should be upheld?